speaking of ethics

By Saul Jay Singer

The Third Man

Mick Wiggins

In 1995 Kathleen Gingrich, mother of then-Speaker Newt Gingrich, was an elderly woman and, unlike her son, unaccustomed to media attention. In an interview that remains controversial among journalism ethicists, reporter Connie Chung asked Mrs. Gingrich on the air what her son thought about then-First Lady Hillary Clinton. When Mrs. Gingrich demurred, Ms. Chung asked her—with the CBS cameras rolling—"just whisper it to me, *just between you and me.*" Mrs. Gingrich then responded aloud that her son thought of Mrs. Clinton as "a [rhymes with witch]."[1]

Many viewers interpreted Ms. Chung's suggestion as a promise that if Mrs. Gingrich whispers her response, that said response would be off the record and the reporter therefore violated *journalistic* integrity. The question here, however, is whether such conduct would constitute a violation of the District of Columbia Rules of Professional Conduct if engaged in by "Connie Chung, Esquire," a member of the D.C. Bar?[2]

Or, let's try this one: Leslie Lawyer, who represents plaintiff in a lawsuit, has discovered and located Walter Witness, whose testimony she believes may be outcome determinative for the case. Determined to beat Daniel Defendant to this key witness,[3] she decides to contact him directly rather than serving a subpoena.

Leslie establishes that Walter is an elderly gentleman who is hard of hearing and somewhat confused. She advises him that she represents Paul Plaintiff in a lawsuit, but she does not disclose the suit is against Daniel Defendant. Walter tells her he is Daniel's childhood friend, but he is unwilling to discuss his crucial personal knowledge of the case. Leslie tells him "I want to assure you that all we are interested in is seeing to it that justice is served. Do you want to be responsible for standing in the way of justice?" Walter proceeds to provide very helpful evidence to Leslie.

* * *

Most lawyers are aware of their ethical duties to their clients, including the duty to provide competent representation (Rule 1.1), pursue their clients' interests with diligence and zeal (Rule 1.3), communicate with their clients (Rule 1.4), and maintain the confidentiality of client information (Rule 1.6). Similarly, members of the Bar know they have ethical duties to the court, including the duty to present only those claims and contentions that are meritorious (Rule 3.1), expedite litigation (Rule 3.2), and exercise candor toward the tribunal (Rule 3.3). Less often considered and discussed are the duties lawyers owe to third persons.[4] A brief primer follows.

1. Rule 8.4(c)

First, and most broadly,[5] Rule 8.4(c) makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." As the D.C. Bar Legal Ethics Committee makes clear in Opinion 323 (2004), "this prohibition applies to attorneys in whatever capacity they are acting—it is not limited to conduct occurring during the representation of a client."[6] This general rule is essential to furthering the public perception of lawyers as honest practitioners, popularizing the belief that law is an ethical profession, and boosting the public's confidence in the Bar's ability to self-regulate.

2. Rule 4.1

Rule 4.1(a), which is an analogue to Rule 8.4(c), prohibits a lawyer from knowingly making a false statement of material fact or law to a third person *in the course of representing a client*.

Rule 4.1(b) provides that a lawyer shall not "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." While not establishing a lawyer's "duty to warn" akin to that which *Tarasoff v. Regents of the University of California* applies to psychotherapists,[7] this rule does impose a duty on the lawyer to make disclosures permitted under Rule 1.6 when failing to make such disclosures would assist the client in a criminal or fraudulent act. Significantly, Rule 1.6(c) and 1.6(d) *permit* a lawyer to make certain disclosures of client confidences and secrets in some circumstances where a crime is likely to result in death or substantial bodily harm, or when the lawyer's services are used to further an economic crime or fraud.

3. Rule 4.3

Rule 4.3(a)(1) prohibits a lawyer from giving advice to an unrepresented person—other than the advice to secure counsel—"if the interests of such persons are or have a reasonable possibility of being in conflict with the interests of the lawyer's client."

Rule 4.3(a)(2) provides that a lawyer may not "state or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested."

Rule 4.3(b) states that "when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

As Comment [1] clarifies, unrepresented third persons, particularly those inexperienced in dealing with legal matters, might assume that a lawyer will provide disinterested advice even when he represents a client; under such circumstances, "a lawyer must take great care not to exploit these assumptions." Comment [2] adds that it is impermissible for a lawyer representing a client to represent to a third person that he or she is disinterested; in fact, Rule 4.3(b) mandates that lawyer takes affirmative steps to correct the third person's misunderstanding regarding his or her role.[8]

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4. Rule 4.4

Rule 4.4(a) provides that: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person."

As Comment [1] explains, "responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, *but that responsibility does not imply that a lawyer may disregard the rights of third persons*" (emphasis added).

Rule 4.4(b) prohibits a lawyer from reviewing a document which has been inadvertently sent.[9]

5. Rule 4.2

Rule 4.2 provides that a lawyer who represents a client in a particular matter and wishes to communicate with a represented third person regarding the subject of the representation must first obtain consent from the third person's counsel.

6. Rule 1.15

Rule 1.15(a) requires a lawyer to "hold property … of third persons that is in the lawyer's possession in connection with a representation" and to keep it separate from the lawyer's own property. Upon receipt of property in which a third person has an interest, the lawyer must notify such third person and promptly deliver property which the third person is entitled to receive. Rule 1.15(b). The lawyer's duty of care to hold the property of others is that of "a professional fiduciary." Comment [1].[10]

7. Rule 9.1

Finally, this rule makes it an ethical violation for a lawyer to discriminate against any third person in conditions of employment because of race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.[11]

* * *

So, which of these Rules of Professional Conduct do you think have been violated by Leslie Lawyer and the mythical Connie Chung, Esquire?

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Notes

1 Many mistakenly believe that "rhymes with witch" were the actual words spoken by Mrs. Gingrich, who actually uttered the infamous "b-word." In fact, "rhymes with witch" was the phrase spoken by Barbara Bush in reference to Democratic vice presidential candidate Geraldine Ferraro during the 1984 campaign, but Bush later apologized to Ferraro for calling her a "witch."

2 Assuming, that is, that the District of Columbia Rules of Professional Conduct apply at all; *see* Rule 8.5 (Disciplinary Authority; Choice of Law).

3 To facilitate the hypothetical and avoid other ethical issues, assume the defendant has not yet served discovery and that there are no required mandatory disclosures at this point.

4 Comment [1] to Rule 4.1 defines *third person* as "any person or entity other than the lawyer's client." Although, on its face, this definition applies only to Rule 4.1, we adopt that definition here for the ensuing discussion.

5 The D.C. Court of Appeals has given a broad interpretation to Rule 8.4(c) and the rule "is not to be accorded a hyper-technical or unduly restrictive construction. *See*, e.g., *In re Ukwu*, 926 A.2d 1106, 1113-14 (2007).

6 See D.C. Bar Legal Ethics Op. 323 (2004), which carved out an interesting exception for attorneys employed by a national intelligence agency, such as the Central Intelligence Agency, who engage in fraud, deceit, or misrepresentation in the course of carrying out their nonrepresentational official duties.

7 In *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), a seminal case on duty to warn, the California Supreme Court held that when a psychotherapist determines that a patient presents a serious danger of violence to another, he or she "bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."

8 A lawyer cannot duck this rule—or, for that matter, any D.C. Rule of Professional Conduct—by retaining an investigator or even a reporter to conduct interviews of third persons. A cardinal rule of ethics in the District of Columbia is that a lawyer cannot accomplish through others that which he is prohibited from doing him- or herself. *See* Rule 8.4(a).

9 This rule generally applies as well to the review of inadvertently produced metadata. *See Metadata as Metaphor: A Major or Miner Matter?* Wash. Law. (Nov. 2007), at 14.

10 *See also* D.C. Bar Legal Ethics Op. 293 (where a third party has a "just claim" to property, the lawyer has the duty to protect that property against "wrongful interference by the lawyer's client").

11 This Rule is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001).

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in the Midwest in the 1970s where Schlesinger and I both spoke. We had postsession glugs of bourbon in his room, and for the life of me I can't remember what I might have said. But I lack the nerve to trudge up to the New York Public Library to review the full text of the journals to see whether he took notes. Just to be on the safe side, I offer a blanket advance apology to anyone I might have slandered.

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