speaking of ethics

By Saul Jay Singer

Mick Wiggins

Let's *Split*!

One fine day in the District of Columbia, at a Goode & Hart partnership meeting:

Peter Partner: Okay, let's turn to new business. Connie and Barry, I understand you have potential new matters to present to us.

Connie Counsel: I was contacted yesterday by Lilly Lawyer, a former law school classmate with a highly successful practice representing large corporations in business transactions. She represents MacroHard, Inc. in a complex deal with Kumquat Computers, Inc. that has blown up and is heading to court here in the District. Lilly, who claims to have never seen the inside of a courtroom, has offered the MacroHard litigation to me.

However, before you all get too excited, Lilly proposes that we do all the litigation work and that her very limited role will be to provide occasional business advice and to share her institutional knowledge of the client. But here's the kicker: she demands 80 percent of the aggregate fee for her firm and is offering us only 20 percent.

Patricia Partner: But that's outrageous! We're going to be committing ourselves to potentially thousands of hours of work and to dedicating limited firm resources to this case for only 20 percent of the fee? And let's put aside the inequitable fee-split issue for a moment and discuss something far more important: this arrangement is a straight-on violation of the Rules of Professional Conduct. Lilly's proposal is no more than a subterfuge to find a way around the Rule 7.1 proscription against receiving a referral fee—and, far more importantly, that prohibition includes a bar against paying such a referral fee! As such, even were Lilly to demand only 5 percent of the aggregate fee, we still could not agree to such an arrangement. Do you want to risk being disbarred for a lousy 20 percent of our standard fee? Let the record reflect that I will have nothing to do with this.

Peter Partner: I want to thank Patricia for her usual dispassionate presentation of her views. [All chuckle]. However, Pat, it would be a shame to walk away from this; do you see any way around the ethics problem?

Patricia Partner: Aside from approaching MacroHard ourselves—which has never been how we conduct business at Goode & Hart—I suggest that we send Connie back to Lilly to explain the ethical problems inherent in the proposal and to suggest that each firm separately bill the client for the actual hours worked on the case. If Lilly agrees, then it's a done deal, and we may commence work on the Kumquat case.

Peter Partner: All agreed? Okay, Barry, what have you got for us?

Barry Barrister: As you all know, Dr. Vanna Helsing, one of the District's most respected medical experts, is our designated expert for all personal injury cases that come in the door. For over 10 years, whenever a prospective PI client has come to us, we have immediately secured medical releases from the client and, after gathering all client records from medical providers, we turned them over to Doc who, after a thorough analysis, advises us in great detail about the strengths and weaknesses of each medical claim. If we decide to take the case, she also acts as our consulting expert, helps prep us to depose Defendant's medical expert, and otherwise provides invaluable assistance in handling whatever issues may arise in presenting our damages claim. We pay her a hefty $600 an hour, but she is worth every penny, not only in helping us win cases, but also in helping us to avoid taking on losing cases.

A few days ago, Doc approached me with a fascinating proposition: in exchange for a partnership and 5 percent ownership interest in our firm, she would provide her services to us in-house. We would have the advantage of her unlimited services without ever having to worry about the "meter" running. I ran some numbers, ladies and gentlemen, and this would save us—and our clients—a veritable fortune; it is truly an "everybody wins" scenario. She will, of course, leave all legal strategies and decisions to us and will not interfere in any way in our legal representation of our clients.

Doc Helsing has one other condition, which I think you will find almost as good: her brother, multi-billionaire Gil Bates, will purchase a 5 percent ownership interest in our firm for a cool $2 million, payable immediately. You have all seen our financials, and there is no question that this would be an incredible windfall for all of us. Frankly, I think the guy is nuts, but I see no problem in taking him on, particularly as a wholly passive investor, the ultimate "silent partner" who agrees to have no say whatsoever—not even a 5 percent vote!—in anything we do. In addition, Bates promises to bring us all his legal work, which would make us one of the most prominent law firms in America.

Peter Partner (sighing): Patricia, do you want to tell him the bad news, or should I?

Patricia Partner: Great idea, Barry, but we can't do it. The rules could not be clearer: a nonlawyer may not have any ownership interest in a law firm or in its legal proceeds. Period.

* * *

"A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm."[1] Such arrangements are permitted—indeed, encouraged—in the District of Columbia because they "facilitate association of more than one lawyer in a matter in which neither alone could serve the client as well."[2] However, Rule 1.5(e) lays out four conditions that must be met before lawyers in different firms may split a fee:

(1) The division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.

(2) The client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged;

(3) The client gives informed consent[3] to the arrangement; and

(4) The total fee is reasonable.[4]

The rule does not require that the lawyers disclose to the client how they decide to split the fee.[5] Rule 1.5(e)(1), however, introduces several complexities that lawyers must carefully consider before entering into such a fee-splitting arrangement.

The first element presents lawyers with a choice of two alternatives. The first, and far less complicated option, is that each lawyer be compensated for the work he or she actually performs. Thus, in an hourly matter, each lawyer would be paid for his or her actual hours[6] and, in a contingency case, each lawyer would receive a proportional recovery based upon the actual work performed.[7] This, in fact, is precisely how Patricia proposed that the firm split the MacroHard fee with Lilly Lawyer, and such an arrangement would satisfy Rule 1.5(e)(1).

However, should Lilly refuse this arrangement, there is a second option: if each lawyer assumes "joint responsibility" for the representation, they can agree to split the fee in whatever manner they choose. This would include, for example, Lilly taking 80 percent of the fee for doing minimal work; in fact, Lilly could take 80 percent of the fee *while doing no work whatsoever*.[8]

But there is a significant catch: the concept of joint responsibility is not "merely a technicality or incantation" and the referring lawyer does not escape the implications of joint responsibility by simply avoiding direct participation:

> The lawyer who refers the client to another lawyer, or affiliates another lawyer in the representation, remains fully responsible to the client, and is accountable to the client for deficiencies in the discharge of the representation by the lawyer who has been brought into the representation. If a lawyer wishes to avoid such responsibility for the potential deficiencies of another lawyer, the matter must be referred to the other lawyer without retaining a right to participate in fees beyond those fees justified by services actually rendered.[9]

Thus, Lilly could, indeed, take a portion of the aggregate MacroHard fee—perhaps even a high proportion—for doing nothing at all, but she becomes fully responsible for any and all of her co-counsel's errors and deficiencies in handling the case. And, of course, this cuts both ways: to whatever extent that Lilly performs any work on the case, the lawyers of record at Goode & Harte are jointly responsible for that work. This is a risk many lawyers will not want to assume or, at the very least, should not assume until after much careful consideration.

Dr. Vanna Helsing's proposal presents one of the clearest examples of how crucial it is for lawyers to consider which rules of professional conduct apply to the particular matter they are handling.[10] As of this writing, the District of Columbia is the sole jurisdiction that—under very limited conditions, as we will discuss—permits limited ownership and control of a law firm by a nonlawyer. Thus, Patricia's cold conclusion that "a non-lawyer may not have any ownership interest in a law firm or in legal proceeds" is patently incorrect under D.C. Rule 5.4(b), which provides that:

> (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
>
> (1) The partnership or organization has as its sole purpose providing legal services to clients;
>
> (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
>
> (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
>
> (4) The foregoing conditions are set forth in writing.

The D.C. Rules, which are overwhelmingly client-centric, permit such ownership or control by a nonlawyer because the ultimate benefit of such associations accrues to the benefit of the client. As such, Rule 5.4(b)(1) makes clear that the *sole* purpose of the partnership must be to provide legal services to clients by permitting "nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee."[11]

Doc Helsing's proposal easily meets this test;[12] in fact, it may well serve as a definitive example of the type of relationship contemplated by Rule 5.4(b)—provided that she agree *in writing* to be fully bound by the D.C. Rules of Professional Conduct exactly as if she were a D.C.-barred lawyer. Moreover, all lawyers who have any ownership interest in Goode, Hart & Helsing[13] or who exercise managerial authority over its legal practice must agree *in writing* to be responsible for Doc's acts and omissions pursuant to Rule 5.1.[14]

However, as to Gil Bates' purchase of a 5 percent interest in the firm, the D.C. Rule is clear: passive investments in law firms by nonlawyers are strictly prohibited. As Rule 5.4, Comment 8, pointedly notes:

> Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes . . . Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.[15]

Finally, a practice tip: it cannot be overemphasized that D.C. lawyers who rely on D.C. Rule 5.4(b) and who practice with a firm in a jurisdiction outside the District risk running afoul of that jurisdiction's ban against ownership or control by nonlawyers.[16] There is a needle here that must be carefully threaded, and D.C. lawyers availing themselves of the limited Rule 5.4(b) exception must proceed with extreme caution.

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Notes

1 D.C. Rule 1.5 (Fees), Comment 9.

2 *Id.*

3 "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e) (Terminology).

4 *See* Rule 1.5(a), which lists eight (nonexclusive) factors to be considered in determining the reasonableness of the fee.

5 *See* Rule 1.5, Comment 14. Interestingly, this constitutes a stark departure from ABA Model Rule 1.5(e)(2), which specifically requires disclosure of "the share each lawyer will receive."

6 The lawyers could decide whether to submit separate invoices to the client, or to join together in presenting a single aggregate invoice; either method is acceptable under the rules.

7 As an arithmetic example, if the total recovery is $300,000; the contingency provision is the traditional one-third; and Lawyer A put in 250 hours and Lawyer B 750 hours; then Lawyer A's fee would be $25,000 and Lawyer B's fee would be $75,000.

8 "The concept of joint responsibility does not require the referring lawyer to perform any minimum portion of the total legal services rendered." Rule 1.5, Comment 12.

9 Rule 1.5, Comment 11.

10 *See* Rule 8.5 (Disciplinary Action; Choice of Law). A discussion on the parameters of this rule, while enormously important, is outside the scope of this article.

11 Rule 5.4, Comment 7.

12 We would arrive at a very different conclusion were Doc and other possible nonlawyer owners to jointly control more than 50 percent of the firm. Rule 5.4(b) clearly contemplates that *lawyers* retain total authority to make every legal decision, and that *lawyers* retain complete independence of judgment with respect to all legal matters and issues—including specifically which cases to take and which to reject. Sharing fees with nonlawyers "should not interfere with the lawyer's professional judgment." Comment 1.

13 The name of the nonlawyer partner may be included in the law firm name. *See L*egal Ethics Opinion 244.

14 Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) lays out the conditions under which a supervisory lawyer will be held responsible for ethical violations by a subordinate lawyer. Thus, Rule 5.4(b)(3) and Rule 5.1 read together make the lawyers who own and/or manage Goode, Hart & Helsing responsible for Doc as if she were a subordinate D.C. lawyer.

15 *See also* Legal Ethics Opinion 362.

16 *See, e.g.*, American Bar Association Formal Opinion 464: Division of Legal Fees With Other Lawyers Who May Lawfully Share Fees With Nonlawyers (August 19, 2013).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE KENNETH M. ROBINSON. Bar No. 51706. August 22, 2013. The D.C. Court of Appeals suspended Robinson for seven months. Robinson engaged in negligent misappropriation of client settlement funds, failed to promptly pay a client the settlement funds due her for more than three years, and failed in his duty to supervise his associate to ensure that Robinson's escrow account was properly maintained after receiving notice that his trust account was overdrawn. Rules 1.15(a), 1.15(b), and 5.1(a).

IN RE LENNOX J. SIMON. Bar No. 426360. August 1, 2013. The D.C. Court of Appeals disbarred Simon. Simon recklessly misappropriated funds entrusted to him as the court-appointed conservator of the estate of an incapacitated individual. Rules 1.1(b), 1.3(a), 1.3(c), 1.15(a), and 8.4(d).

Reciprocal Matters

IN RE JAMES H. DICKEY. Bar No. 414988. August 8, 2013. In a reciprocal matter from South Carolina, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Dickey for two years with a fitness requirement, *nunc pro tunc* to January 23, 2013. In South Carolina, Dickey was found to have created a document that appeared to be a medical record and included it in a settlement package sent to an insurance company, failed to return an unearned fee as required by an arbitration award, and failed to keep a client fully apprised of the status of the representation.

IN RE GREGORY MILTON. Bar No. 978857. June 6, 2013. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and indefinitely suspended Milton, with the right to seek reinstatement after 90 days, *nunc pro tunc* to May 17, 2013. Milton's reinstatement is contingent upon a showing of fitness. In Maryland, Milton stipulated that his conduct violated rules involving neglect of client matters, a failure to communicate with clients, and failing to respond to lawful requests for information from Maryland Bar Counsel. (Corrected disciplinary summary).

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE ALLEN BRUFSKY. Bar No. 64956. August 27, 2013. Brufsky was suspended on an interim basis based upon discipline imposed in Florida.

IN RE GRASON JOHN-ALLEN ECKEL. Bar No. 459296. August 27, 2013. Eckel was suspended on an interim basis and a reciprocal proceeding was stayed based on an interim suspension order in Maryland.

IN RE DARRELL N. FULLER. Bar No. 499204. August 13, 2013. Fuller was suspended on an interim basis based upon his conviction of a serious crime in the District Court of Harris County, Texas.

IN RE CHRISTOPHER M. JOHNS. Bar No. 433783. August 29, 2013. Johns was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE GLENN C. LEWIS. Bar No. 955500. August 27, 2013. Lewis was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE LEODIS CLYDE MATTHEWS. Bar No. 284182. August 29, 2013. Matthews was suspended on an interim basis based upon discipline imposed in California.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE STEVEN C. PALLAT. Bar No. 405168. July 23, 2013. Bar Counsel issued Pallat an informal admonition for failing to set forth the rate or basis of his legal fee and failing to communicate the scope of the representation while representing his client in an immigration matter. Rules 1.4(b) and 1.5(b).

IN RE STEVEN C. PALLAT. Bar No. 405168. July 23, 2013. Bar Counsel issued Pallat an informal admonition for failing to effectively communicate and failing to take timely steps to the extent reasonably practicable to protect the client's interest in connection with termination of the representation while representing his client in an immigration matter. Rules 1.4(a), 1.4(b), and 1.16(d).

IN RE MELODIE V. SHULER. Bar No. 488686. July 23, 2013. Bar Counsel issued Shuler an informal admonition. While retained to represent a client, Shuler disclosed the client's confidences and secrets in a motion to withdraw from the case, failed to appear at a court hearing, and failed to move to withdraw from the client's case in a timely manner. Rules 1.6(a), 1.16(a), and 8.4(d).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.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.*