speaking of ethics

By Heather Bupp-Habuda

D.C. Conflict-of-Interest Rules and Opinions

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Seven rules of the D.C. Rules of Professional Conduct provide ethical guidance on conflicts of interest: 1.7 describes the general rule; 1.8 delineates the prohibited transactions; 1.9 discusses former client interests; 1.10 concerns imputed qualifications; 1.11 defines the limits on successive government and private employment; 1.12 applies to former arbitrators; and 1.13 deals with having an organization as a client. More than 70 opinions of the D.C. Bar Legal Ethics Committee address scenarios related to conflicts of interest.

"[T]he 'conflict rules' are best understood as rules of 'risk avoidance.' They address situations in which there is a risk that a lawyer will not adequately carry out obligations to a present or former client because of competing obligations to another present or former client or because of the lawyer's own competing interests." Bruce Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71 (1996).

Uncertainty about the existence of potential conflicts can lead to much controversy among parties and counsel. The numerous lawyer inquiries directed to D.C. Bar legal ethics counsel indicate a wide divergence of opinion on conflict issues. Ironically, it often makes little difference whether the practitioner is well seasoned or quite green. Commonly, resolving a conflict highlights a seeming knot of interrelated ethical rules. Such is the complex and perilous nature of conflicts.

Rule 1.7 divides the work of conflicts into two broad categories: the waivable choices in subpart (b) and the nonwaivable adversity in a single matter at subpart (a). D.C. Bar Legal Ethics Comm. Op. 265 (1996); *see id.* Ops. 272 (1997), 326 (2004), 328 (2005), 334 (2005). Both current and advance waivers of conflicts are permitted under the D.C. rules. *See id.* Op. 309 (2001). When created with informed consent, waivers can offer a valuable solution to a conflict of interest. *See In re James*, 452 A.2d 163, 167 (D.C. 1982); *cf.* D.C. Bar Legal Ethics Comm. Op. 317 (2002) (when repudiating a conflict-of-interest waiver).

In addition, Rule 1.7 governs conflicts of interest between current clients, as opposed to former clients, which are covered in Rule 1.9. *See* D.C. Rules of Prof'l Conduct R. 1.9 cmt. 2; D.C. Bar Legal Ethics Comm. Op. 301 (2000). *See generally* D.C. Bar Legal Ethics Comm. Op. 259 (1995). "Where a *former* client is involved, a conflict exists only if the adversity arises in a matter that is the same as, or substantially related to, the matter in which the lawyer formerly represented that client." *Id.* Op. 309 (2001); *see T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953).

Rule 1.8 involves essentially nine prohibited situations in which a lawyer could potentially reap monetary rewards at the expense of the client because the lawyer's dealings with a client were not fair and reasonable. The Legal Ethics Committee has developed many opinions distinguishing a conflict from permissible ethical action. *See, e.g.,* D.C. Bar Legal Ethics Comm. Ops. 211 (1990), 218 (1991), 225 (1992), 230 (1992), 235 (1993), 250 (1994), 260 (1995), 269 (1997), 273 (1997), 279 (1998), 290 (1999), 300 (2000), 306 (2001), 319 (2003), 333 (2005).

Rule 1.10 addresses the considerations when a lawyer departs one firm to affiliate with another. *See id.* Ops. 237 (1992), 272 (1997), 279 (1998), 312 (2002). Lawyers may be surprised to know that conflict-of-interest concerns are raised for the new firm whether or not the lawyer arrives with clients. *Id.* Op. 273 (1997).

Rule 1.11 explains when a former government lawyer may represent a private client in challenging the same government agency. *See id.* Ops. 313, 315 (2002); *In re Sofaer*, 728 A.2d 625 (D.C. 1999). The Ethics in Government Act, 18 U.S.C. § 207, the federal conflict-of-interest statute, and Rule 1.11 apply in similar ways to restrict postgovernment employment. Opinion 297 (2000) is instructive on the threshold issue of the applicability of section 207 to a particular situation, before considering the applicability of Rule 1.11. Rule 1.12 extends the basic requirements of Rule 1.11(a) to privately employed arbitrators.

Rule 1.13 charges a lawyer to know the possibility of adversity between an organizational client and a constituent of that client, make the appropriate disclosures to the constituent, and thus avoid any conflict of interest between the two. D.C. Bar Legal Ethics Comm. Op. 269 (1997). Nonetheless, a lawyer is not deemed to have established an attorney–client relationship with each member of a client organization by representation of that organizational client. *Id.* Op. 305 (2001); *see id.* Ops. 314 (2002), 328 (2005).

Conflict matters are not limited to special practice areas, phases of representation, certain work settings, or particular personalities. The key to the proper processing of conflict issues lies in recognizing the factors influencing a lawyer's decision making. *See* Joyce R. Peters, *Navigating the Reefs: Conflicts and Prohibited Transactions*, Wash. Law., Dec. 2002, at 10.

Issues such as malpractice qualms, revolving-door employment, imputed conflicts, disparate fee-generating potentials, "thrust upon" conflicts, application of the definitions of *substantially related matter* and *materially adverse*, interpretations of the scope of representation, and uncertainties about terminating representation are all examples of strong battling influences. Each of these concerns can be difficult when pondered individually, but as a group they are much more dangerous. No substitute exists for diligent research and trustworthy advice before you choose to act.

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