Lawyer vs. Client: The Problem With Keeping Secrets

The best, or only, position to prevent a lawyer from revealing a client’s confidences or secrets is one in which the client was involved, or to the advantage of the lawyer, in a controversy between the lawyer and the client.15 (Emphasis added.)

Thus, in the absence of some other exception to Rule 1.6, the opinion concludes, per the plain language of the rule, that an in-house lawyer may not reveal or use employer confidences or secrets in an offensive lawsuit against his or her employer.

It is not entirely clear why the D.C. Rule omits the ABA Model Rule exception, although it is certainly revealing that the Jordan Committee,17 as discussed in Opinion 363, grappled with whether the D.C. Rule 1.6 exceptions should even permit a lawyer to use client confidences or secrets to sue a client for legal fees.18 Additionally, the fact that the D.C. Rules depart from the Model Rules on an issue involving client confidentiality is far from unique. For example, pursuant to D.C. Rule 3.3(a) (Candor to the Tribunal), a lawyer’s affirmative duty to correct false statements of material fact or law previously made to a tribunal by

...
the lawyer is significantly limited by D.C. Rule 1.6.19 In contrast, ABA Model Rule 3.3 requires a lawyer to make such corrections even if compliance necessitates disclosures of information otherwise protected by Model Rule 1.6.

Similarly, although D.C. Rule 1.13(b) requires, in some instances, a lawyer for organization to “report up” within the organization illegal conduct of an officer, employee, or other person associated with the organization, the D.C. Rules do not permit a lawyer to report such conduct outside the organization, unless the lawyer is able to do so pursuant to an exception to Rule 1.6.20 In contrast, the significantly more permissive ABA Model Rule 1.13 permits organizational lawyers to “report out” illegal conduct.

These examples illustrate important policy decisions of the D.C. Court of Appeals in its promulgation of lawyer ethics rules that strongly favor client confidentiality, in some instances over other significant values. No doubt, important social, moral, and legal values undergird an employee’s right to sue an employer for discrimination and/or retaliatory discharge. Opinion 363 highlights the often inherent tension between the duty of confidentiality and other competing values.21 At least for now, the balance tips in favor of the client.

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

Notes
1 The lawyer–client relationship is a fiduciary relationship, by definition, one of trust.
2 See D.C. Rule 1.6, Comment [9], and D.C. Rule 1.18 (Duties to Prospective Clients) (“Even when no client–lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation.”).
3 See D.C. Rule 1.6(g); see also D.C. Legal Ethics Opinion 324 (Disclosure of Deceased Client’s Files) (2004) and Swudder & Berlin v. United States, 524 U.S. 399 (1998).
4 D.C. Rule 1.6, Comment [2].
6 See D.C. Rule 1.6, Comment [3].
8 “Confidence” refers to information protected by the attorney–client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.” D.C. Rule 1.6. Importantly, “[a] secret exists without regard to the nature or source of the information or the fact that others share the knowledge.” Id., Comment [8].
9 Except when pursuant to paragraphs (c), (d), or (e), a lawyer shall not knowingly:
(1) reveal a confidence or secret of the lawyer’s client;
(2) use a confidence or secret of the lawyer’s client to the disadvantage of the client;
(3) use a confidence or secret of the lawyer’s client for the advantage of the lawyer or of a third person.” D.C. Rule 1.6(d).
11 D.C. Rule 1.6(c)(1).
12 D.C. Rule 1.6(d).
13 D.C. Legal Ethics Opinion 363 (In-House Lawyer’s Disclosure or Use of Employer/Client’s Confidences or Secrets in Claim Against Employer/Client for Employment Discrimination or Retaliatory Discharge) (2012). The opinion also addresses two related questions not discussed herein: whether the lawyer may disclose or use employer/client confidences or secrets if the employer/client puts the lawyer’s conduct at issue, and whether the in-house lawyer is prohibited from bringing a claim against her employer/client merely because the client may find it necessary or helpful to disclose its confidences or secrets. See D.C. Rule 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).
14 ABA Model Rule 1.6: see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-424 (2001) (concluding that Model Rule 1.6 permits the offensive use of client information in an in-house lawyer’s lawsuit for wrongful discharge).
16 See, e.g., D.C. Rule 1.6(d). Opinion 363 notes the possibility that an in-house lawyer could sue a client pursuant to Rule 1.6(e)(5) in an action for the lawyer’s fees; however, FN[10] clarifies that an in-house lawyer’s salary does not constitute a fee within the meaning of Rule 1.6(e)(5).
18 See D.C. Legal Ethics Opinion 363 (2012); D.C. Rule 1.6(e)(5) permits lawyers to use or reveal client confidences or secrets “to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer’s fees.”
19 “[A] lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6.” D.C. Rule 3.3(a)(1); But see D.C. Rule 3.3(d), “A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).”
20 See, e.g., D.C. Rule 1.6(d) (limited economic crime/fraud exception); D.C. Rule 1.6(e)(2)(A) (when required by court order or law).
21 Indeed, the Legal Ethics Committee acknowledges important public policy that encourages redress in cases of employment discrimination and retaliatory discharge.” D.C. Legal Ethics Opinion 363 (2012).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE DAVID AGATSTEIN. Bar No. 427112. October 3, 2012. Agatstein was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE AMAKO N. K. AHAGHOTU. Bar No. 352237. September 27, 2012. Agahdotu was suspended on an interim basis pursuant to D.C. Bar Rule XI, § 9(g), pending final action on the Board on Professional Responsibility’s July 20, 2012, recommendation of disbarment.

IN RE STEPHANIE Y. BRADLEY. Bar No. 288910. September 27, 2012. Bradley was suspended on an interim basis pursuant to D.C. Bar Rule XI, § 9(g), pending final action on the Board on Professional Responsibility’s July 31, 2012, recommendation of a two-year suspension with fitness.

IN RE KIMUEL W. LEE. Bar No. 424701. October 31, 2012. Lee was suspended on an interim basis based upon discipline imposed in Louisiana.

IN RE ANN M. OLIVARIUS. Bar No. 429231. October 31, 2012. Olivarius was suspended on an interim basis upon the revocation of her previously granted admission to the practice of law in New York.

IN RE LAITHAL PONDER JR. Bar No. 434951. October 16, 2012. Ponder was suspended on an interim basis based upon discipline imposed in the U.S. District Court for the District of Columbia.

IN RE JOHN A. SUTHERLAND JR. Bar No. 358924. October 3, 2012. Sutherland was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE ERIN M. WEBER ANDER-SON. Bar No. 422977. October 16, 2012. Weber Anderson was suspended continued on page 46
B ar Happenings  
continued from page 7

"Introducing Lawyers to the Power and Serenity Meditation" will provide participants with the fundamentals of mindfulness meditation. Attendees will learn about some of the recent research on the benefits of meditation in daily life and will go through a guided meditation session led by Hugh Byrne, a senior teacher with the Insight Meditation Community of Washington.

The session takes place from 5:30 to 7:30 p.m. and will be held at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

For more information or to register, visit www.dcbars.org/for_lawyers/events.

S peaking of Ethics  
continued from page 9

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcbars.org/discipline and search by individual names.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE EDWARD C. BOU. Bar No. 37713. October 3, 2012. Bar Counsel issued Bou an informal admonition for failing to notify a third-party medical provider that his clients received insurance proceeds in satisfaction of a personal injury claim, even though Bou executed an assignment and authorization. Rule 1.15(c).

IN RE HAROLD G. MARTIN. Bar No. 985092. October 11, 2012. Bar Counsel issued Martin an informal admonition. After serving as a court-appointed attorney in a criminal matter that resulted in a conviction, Martin failed to obtain the client’s current location and address, failed to notice an appeal of the criminal matter, and failed to take reasonable steps to protect the client’s interests at the termination of the representation. Rules 1.1(a), 1.1(b), 1.3(a), 1.4(a), 1.4(b), and 1.16.

IN RE HENRY N. MATURI. Bar No. 498767. October 3, 2012. Bar Counsel issued Maturi an informal admonition for failing to file a timely appeal while representing a client in an immigration matter. Rules 1.1(a), 1.1(b), and 1.3(a).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by the Office of Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbars.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.

Reach D.C. Bar staff writer Kathryn Alfisi at kalfisi@dcbars.org.