speaking of ethics

By Heather Bupp-Habuda

Law-Related Services

Mick Wiggins

In Rule 5.7 of the new D.C. Rules of Professional Conduct, *law-related services* denotes services that are substantively related to the provision of legal services and that might reasonably be conjoined, but are *not* actually legal services. Rule 5.7(b).

Law-related services by lawyers present the possibility that the person for whom the law-related services are performed would fail to understand that the services may not carry with them the protections normally afforded a client–lawyer relationship. Rule 5.7 cmt. 1. The recipient of the law-related services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services, when that may not be the case. *See id.*

For exactly that reason, Rule 5.7(a) states, in pertinent part:

> (a) A lawyer shall be subject to the Rules of Professional Conduct . . . if the law-related services are provided:
>
> (1) By the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) In other circumstances if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client–lawyer relationship do not exist.

Comment 6 to Rule 5.7 makes clear that this communication with a person should be made *before* entering into an agreement for law-related services, and preferably should be in writing. *Id.* Not surprisingly, the burden is upon the lawyer to show that he or she has taken reasonable measures under the circumstances to communicate the desired understanding to the person. Rule 5.7(a)(2) & cmt. 7.

In prior opinions the D.C. Bar Legal Ethics Committee has recognized that, as a general matter, an attorney–client relationship can be created as a result of reasonable expectations of the client and a failure of the lawyer to dispel these expectations. *See* D.C. Bar Legal Ethics Ops. 306 (2001), 316 (2002); *see also In re Lieber*, 442 A.2d 153, 156 (D.C. 1982) (finding that a client's perception of an attorney as his counsel is a significant consideration in determining whether a relationship exists).

Disclosures of this type, to clarify the lawyer's role and the terms of the lawyer's interaction with another person, are well known to the practicing lawyer, and plainly required by other rules as well. *See, e.g.*, Rules 1.2, 1.5, 4.2, 4.3. Nonetheless, Rule 5.7 more specifically identifies a lawyer's ethical responsibilities in this often blurry area of law-related services. It is inherently blurry because when a lawyer provides law-related services, the lawyer is often acting as a nonlawyer.

The January 2007 "Speaking of Ethics" column covered existing Legal Ethics Committee opinions that addressed whether a lawyer's ethical duties are different when the lawyer is acting in a nonlawyer capacity (e.g., as a guardian or a licensed insurance or real estate broker). *See* D.C. Bar Legal Ethics Ops. 226 (1992), 306 (2001), 336 (2006). Directing the analysis of which rules of conduct applied was the determination of whether an attorney–client relationship ever existed. The committee had concluded in Opinions 226, 306, and 336 that the attorney–client relationship is not usually created when a lawyer is acting as a nonlawyer. The facts in those three inquiries supported the conclusion that the interaction was between a lawyer acting in nonlawyer role and a customer, as opposed to a (former or current legal) client. Therefore, no attorney–client relationship had been created, past or present.

Comparable issues arise in Opinion 337 (2007) (lawyer as expert witness). The outcome in Opinion 337 turns on the existence of an attorney–client relationship in answering a complementary question concerning the ethical obligations of a lawyer acting as an expert witness. Again, the committee reviewed the factors that control when the lawyer is potentially acting no differently than a nonlawyer would in the same role. Generally, lawyers who are expert witnesses are employed to testify about requirements of the law or standards of legal practice. The evidence that an expert witness provides lies within the expert's special area of knowledge by reason of training and experience, regardless of whether or not the expert is a lawyer.

The inquirer in Opinion 337 had served as an expert witness in litigation of banking matters. While planning to testify on behalf of the plaintiff at a trial and/or hearing in a new matter, the defendant bank's attorney objected to the inquirer's serving as an expert witness because one or both of the law firms with whom the inquirer was formerly employed did legal work for the defendant bank in prior years. Neither the inquirer nor the inquirer's current firm had ever worked on any previous matter for the defendant bank.

The committee found that if the inquirer served solely as an expert witness on behalf of another law firm's client and the law firm explained this role to the client at the outset, then the expert witness would not typically have an attorney–client relationship with the party for whom she may be called to testify. Consequently, without an attorney–client relationship the relevant rules relating to conflicts of interest from representation of former clients, Rules 1.9 and 1.10(a), are inapplicable here. (The lawyer as expert witness is distinguished from a lawyer consultant giving expert legal advice to a firm or a client because the

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Basic Estate Planning, Part 3
6–9:15 p.m. See listing for May 7.

MAY 15

Tenant Opportunity to Purchase Act: Developments and Practice
12:30–2 p.m. Sponsored by the Real Estate, Housing and Land Use Section.

What Every Lawyer Should Know About Immigration Law, Part 2: Family-Based Immigration Law and Domestic Relations
6–9:15 p.m. See listing for May 8.

How to Be a Sports Agent
6:30–8:30 p.m. Sponsored by the Arts, Entertainment, Media and Sports Law Section.

MAY 16

Addressing the Problem of Human Trafficking
12–1:30 p.m. Sponsored by the Criminal Law and Individual Rights Section. Cosponsored by the International Law Section. DLA Piper US LLP, 1200 19th Street NW.

Fundamentals of Administrative Law Practice, Part 2: Judicial Review of Agency Decision Making
6–9:15 p.m. See listing for May 2.

MAY 17

Advanced Effective Writing for Lawyers
9:30 a.m.–1:45 p.m. CLE course.

Everything You Ever Wanted to Know About Revocable Trusts but Were Afraid to Ask
12–1:45 p.m. Sponsored by the Estates, Trusts and Probate Law Section. Cosponsored by the Real Estate, Housing and Land Use Section.

Introduction to Securities Law, Part 4: SEC Enforcement and Private Rights of Action
6–9:15 p.m. See listing for May 3.

MAY 22

What Every Lawyer Should Know About Immigration Law, Part 3: Business Immigration Law for Business Lawyers
6–9:15 p.m. See listing for May 8.

MAY 23

Working With the World Bank, IMF, and IADB on Divorce and Child Support Issues
5:30–7:30 p.m. Sponsored by the Family Law Section.

Ethics and Lawyer Trust Accounts
6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section, Courts, Lawyers and the Administration of Justice Section, Family Law Section, Labor and Employment Law Section, Law Practice Management Section, Litigation Section, Real Estate, Housing and Land Use Section, and Tort Law Section.

MAY 24

Introduction to Key Antitrust and Tax Issues in Health Law
6–9:15 p.m. CLE course cosponsored by the Antitrust and Consumer Law Section and Health Law Section.

MAY 29

What Every Lawyer Should Know About Immigration Law, Part 4: Immigration Implications of Criminal Convictions
6–9:15 p.m. See listing for May 8.

JUNE 6

Public Benefits
9 a.m.–5 p.m. Training presented by the D.C. Bar Pro Bono Program. Sponsored by the Archdiocesan Legal Network, Bread for the City, Legal Aid Society of the District of Columbia, Washington Legal Clinic for the Homeless, and Whitman-Walker Clinic Legal Services Program. Cosponsored by the D.C. Bar Administrative Law and Agency Practice Section, District of Columbia Affairs Section, Health Law Section, and Litigation Section. Call 202-737-4700, ext. 293.

JUNE 8

Wills and Advance Directives
12–4:15 p.m. Training presented by the D.C. Bar Pro Bono Program. Sponsored by AARP Legal Counsel for the Elderly and the Archdiocesan Legal Network. Cosponsored by the D.C. Bar Estates, Trusts and Probate Law Section, Health Law Section, and Litigation Section. Call 202-737-4700, ext. 293.

JUNE 12

Litigating Qui Tam Cases Under the False Claims Act
6–9:15 p.m. CLE course cosponsored by the Health Law Section, Labor and Employment Law Section, and Litigation Section.

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the rewards of their hard work at the associate level is quite justifiable. Finally, I'm sure that billing rates will rise, as long as lawyers' services are in demand by clients who are willing to pay, but I certainly don't view associate raises as the primary cause of this.

I agree that higher salaries will not give associates "greater responsibility, more rewarding work, better training, or increased access to mentors," which, though critical, are more dependent on firm leadership to create and foster. However, if markets like New York want to attract top talent, they should continue to offer associates commensurate rewards for their services, which are both needed and oftentimes come at a price.

—Dana C. Pawlicki

Let Us Hear From You

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latter undertakes representation and all the duties therein.)

Moreover, because the lawyer as expert witness is presented to the tribunal as an objective witness and must provide opinions adverse to the party for whom the lawyer expects to testify if frankness so requires, the lawyer could not legitimately comply with all duties to a client. For instance, Rule 1.3 requires all lawyers to diligently advance their client's objectives through all lawful means, but that role would be inconsistent with that of an expert witness.

Thus, while a lawyer acts as an expert witness separate from his or her law practice, Rule 5.7 of the D.C. Rules of Professional Conduct, in addition to Rules 1.3(b), 1.7(b), 1.8(a), 3.3(a), 3.3(d), 8.3, and 8.4(c), will govern the lawyer's conduct.

Legal ethics counsel Heather Bupp-Habuda and Hope Todd are available for telephone inquiries at 202-737-4700, ext. 232 and 231, respectively, or by e-mail at ethics@dcbar.org.