

A summary of important recent developments in laws affecting lawyers and law firms in the District of Columbia.

D.C. Bar Committee Proposes Changes to Disciplinary System

In an area which, we hope, is only of academic interest to the readers of Professional Responsibility Highlights, a special committee appointed in 2003 by the Board of Governors of the D.C. Bar has proposed significant changes to the rules governing lawyer disciplinary proceedings in the District of Columbia. The committee's report can be found at www.dcbar.org/inside_the_bar/structure/reports.

Among the changes are ones which would permit Bar Counsel and a respondent lawyer to enter into stipulations of the lawyer's misconduct, to avoid the need for evidentiary hearings in situations where the lawyer wishes to concede his misconduct. Under current rules, a lawyer may only consent to disbarment. Other proceedings, which would lead to a lesser sanction, must include a hearing and the creation of an evidentiary record. The special committee's report claims that its proposal contains safeguards against disciplinary plea bargaining.

The report also recommends that sanctions less than a suspension, and certain suspensions, be imposable by the Board on Professional Responsibility, with Court of Appeals review available on a *certiorari* basis only. Under present rules, all lawyer discipline is reviewable as of right before the Court of Appeals.

The special committee is currently reviewing public comments on its report. The Board of Governors of the Bar is expected to make its formal recommendations to the Court of

Appeals for revisions to its disciplinary procedures later this year.

When a Former Client Requests a Copy of Its "File," What Must Be Provided?

A former client, or successor counsel for that client, may ask for a copy of the file kept by your law firm for the client's matter. In addition to completed work product, such as pleadings, transactional documents and correspondence, the file may contain such things as research and planning notes, and materials related to management of the matter. How much of this "file" must be provided to the former client or successor counsel?

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According to D.C. Bar Legal Ethics Committee Opinion 333 (December 2005), the answer is "all" of the file—both completed written work and other materials created during the course of the representation. The Committee's reliance on Rule of Professional Conduct 1.16(d) ("In connection with any termination of representation, a lawyer shall take timely steps . . . to protect a client's interests, such as . . . surrendering papers . . . to which the client is entitled . . .") may not completely support its conclusion, as the Rule does not specifically address a request by a former client in a completed matter, where the client does not need the complete file to "protect the client's interests." But the Committee also refers to Section 46(2) of the Restatement of the Law Governing Lawyers which, more broadly, gives a current and former client the right to inspect "any document . . . relating to the representation."

Conflicts of Interest: A Potential Hazard Hidden in a Seemingly Innocuous Representation

You are the partner responsible for evaluating conflict of interest issues presented by new matters at your firm. The conflicts report for a new litigation representing Adams Corp. against Brown Co. shows that Brown is also the adverse party in a pending matter in which Crown Bank is the firm's client. You see no need to investigate this conflict "hit" because Brown is an adverse party in both matters, not a client from which you might have received confidential information or who could otherwise seek disqualification.

Most lawyers would see this situation the same way. But a recent ruling by a federal district court in a malpractice case (*Victory Lane Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 2006 U.S. Dist. LEXIS 2523 (S.D. Miss., Jan. 12, 2006)) found a problem in this situation. The litigation the law firm was bringing on Adams' behalf against Brown was to recover damages for breach of contract. The work the law firm was doing for Crown Bank was to improve the bank's security interest in certain of Brown's assets. The effect of the firm's work for Crown Bank work was to make Brown's assets unavailable to pay the judgment the firm obtained for Adams against Brown.

In *Victory Lane*, the court saw these two client representations as presenting a conflict for the firm, because the firm's work for the bank client had an adverse effect on the firm's work for the trade creditor client. That conflict is actually rather obvious, once it is recognized. The problem for the law firm in *Victory Lane* was that it never saw the problem because the two adversities against Brown did not appear as a conflict. *Lesson:* a conflict

report for a new client which shows the adverse party as adverse to another law firm client should not be treated as a green light for the new representation; the nature of the work being performed for the existing client and to be performed for the new client should be examined to determine if they are possibly conflicting.

Application of Professional Ethics Rules to Lobbyists Who Are Also Lawyers

A recent ethics opinion of the Virginia Bar (Legal Ethics Opinion No. 1819 (2005)) provides useful professional responsibility guidance for lawyers who perform lobbying services in government relations firms, not law firms. The Opinion notes that certain ethics provisions (such as those prohibiting dishonest conduct or conduct prejudicial to the administration of justice) apply to a lawyer in any situation. But other ethical requirements, for example, those relating to confidentiality and conflict of interest, apply only where an attorney-client relationship has been formed.

While lobbying performed by a lawyer in a lobbying firm would not, ipso facto, create an attorney-client relationship, where the lobbyist is presented to the public as a lawyer (as in a website or other promotional materials), and acts in a way which could reasonably permit the lobby client to believe that the lobbyist/lawyer is providing legal services, an attorney-client relationship may be created, to which all of the Rules of Professional Conduct, including conflict of interest rules, would apply. The Committee notes that this result could be avoided by an explicit statement in the lobbyist's engagement agreement that the relationship with the lawyer-lobbyist is not an attorney-client one and that legal services are not being provided.



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