speaking of ethics

By Saul Jay Singer

Mick Wiggins

When Does the Client Get to Call the Shots?[1]

One fine morning in the District of Columbia, at a Firm litigation department meeting:

Peter Partner: Okay, now we turn to Alex and his "client from hell." What's going on in the Carnivore litigation?

Alex Associate: We represent Carnivore Corporation in defending against a wrongful termination/sexual discrimination suit brought against the corporation by plaintiff Vanessa Victim, who had been Carnivore's accounting manager. From the very outset of the representation, Bertha Boardmember, Carnivore's duly authorized constituent in the case,[2] has been micromanaging us and bitterly criticizing, impeding, and prohibiting various actions we deem crucial to the case.

It began almost immediately when Bertha ordered us to file a motion to dismiss the complaint. However, Victim more than met her burden to plead specifics laying out a discrimination cause of action, and her counsel, Lord Voldemort, did a masterful job pleading the elements of the tort. When I explained this to Bertha, she said, "Even if the motion is ultimately denied, we get a first crack at presenting our theory of the case to the court and we get a chance to influence how the court will view the case; this is what I want and you will do it."

We now find ourselves in a real crisis situation due to Bertha's decision to impose a $10,000 cap on our entire discovery budget in this case. She told us, "I know how you lawyers run up client bills burning hours and hours of unnecessary discovery. Carnivore is not going to pay for such nonsense; not on my watch, folks." We repeatedly warned her of the serious risks inherent in the failure to undertake a careful document review but, in her customary arrogant fashion, she replied, "I'm the client, I get to decide what to do, and your job is to follow my instructions to the letter." As a result, we could only allocate limited resources to a privilege review of some 25,000 documents called for by Victim's request for production.

When we were served with Victim's motion for summary judgment last week, we discovered for the first time that we had produced an internal e-mail from Victim's supervisor, Barry Buckshot, to Carnivore's in-house counsel, in which he wrote: "I am well aware of our strict nondiscrimination policy, which I have always carefully observed. However, I have never been particularly comfortable with female accounting managers, and Vanessa is our first. I found out today that she is president of USA, U.S.A. (Undo the Second Amendment, America) and, because I cannot tolerate even the idea of our employing an anti-gun zealot, I undertook unilaterally to fire her this afternoon." When we advised Bertha about our release of the e-mail, she launched into a 150-decibel, hour-long verbal rampage and, when I tried to explain calmly that the e-mail would not have been produced had she followed our advice and not unreasonably limited our discovery efforts, she went positively nuclear.

Finally, with steam still shooting out of her ears, Bertha said, "Here's what we're going to do. First, you will call Voldemort and threaten to file a Bar complaint against him unless he withdraws the motion for summary judgment. Second, you will argue in opposition that Carnivore has no legal liability because Buckshot had a legitimate reason to terminate Vanessa's employment: He fired her not because she is female but, rather, because she ignored his repeated requests to cease the relentless proselytizing of her anti-gun position at the office, which upset many employees and which interfered with accounting department operations. Alternatively, you will characterize Buckshot as a "gun nut" and pin the entire matter on him as a supervisor who, unknown to Carnivore, acted outside the scope of his employment in firing Victim." Bertha concluded by threatening to file a Bar complaint against us if we did not follow her instructions precisely.[3]

Peter Partner: Here's one problem: Not only do we regularly represent AFA (American Firearms Association)[4] but, as active recreational hunters, all our partners would find it repugnant to take a position that disparages Buckshot for his pro-gun position.

Arthur Associate: But, Peter, don't we have the affirmative *duty* to follow the client's instructions, so long as they are not illegal or unethical?

* * *

The first problem with Bertha's demand that Firm file a motion to dismiss is Rule 3.1 (Meritorious Claims and Contentions), pursuant to which "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law." As Comment [1] explains, "the advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Comment [2] adds that a filing "is not frivolous even though the lawyer believes that the client's position ultimately will not prevail."

In our scenario, the question is whether filing the motion to "get a shot at influencing the court" uses "legal procedure for the fullest benefit of the client's cause" or constitutes "abuse [of] legal procedure." Reasonable lawyers may differ on this question, but Firm could argue that, as per Comment [2], the mere fact that Alex feels strongly that the motion to dismiss will fail does not make filing it *per se* frivolous.

But did Firm have the affirmative *duty* to file the motion to dismiss? Rule 1.2(a) (Scope of Representation) walks the line—or at least tries to, as we shall see—between the *objectives* of the representation, which vest generally in the client, and the *means* of obtaining those objectives, which vests generally in the lawyer:

> A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall con-

sult with the client as to the means by which they are to be pursued. . . .

As Comment [1] to the rule elaborates:

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within these limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. *At the same time, a lawyer is not required to pursue objectives or employ means simply because the client may wish that the lawyer do so.* A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client–lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. . . .

(Emphasis added.) In this case, Firm could have argued, I think correctly, that:

1. A motion to dismiss is merely a *means* to the client's objective—which is to ultimately prevail in defending against Victim's claims or to facilitate a favorable settlement—and that Firm therefore need not obey Carnivore's order to file it;

2. The question of whether to file a dispositive motion is clearly a *legal tactical* issue with respect to which Firm, after consulting with the client, may exercise its discretion; and

3. One of the core principles of legal ethics is that the client is entitled to counsel of his, her, or its choice and, if Carnivore isn't happy with Firm's handling of the case in general, or about its refusal to file a motion to dismiss in particular, it is free to fire Firm and to retain alternative counsel.

Turning to Firm's unfortunate production of a clearly privileged e-mail, we start with the unambiguous provision in Rule 1.2 that the lawyer "should defer to the client regarding such questions as the expense to be incurred." However, Carnivore's authority to establish a budget for Firm's representation and to exercise control over Firm's spending is not absolute because Firm may not abdicate its responsibility to provide competent representation to the client, which specifically includes "thoroughness and preparation reasonably necessary for the representation."[5] As such, had Firm reasonably determined that Carnivore's financial constraints interfered with its duty to provide competent representation, it had the obligation to so inform the client and, in the absence of Carnivore adjusting its budget to reflect Firm's reasonably necessary discovery needs, to withdraw from the representation.[6]

As to Bertha's demand that Firm file a Bar complaint against Voldemort, Comment [1] to Rule 1.2 makes clear that, even where the client has authority to "call the shots," that authority is subject to "limits imposed by law and *the lawyer's professional obligations*," which include the duty not to "threaten to seek . . . disciplinary charges solely to obtain an advantage in civil litigation."[7] (Emphasis added.) As such, Firm must refuse to follow the client's directions in this regard.

However, Firm and Carnivore each have reasonable arguments regarding Firm's obligation, *vel non*, to follow Bertha's order to "throw Buckshot under the bus" and make him the villain of the piece. Firm will argue that it need not follow Bertha's order to assert that Buckshot fired Victim in response to her

anti-gun proselytizing because Firm "may exclude objectives or means that the lawyer regards as repugnant or imprudent"[8] and because "A lawyer is not bound to press for every advantage that might be realized for the client."[9] More significantly, Firm will argue that here, too, the bottom line remains that Carnivore cannot dictate to Firm which means to use to achieve the objectives of the representation, that the Carnivore cannot determine the tactics that Firm must use in opposition to the motion for summary judgment, and that Bertha simply cannot decree which legal arguments Firm must make.

Carnivore will counter that Firm must follow its order:

1. Because, pursuant to Rule 1.2(b), "a lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social, or moral views or activities" and that, in accordance with Comment [3], "representing a client does not constitute approval of the client's views or activities." As such, Firm must make a legal argument that promotes Carnivore's interests and that increases the probability of meeting Carnivore's objectives in the case, even if that argument is "repugnant" to Firm lawyers.

2. Perhaps more importantly, Firm's discretion regarding the means of the representation and which legal arguments to raise is limited by its duty of competence. In the instant case, which may very well turn on Buckshot's motive for firing Victim, it would constitute rank incompetence of the highest order to fail to argue the existence of another legal and entirely proper animus for the firing—which includes not only Victim's disturbing the office through her proselytizing, but also Buckshot's personal vendetta against those with anti-gun views.

Like so many "objectives vs. means" questions that arise under Rule 1.2, the inquiry is intensely fact-specific and varies by circumstance. In the instant case, if Firm refuses to at least try to make Buckshot the fall guy (assuming that there is a good-faith basis in fact and law to do so), I think Firm would be hard-pressed to defend itself in a malpractice action brought by Carnivore—or against a Bar complaint alleging incompetence by Firm lawyers.

Finally, an important practice tip in this tough economy and challenging market for lawyers and law firms: Though establishing a client base and facilitating positive cash flow may be your foremost concerns, there is no reason to tolerate abuse from a client. In most cases, a lawyer may voluntarily withdraw from a representation,[10] and I can virtually guarantee that you will rue the day when you undertake to represent a client like Bertha. In some cases, both expediency and common sense dictate that you get out . . . while you still can!

Legal Ethics counsel Saul Jay Singer and Hope C. Todd are available for telephone inquiries at 202-737-4700, ext. 3232, and 3231, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 One wag with whom I discussed this question responded: "Until the client pays his outstanding fees." (I hope he was kidding.)

2 *See* Rule 1.13(a) (Organization as Client): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

3 The fact that this threat creates a clear Rule 1.7(b)(4) (Conflict of Interest: General) conflict that may require Firm to withdraw from the Carnivore matter is beyond the scope of this article.

4 This, too, creates a Rule 1.7(b)(4) conflict for Firm's lawyers, as well as a potential "positional conflict." *See* Rule 1.7, Comment [13].

5 *See* Rule 1.1 (Competence). *See also* Comment [1] to Rule 1.2, *supra*, which subjects the client's authority to determine the purposes of the representation to "limits imposed by law and the lawyer's professional obligations"—which obligations certainly include competence.

6 Whether Firm could reasonably meet its duty of competence on a $10,000 discovery budget, and whether it had the duty to withdraw in this case, are ultimately questions of fact. The question of whether Firm's production of the e-mail under these circumstances violated Rule 1.1 is similarly a question of fact—though I would argue that it did.

7 *See* Rule 8.4(g). *See also* Legal Ethics Opinion 220 for a full exposition on this subject.

8 *See* Rule 1.2, Comment [4].

9 *See* Rule 1.3 (Diligence and Zeal), Comment [1].

10 *See* Rule 1.16 (Declining or Terminating Representation). There are many complexities regarding withdrawal of which the lawyer must be aware, including important Rule 1.6 (Confidentiality of Information) considerations and the fact that the withdrawing lawyer must continue the representation until the tribunal grants the motion to withdraw. *See, e.g.,* Saul Jay Singer, *Going Through 'Withdrawal,'* Wash. Law., Jan. 2011, at p. 12.

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE JOHN B. BLANK. Bar No. 208660. December 31, 2012. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Blank by consent.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE MICHAEL V. KUHN. Bar No. 358570. December 6, 2012. The D.C. Court of Appeals granted Kuhn's petition for reinstatement.

IN RE JOHN H. PYE JR. Bar No. 436695. December 27, 2012. The D.C. Court of Appeals disbarred Pye for intentional misappropriation. In connection with his service as successor personal representative of an estate, Pye violated rules pertaining to lack of skill and care; lack of promptness; unreasonable fee; commingling, intentional misappropriation, and failure to maintain complete financial records; failure to promptly deliver funds; failure to protect a client's interest on termination of representation; conduct involving dishonesty, fraud, deceit, or misrepresentation; and serious interference with the administration of justice. Rules 1.1(b), 1.3(c), 1.5(a), 1.15(a), 1.15(b), 1.16(d), 8.4(c), and 8.4(d).

Reciprocal Matters

IN RE DAVID AGATSTEIN. Bar No. 427112. December 13, 2012. In a reciprocal matter based upon a consent disbarment in Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Agatstein.

IN RE RICHARD A. FAIRBROTHERS. Bar No. 426442. December 6, 2012. In a reciprocal matter from Massachusetts, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Fairbrothers for one year and one day with fitness. In Massachusetts, Fairbrothers was found to have engaged in a conflict of interest, lacked diligence, and abandoned his clients' cases.

IN RE RICHARD L. LANCIANESE. Bar No. 464879. December 6, 2012. In a reciprocal matter from West Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Lancianese for three years with fitness. In West Virginia, Lancianese was found to have charged unreasonable fees and engaged in dishonesty.

IN RE DAVID J. PERCELY. Bar No. 403066. December 6, 2012. In a reciprocal matter from New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and indefinitely suspended Percely, with the opportunity to petition for reinstatement in five years or upon his reinstatement in the state of New Jersey, whichever occurs first.

IN RE JOHN A. SUTHERLAND JR. Bar No. 358924. December 13, 2012. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed functionally equivalent reciprocal discipline and disbarred Sutherland. In Virginia, Sutherland

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