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District of Columbia Professional Responsibility Highlights

November – December 2005

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

Communicating with a Represented Party

The rule was once a black letter one – a lawyer may not communicate with a party represented by counsel without the consent of that counsel. For individuals represented by counsel, the rule is still black letter and easy to apply.

But for a corporation represented by counsel, which individuals affiliated with that corporation are off limits? The answer depends on whether and how the applicable jurisdiction has incorporated into its ethics rules ABA Model Rule 4.2, which codifies the no-contact rule. At one end of the spectrum are jurisdictions, such as Kentucky and Vermont, where *all* corporate managerial personnel are off limits for contact by opposing counsel. At the other end of the spectrum is the District of Columbia, which limits the no contact rule to current employees with "the authority to bind a party organization as to the representation to which the communication relates." Other jurisdictions fall between these two poles.

A District of Columbia lawyer representing a client before a forum in another jurisdiction should consult that jurisdiction's version of Rule 4.2 before contacting any current or former employees of an opposing corporate party. Reliance on District of Columbia ethics law as a safe harbor is likely to be unavailing, as pro haec vice admissions in most jurisdictions require the lawyer seeking admission to comply with the ethics rules of the forum jurisdiction.

A recent opinion of the Legal Ethics Committee of the District of Columbia Bar (No. 331, October 2005) has added some helpful clarification to D.C.'s Rule 4.2. It concludes that the no-contact prohibition does not apply to in-house counsel of a corporate party represented by outside counsel, even if such in-house counsel has "the authority to bind a party organization as to the representation to which the communication relates." The Committee reasoned that such lawyer-to-lawyer contacts are not the type to which the prohibition was intended to apply.

The Paperless Law Office: Is It Ethical?

Most law offices have the technology to maintain all of their records electronically. Court filings, e-mails, memoranda, discovery and just about every other piece of information traditionally recorded on paper can now be recorded and preserved electronically. Would it be unethical for a lawyer to maintain office files entirely in electronic form, and keep no paper records, save documents such as deeds and negotiable instruments, which may have existence and value only in paper form?

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Nothing in the ABA Model Rules of Professional Conduct or in the District of Columbia's version of them requires that a lawyer's files be maintained in paper form. The Virginia State Bar, the first among our neighboring jurisdictions to do so, has recently opined that an all-electronic law office can be ethical. VSB's Legal Ethics Opinion No. 1818 (issued September 30, 2005) concludes that there is no *per se* ethical prohibition of electronic record-keeping as the lawyer's

exclusive filing method. Where, however, a client has no means of receiving and examining electronic documents (as where the client has no access to a computer or necessary software), the lawyer may be required to keep a paper file.

Look for this sensible conclusion to be adopted elsewhere as ethics law tries to keep up with developing law practice technology.

Choice of Law for Professional Responsibility Questions

When a District of Columbia lawyer travels to another jurisdiction to negotiate a contract or interview a witness, do the ethics rules of that other jurisdiction apply to the lawyer's conduct there? When a lawyer is appearing before a tribunal in another jurisdiction, the rules of that tribunal typically require the lawyer to abide by its ethics rules. But where the travel was for some other professional purpose, such as a negotiation, the lawyer historically was thought to be subject only to the ethics rules of the jurisdiction or jurisdictions in which he was admitted. That was the rule in the District of Columbia under Rule of Professional Conduct 8.5(b) and under ABA Model Rule 8.5(b) before the ABA's wide-ranging amendments to those rules in 2002.

The ABA's 2002 amendment to Model Rule 8.5(b) made a significant change in choice of law principles. Under the amended rule, a lawyer's conduct is to be measured against "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the lawyer's conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct."

Consider the implications of this choice of law rule, which has been adopted in Maryland and many other jurisdictions, and is pending adoption (without the "predominant effect" option) in Virginia. As noted in another article in this issue of Professional Responsibility Highlights, the rule on contacting employees of a corporate party represented by counsel (Rule of Professional Conduct 4.2) varies from state to state. If, in a non-litigation matter, a lawyer interviews a mid-level manager, located in Kentucky, of a corporation represented by counsel, and interviews another mid-level manager of the same corporation located in the District of Columbia, and both interviews occur without the consent of the corporation's lawyer, the "location of the conduct" test of ABA Model Rule 8.5(b) could subject the lawyer's conduct in Kentucky to professional discipline, because all managerial employees of a corporation are protected under its version of Rule 4.2. But the lawyer's conduct in the District of Columbia might be lawful, because its version of Rule 4.2 permits contacts with such an employee. The picture becomes even more complicated if the affected corporation, headquartered in a third state, complains to bar counsel that, because its interests were invaded by the lawyer's interviews, the "predominant effect" of the alleged misconduct was at its corporate headquarters, thus potentially implicating the ethics law of that jurisdiction in measuring the lawfulness of the lawyer's interviews.

The District of Columbia Court of Appeals has not yet determined whether and to what extent it will adopt the ABA's 2002 amendments to the Model Rules. But the Bar's Board of Governors , in its 2005 report to the Court concerning amendments to the Rules of Professional Conduct, has recommended against the ABA amendment to Rule 8.5(b), on the ground that it would impose too great a burden on a lawyer to determine what law would govern the lawyer's conduct outside of the District of Columbia, without any compensating improvement in ethical standards.

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