speaking of ethics

By Hope C. Todd

Mick Wiggins

Ignorantia Juris Non Excusat[1]

After 25 years in practice, Sally Solo, Esq., is shutting the doors to her District law office and dedicating herself fulltime to her true passion: self-published crime thrillers that are selling like hotcakes for $2 a pop on a well-known e-vendor site. Never good with numbers, she is frankly relieved that she will no longer have to regularly reconcile her operating and client trust accounts, the latter of which has carried the following journal entry for the past 10 years:

> September 2, 2001—Deposit: $750 contract dispute settlement proceeds belonging to Client John Smith (Note: Client missing. Last spoke to Client Smith July 15, 2001; notified him of settlement finalized per his authorization and instructions.)

That September, after several failed attempts to reach Mr. Smith by phone, e-mail, and through certified letters, all of which were returned to sender, Sally resigned herself to protecting Client Smith's money, in trust, until his reappearance. Such action seemed consistent with her ethical obligation to protect her client's property.[2]

Today, the balance in her D.C. Interest on Lawyers' Trust Account (IOLTA) is precisely $750, and she wants—no, she *needs*—a final resolution. Sally quickly scribbles "Call D.C. Bar Ethics Helpline re: $750?" just before her mind wanders back to the Parkers' kitchen table in a two-story walk-up flat on the south side of Chicago, where the massive body of Joseph Louis Parker, the victim in her latest novel, slumps face first in a pool of blood and tepid black coffee.

In Opinion 359, the Legal Ethics Committee provides guidance on what a D.C. lawyer must do when the lawyer possesses client money in trust, but the client has disappeared.

The committee begins by outlining the core mandates of D.C. Rules of Professional Conduct Rule 1.15, which requires lawyers to hold client money separate from lawyer money, in a trust account, as directed by Rules 1.15(a) and (b), and to promptly notify and deliver money to clients pursuant to Rule 1.15(c). The opinion then explains that although the ethics rules are "silent on the specific issue of what is required or permitted if a lawyer is unable to locate a client," there is substantive law in the District about which D.C. lawyers should take careful note.

Setting forth the committee's understanding of the D.C. Unclaimed Property Act,[3] Opinion 359 explains that the Act, by its terms, requires holders of money that is "held or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than three years after it became payable or distributable" to presume that the money has been abandoned and, pursuant to the Act, to surrender such property to the Mayor after attempting to locate and notify the owner.[4]

The committee concludes that given the mandatory nature of the Act (which provides no exception for lawyers), and given the absence of a contrary ethical mandate in the D.C. Rules, a lawyer commits no ethical violation in complying with the Act,[5] and, in fact, may incur significant financial penalties for failing to comply. Nevertheless, the committee also clearly states that "[it does] not mean to foreclose a lawyer from either challenging the application of the Act to a particular scenario, or even the Act's general applicability to lawyers."[6] However, in light of a recent D.C. Court of Appeals decision, the latter challenge may prove difficult.

In *Bergman v. District of Columbia*, 986 A.2d 1208 (DCCA 2010), D.C. lawyer Scott N. Bergman challenged the validity of the White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006 (White Collar Insurance Fraud Act).[7] Mr. Bergman argued, *inter alia*, that the D.C. Council violated the District's Home Rule Act and the separation of powers doctrine by usurping the judiciary's power to regulate the conduct of D.C. lawyers.

In general, the White Collar Insurance Fraud Act prohibits lawyers (among other professionals) from soliciting for remuneration auto accident victims by phone or through in-person contacts, and from securing police reports, within 21 days of an automobile accident in the District absent a specific exception to the Act, such as a preexisting relationship between the lawyer and the prospective client.

As an ethical matter, D.C. Rule 7.1 governs attorney solicitation. The D.C. Rules are promulgated by the Court of Appeals, and a violation of the Rules subjects a lawyer to discipline that can potentially include licensure suspension or disbarment. Under Rule 7.1, D.C. lawyers are generally permitted to solicit clients by phone or even through in-person contact if they do so consistent with the Rules.[8] A lawyer's communications to a prospective client cannot be false or misleading, nor can solicitation involve the use of coercion, duress, or harassment. A lawyer is not permitted to solicit in-person or by telephone any "potential client, [who] is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable considered judgment as to the selection of a lawyer."[9] However, the White Collar Insurance Fraud Act places additional statutory limitations on in-person and telephone solicitations by imposing specific "time restriction[s] regarding when and how solicitations may be carried out."[10]

In *Bergman*, the court clarifies that although under the D.C. Home Rule Act the judiciary has "primary" power to discipline attorneys, the court's *inherent* authority to regulate the legal profession is not *exclusive*. Thus, "the Council is not prohibited from exercising police powers to address matters . . . that otherwise would indisputably be within its legislative purview" merely because such legislation also "restricts the professional

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conduct of lawyers."[11]

The court reasoned that overlapping powers "only constitute a violation of separation of powers if the intruding branch, impermissibly undermines the powers of the other branch or disrupts the proper balance between the coordinate branches by preventing the [intruded-on branch] from accomplishing its constitutionally assigned functions."[12] In *Bergman*, the court ruled that the council's passage of the White Collar Insurance Fraud Act did not impermissibly burden or unduly interfere with the court's authority to "exercise its core functions relating to Bar admission and the discipline of attorneys,"[13] notwithstanding the fact that lawyer conduct regulated by the White Collar Insurance Fraud Act was also subject to regulation within the D.C. Rules.

Sally may wish to consult the D.C. Unclaimed Property Act and undertake renewed efforts to locate Mr. Smith. The operating principle at work in Opinion 359 is, in essence, quite modest: where ethics rules are either permissive or silent on a particular course of attorney conduct, and the substantive law is mandatory, the substantive law will control.[14]

Notes

1 Latin for "Ignorance of the law is no excuse."

2 *See* D.C. Rule 1.15; Comment [1] explains that a lawyer should "exercise the care of a professional fiduciary" in safeguarding client property.

3 D.C. Code §§ 41-101 to -142 (2011). The committee, while reminding lawyers that it does not opine on questions of substantive law, sets forth here its understanding of the Act for the sole purpose of analyzing the ethical issues presented.

4 The Act applies to funds owned by individuals whose last known address was in the District, or where the holder's principal place of business is in the District. D.C. Legal Ethics Opinion 359 footnotes [3] and [4] remind lawyers that some circumstances may give rise to choice of law issues and/or implicate other jurisdictions' unclaimed property laws.

5 Significantly, both the Act and the D.C. Rules require reasonable efforts to locate a client or missing client before surrendering any property to the Mayor.

6 D.C. Legal Ethics Opinion 359 (2011).

7 D.C. Code § 22-3225.14 (2011).

8 D.C. Rule 7.1(d) limits the ability of D.C. lawyers to solicit clients for a fee in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side; D.C. Rule 7.1(e) requires lawyers soliciting incarcerated persons for a fee to provide timely and adequate notice to existing lawyers of such individuals before accepting any fees.

9 D.C. Rule 7.1(b)(1)(C).

10 *Bergman v. District of Columbia*, 986 A.2d 1208, 1218 (DCCA 2010).

11 *Id.* at 1215.

12 *Id.* at 1230 (quoting *Hessey v. Burden*, 584 A.2d 1, 5 (D.C. 1990)) (internal quotations omitted).

13 *Id.*

14 "The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general." D.C. Rules Scope [2].

Disciplinary Actions Taken by the Board on Professional Responsibility

Hearing Committees on Negotiated Discipline

IN RE LORENZO C. FITZGERALD. Bar No. 390603. June 15, 2011. The Board on Professional Responsibility's Ad Hoc Hearing Committee recommends that the D.C. Court of Appeals accept Fitzgerald's petition for negotiated disposition and suspend him for six months, with all but 60 days stayed in favor of one year supervised probation, for violations of Rules 1.16(d), 8.1(a), 8.1(b), 8.4(c), and 8.4(d).

IN RE HARRY TUN. Bar No. 416262. June 24, 2011. The Board on Professional Responsibility's Hearing Committee Number Six recommends that the D.C. Court of Appeals accept Tun's petition for negotiated disposition and suspend Tun for 18 months, with six months of the suspension stayed, followed by a one-year probation period, with conditions. Tun has agreed that, if his probation is revoked for any reason, he will consent to the imposition of the six-month stayed suspension and a requirement that he prove his fitness to practice law before being reinstated. Rules 1.5(a), 1.5(f), 3.3(a)(1), 8.4(c), and 8.4(d).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE ROBERT E. COUGHLIN II. Bar No. 480261. June 7, 2011. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Coughlin by consent and that the period of disbarment run, for purposes of reinstatement, from June 12, 2008, the date of the court's order of interim suspension.

IN RE DAVID E. FOX. Bar No. 165258. June 24, 2011. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Fox for 45 days. While representing a client in a civil matter, Fox failed to provide competent representation, failed to serve the client with skill and care, failed to represent the client zealously, failed to act with reasonable promptness, and failed to communicate with and explain matters to the client. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), and 1.4(b).

IN RE KENNETH A. MARTIN. Bar No. 420600. June 24, 2011. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Martin for six months with restitution or disgorgement, with interest at the legal rate since January 19, 2005, as a condition of reinstatement. While retained to represent a small corporation in a civil matter, Martin charged an unreasonable fee; engaged in dishonesty, fraud, deceit, or misrepresentation; and engaged in conduct that seriously interferes with the administration of justice. Rules 1.5(a), 8.4(c), and 8.4(d).

IN RE PATRICK J. REDD. Bar No. 986694. June 28, 2011. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Redd by consent.

IN RE RICHARD A. SAMAD. Bar No. 462384. June 24, 2011. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Samad for three years with fitness and a requirement that he make restitution to his client or reimburse the Clients' Security fund, as appropriate, for the unearned $2,500 fee plus interest at the legal rate, as conditions of reinstatement. Samad committed 40 violations of the Rules in connection with six cases. Specifically, in the first case, while representing a client charged with a felony drug violation, Samad violated: (1) Rules 1.1(a) and 1.1(b) in failing to investigate or prepare for the client's trial; (2) Rule 1.3(a) in not visiting the scene or filing motions to suppress the client's confession and other evidence; (3) Rule 1.4(b) by not keeping the client informed about the status of his case; (4) Rule 1.16(d) by failing to return the client's fee; (5) Rules 3.3(a)(1) and 8.4(c) by falsely telling the presiding judge that he was unavailable because he was in trial when, in fact, the trial was over and the case was before the jury; and (6) Rule 8.4(d) in insinuating to prosecution counsel that he would be in trial in another case, failing to put his name on the conflicts list, arriving late to court, and falsely telling the court that he was in another trial.

In the second case, while representing a client in a criminal matter, Samad violated Rules 3.4(c) and 8.4(d) by failing to appear in the presiding judge's court at the scheduled hour to begin jury selection.

In the third case, while representing a client to obtain a sentence reduction, Samad violated: (1) Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c), and 1.4(a) by not filing a motion to reduce the client's sentence in a timely manner, by not taking any steps to preserve his client's procedural rights, and by not taking his client's telephone calls or otherwise keeping him informed of the status of the matter; (2) Rule 1.4(b) by not advising the client that he would not file

the motion to reduce sentence unless the client paid the remainder of his fee and an additional $300; and (3) Rule 1.16(d) by not explaining the limitations of his retainer letter and by not advising the client or the client's family that he would not continue to represent the client unless his full fee was paid.

In the fourth case, while representing a client in custody without bond on felony charges, Samad violated: (1) Rule 1.1(a) and (b) by failing to appear at the second and third status conferences; (2) Rules 1.3(a), 1.3(b)(1), and 1.3(b)(2) by prematurely abandoning the client and by failing to attend two scheduled court hearings while he was still counsel of record and before replacement counsel had entered an appearance; (3) Rule 1.4(a) by not keeping the client informed as to the status of his matter; (4) Rule 1.4(b) by not advising the client that he was terminating the representation; (5) Rule 1.16(d) by not taking reasonable steps to protect the client's interests after he terminated his representation; and (6) Rule 8.4(d) by not advising the client that he had terminated the representation.

In the fifth case, while representing a client in an immigration matter, Samad violated: (1) Rules 1.1(a) and (b) by failing to explore alternatives to the H-1B visa that might permit the client to remain in the country; (2) Rules 1.3(a) and 1.3(c) by failing to file the necessary papers to protect the client's ability to remain in this country and by failing to keep her informed of developments; (3) Rule 1.4(a) by not keeping the client informed about the status of her matter and not taking or returning her telephone calls; and (4) Rule 1.4(b) by not informing the client that there was a quota associated with H-1B visas.

In the sixth case, while representing a client who, at 16 years of age, was arrested and charged with armed carjacking, Samad violated: (1) Rules 1.1(a) and 1.1(b) when he failed to investigate a complicated case in which his juvenile client was facing trial as an adult and a significant period of incarceration if convicted; (2) Rules 1.3(a) and 1.3(b)(1) by not adequately investigating the alleged conduct and by not fully informing the client of the government's plea offer and refusing to negotiate a comprehensive plea offer with the government; (3) Rules 3.3(a)(1) and 8.4(c) by "knowingly misrepresent[ing] to Judge Bartnoff the status of the [client's] matter by failing to respond to Judge Bartnoff's inquiry with complete information regarding his obligations in Judge Cushenberry's court on the morning that he was to start a civil trial;" (4) Rule 3.4(c) by deliberately and knowingly disregarding court rules and the judge's order when he failed to appear before Judge Cushenberry and commenced a civil trial before Judge Bartnoff; and (5) Rule 8.4(d) by not being prepared for the client's trial. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.3(c), 1.4(a), 1.4(b), 1.16(d), 3.3(a)(1), 3.4(c), 8.4(c), and 8.4(d).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Reciprocal Matters

IN RE JAMES G. CHARLES. Bar No. 360365. June 23, 2011. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Charles.

IN RE DALE E. DUNCAN. Bar No. 370591. June 23, 2011. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Duncan for two years.

IN RE KURT D. MITCHELL. Bar No. 502497. June 23, 2011. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Mitchell for 10 days.

IN RE KEH SOO PARK. Bar No. 220194. June 23, 2011. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Park.

IN RE JOSEPH P. SINDACO. Bar No. 224832. June 23, 2011. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Sindaco.

IN RE JEFFREY L. STREET. Bar No. 467083. June 23, 2011. In a reciprocal matter from Oregon, the D.C. Court of Appeals suspended Street for one year, nunc pro tunc to April 5, 2011, with eight months of the suspension stayed and a requirement that Street serve a two-year probationary period subject to the terms imposed by the state of Oregon.

IN RE JOHN VENUTI. Bar No. 963256. June 23, 2011. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Venuti for six months, nunc pro tunc to May 19, 2011.

Criminal Convictions

IN RE WILLIAM S. BACH, SP 2010-CCC-000004. Bar No. 448392. June 20, 2011. Judge Robert E. Morin of the Superior Court of the District of Columbia sentenced Bach to 30 days incarceration, execution of sentence suspended, and one year of probation for criminal contempt of the Court of Appeals' February 26, 2009, order disbarring him from the practice of law.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE JOHN M. COPPOLA. Bar No. 429287. June 14, 2011. Coppola was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE MARK A. KEY. Bar No. 458725. June 8, 2006. Key was suspended on an interim basis based upon discipline imposed in North Carolina.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE WILLIAM H. BRAMMER JR. Bar No. 478206. May 13, 2011. Bar Counsel

continued on page 46

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Attorney Briefs

continued from page 44

practice… **Jeffery Mitchell Chiow** has joined Blank Rome LLP as an associate in the firm's maritime, international trade, and public contracts group… **Christopher E. Condeluci** has joined Venable LLP as of counsel in the firm's employee benefits and executive compensation practice… **Eric J. Conn** has joined Epstein Becker & Green, P.C. as head of the firm's occupational safety and health practice group… **Jeffrey W. Kilduff**, a partner at O'Melveny & Myers LLP, has been named firmwide chair of its securities litigation practice group… Antitrust lawyer **Craig P. Seebald** has joined Vinson & Elkins L.L.P. as partner… **Christian R. Bartholomew** has joined Weil, Gotshal & Manges LLP as partner, leading the firm's U.S. Securities and Exchange Commission enforcement and litigation efforts.

Company Changes

Roth Doner Jackson, PLC has opened an office in Richmond, Virginia. Sean M. Gibbons has joined as partner, and the office will operate under the name **Roth Doner Jackson Gibbons, PLC**… Michele Sherman Davenport and Dennis James Jr. have formed **Davenport & James PLLC**, an international trade law firm located at 1101 30th Street NW, suite 500… **Real Estate Counselors, PLLC**, a law firm specializing in commercial real estate and business transactions, has opened an office at 300 N. Washington Street, suite 405, in Alexandria, Virginia… Marilynn L. Schuyler has established **Schuyler Affirmative Action Practice**, a law firm that specializes in federal contractor compliance. The firm is located at 1629 K Street NW, suite 300… **Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.** has opened an office at 1899 Pennsylvania Avenue NW. It will be led by Lisa A. Prager, who has joined the firm as principal. . . **DLA Piper LLP** has opened a full-service business law firm in Australia.

Author! Author!

Bernard M. Resnick, founder of Bernard M. Resnick, Esq., P.C., and **Priscilla J. "Sally" Mattison**, of counsel at the firm, have coauthored the chapter "USA Concert Touring Issues," which was included in the International Association of Entertainment Lawyers' 2011 publication *Live Entertainment Handbook*. Resnick also has been elected as governor of the Philadelphia chapter of The Recording Academy for 2011–2013… **Mitchel H. Kider**, chair and managing partner of Weiner Brodsky Sidman Kider PC, and associates **Michael Y. Kieval** and **Leslie A. Sowers** have written the book *Consumer Protection and Mortgage Regulations Under Dodd–Frank,* a plain language introduction to the Bureau of Consumer Financial Protection and a guide to the changes in consumer protection laws and regulations that impact the mortgage industry, with a detailed section-by-section statutory commentary, published by West… **Deborah A. DeMasi** and **Kenneth B. Weiner,** partner and counsel, respectively, at Nixon Peabody LLP, have coauthored the book *International Project Financing*, published by Juris Publishing, Inc.… **Daniel S. Koch**, a principal at The Law Firm of Paley Rothman, contributed the chapter "How Delayed Debriefings Cause Contractors to Lose Valuable Contracts and Key Personnel" to the soon-to-be-published book *Inside the Minds: The Impact of Recent Changes in Government Contracts*… **Kenneth L. Marcus** has written *Jewish Identity and Civil Rights*, published by Cambridge University Press.

D.C. Bar members in good standing are welcome to submit announcements for this column. When making a submission, please include name, position, organization, and address. E-mail submissions to D.C. Bar staff writer Thai Phi Le at tle@dcbar.org

Speaking of Ethics

continued from page 13

issued Brammer an informal admonition for failing to provide competent representation, failing to serve the clients with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters, and failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation while representing clients in an immigration matter. Rules 1.1(a), 1.1(b), and 1.4(b).

IN RE LISA D. BUTLER. Bar No. 492975. May 12, 2011. Bar Counsel issued Butler an informal admonition for failing to provide competent representation, failing to serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters, failing to represent a client zealously, and revealing a client's confidence or secret without reasonable necessity while retained to represent a client in a criminal matter. Rules 1.1(a), 1.1(b), 1.3(a), 1.6, and 8.4(d).

IN RE THOMAS E. DOYLE. Bar No. 439276. May 13, 2011. Bar Counsel issued Doyle an informal admonition. While representing a client in a personal injury matter, Doyle failed to provide competent representation, failed to act diligently and with reasonable promptness, failed to keep a client reasonably informed and to comply promptly with reasonable requests for information, violated the Rule pertaining to duties of partners and lawyers with managerial authority to supervise, and failed to make reasonable efforts to ensure that the firm had in effect measures that gave reasonable assurance that lawyer and nonlawyer employees conformed to ethical rules. Rules 1.1, 1.3(a), 1.3(c), 1.4(a), 5.1(a), and 5.3.

IN RE CLAUDE W. ROXBOROUGH. Bar No. 162313. May 12, 2011. Bar Counsel issued Roxborough an informal admonition. Roxborough communicated with an opposing party after being informed that the party was represented by counsel. Rule 4.2(a).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*

Books in the Law

continued from page 43

on a number of cases, the predicted price came down to "a single-digit sum in the billions," Prakash writes. Eventually Merck settled the class action for $4.85 billion, an amount that Prakash computed "would take Merck less than a year to earn back."

But I am not going to tell you the outcome of the Atlantic City cases. To do so would strip the suspense factor from Prakash's book, which is not fair to a first-time author. A superb read for the lawyer and the layman alike; stick this one in your beach bag.

Washington, D.C., writer Joseph C. Goulden has written several books on the legal profession, most recently The Money Lawyers *(2006).*