speaking of ethics

By Saul Jay Singer

Suing Your Client: The Rule 1.6 Problem

Mick Wiggins

Larry Lawyer represented Carol Client in a failed civil rights and wrongful death action against the District of Columbia arising out of her sister's death while in the custody of the Metropolitan Police Department. A furious and disconsolate Carol, certain that she lost her case because of Larry's incompetence or malfeasance, decides to dedicate her life to ensuring that Larry is never again permitted to practice law. She files a complaint against him with the Office of Bar Counsel (OBC) and, over the course of the next few weeks, bombards OBC daily with sloppily handwritten notes, newspaper clippings, citations to legal authorities that have absolutely nothing to do with any issue in the case, and rambling demands for action. Carol is astounded when OBC quickly issues a finding that Larry had not violated any of the D.C. Rules of Professional Conduct, and she becomes even more determined to harm the lawyer professionally. She proceeds to advise every conceivable acquaintance and stranger she meets that Larry is a terrible lawyer who lost her case and should not be permitted to represent other clients. She even goes so far as to attend community meetings in the District of Columbia, specifically those at Larry's church, to announce publicly that Larry is a "dreadful lawyer" who "did an absolutely terrible job."

While attending a church meeting at which Carol is ranting about Larry, Betty Buttinsky becomes outraged and decides that it is her duty to do all she can to help Carol spread the word about Lucifer Larry. She proceeds to fabricate and broadly disseminate an allegation that Larry lost Carol's case because he failed to subpoena Crucial Witness, even after Carol had spent hours discussing Crucial Witness' key role in the death of her sister and ordering Larry to call him to testify.

Larry had maintained a successful 20-year practice in the District of Columbia, drawing most of his client base from his church and community and through positive word of mouth by former clients. Suddenly, though he has done no wrong, his new business evaporates and his practice is on the verge of collapse. He decides that the only way to clear his name and to save his practice is to sue both Carol and Betty for slander.[1]

But Larry has a potentially serious problem: Rule 1.6 of the Rules of Professional Conduct (Confidentiality of Information). How can he possibly support his lawsuit—or even plead sufficiently so as to withstand a motion to dismiss—without disclosing information protected by Rule 1.6? For example, it turns out that he never called Crucial Witness to testify because Carol, after confiding various personal and highly confidential secrets to Larry regarding her clandestine relationship with Crucial Witness, specifically ordered him not to do so. But wouldn't disclosing that information constitute a violation of the Rule 1.6 duty of confidentiality?

Larry calls the Legal Ethics Help Line and asks if there is any "sword and shield" exception to Rule 1.6 in this case.[2] It doesn't seem fair, he argues, that he be constrained by the restrictive chains of Rule 1.6 from seeking his remedy against his former client, nor can it be equitable to permit some slanderous intermeddler to run around defaming and damaging him with impunity. Moreover, he vociferously argues, *he* is not the one who placed his competence and Carol's confidences at issue; having used those confidences as a "sword" against him, should Carol and Betty now be permitted to use them as a "shield" against his lawsuit?

There is, indeed, an ethical analogue to the sword and shield doctrine, which arises in several enumerated exceptions such that a lawyer may disclose confidences and secrets "to the minimum extent reasonably necessary."[3] The relevant exception in Larry's case is Rule 1.6(e)(3), which provides that a lawyer may use or reveal client confidences or secrets:[4]

> to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client.

There are two distinct and independent bases within Rule 1.6(e)(3) that permit disclosure of client secrets—but only "to the extent reasonably necessary." The first, on its face, permits disclosure *only* where a *formal* action—criminal, disciplinary, or civil—has been instituted against the lawyer.[5] The second exception gives the lawyer the right to respond to "specific allegations"—whether or not "formally instituted"—but only when those allegations are made by the client, and not by a third party.

The practical and disconcerting implication of these provisions is that Larry is stuck; he can sue neither Carol nor Betty.[6]

First, neither putative defendant to Larry's suit has filed any formal action against him.[7] As such, it is clear that he cannot avail himself of the first clause of Rule 1.6(e)(3). Nonetheless, Larry argues that he can sue Carol under the second clause because she has made allegations concerning his representation of her. However, general comments by a client regarding her dissatisfaction with her lawyer and his performance do not rise to the level of the "*specific* allegation" required by Rule 1.6(e)(3). As Comment [25] to Rule 1.6 makes clear:

> If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be 'specific' charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an

> example of such general criticism would be an assertion by the client that the lawyer 'did a poor job' of representing the client . . .

Thus, Carol's "general criticism" of Larry does not release him from his Rule 1.6 duties to his former client.[8]

As to Betty's allegations, Larry correctly argues that her statements were specific, defamatory, broadly disseminated, and malicious. However, the second clause of the Rule 1.6(e)(3) exception permits a lawyer to disclose client confidences *only* when specific allegations are made "by the *client*," and not by third parties such as Betty. As Comment [24] explains:

> The lawyer may not disclose a client's confidences or secrets to defend against informal allegations made by third parties; the Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer . . .

As such, the rules leave poor Larry with no recourse and no remedy.

But is this fair? What do you think? Do you think that the overwhelming emphasis of the Rules of Professional Conduct on preserving client confidentiality is misguided in this instance? If so, how would you rewrite Rule 1.6 to permit Larry to disclose client confidences and secrets in support of his suit against a former client and a third-party meddler, both of whom wrongfully and irreparably damaged him?

Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 231 and 232, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 Of course, suing a client raises many other strategic and nonethical considerations that are well beyond the scope of this article. Even where it is ethically permissible, a lawyer should proceed very carefully, indeed, before instituting suit against a client.

2 Under the sword and shield doctrine, a well-recognized principle of privilege law, courts will not permit litigants to selectively disclose favorable information while asserting privilege as to unfavorable information. Thus, a party may not make an allegation or assert a defense and then use the attorney–client privilege to shield discovery of the underlying facts by the opposing party. As Professor Wigmore has noted:

> There is always also the objective consideration that when [an attorney's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.

See, John Henry Wigmore, *Wigmore on Evidence* (McNaughton Rev. 4th ed. 1961), § 2327 at 636.

3 *See,* for example, Rule 1.6(e)(5), which permits a lawyer to reveal client confidences or secrets "in an action instituted by the lawyer to establish or collect the lawyer's fee."

A full discussion of all Rule 1.6 exceptions is beyond the scope of this article. It is important to note, however, that, as the comments to Rule 1.6 make clear, even when a lawyer falls squarely within one of the Rule 1.6 exceptions, he or she does not have *carte blanche* to disclose client confidences and secrets. Rather, the lawyer must undertake a meticulous analysis of precisely what limited client information is reasonably required to proceed under the applicable exception.

4 A lawyer's duties under Rule 1.6, which are very broad, extend well beyond the mere duty to preserve the confidentiality of attorney–client communications. In fact, these duties apply to client "secret[s]" and to "information gained in the professional relationship [whether or not gained from the client himself] 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." *See* Rule 1.6(b).

In general, the duty to preserve client confidences and secrets under the Rules of Professional Conduct will usually trump other ethical duties; as such, each of the Rule 1.6 exceptions must be very narrowly and precisely read and applied.

5 A fascinating question, which has not to date been specifically addressed by the D.C. Bar Legal Ethics Committee in any opinions, is whether under Rule 1.6(e)(3), a lawyer who is sued by a client may disclose otherwise protected client confidences in asserting a counterclaim against the client arising out of the same nucleus of operative fact underlying the client's suit. A narrow reading of the first clause of Rule 1.6(e)(3), which limits the exception to "a *defense*" to a claim, strongly suggests the lawyer may not.

6 Of course, he can "sue" them in the sense that there is nothing to prevent him from actually filing an action against them. What he cannot do, however, is use any client confidences and secrets in pursuing his action. Filing suit under such circumstances would be, at best, a waste of time and, at worst, a violation of Rule 3.1 (Meritorious Claims and Contentions) and a violation of SCR-11 or Fed. R. Civ. P 11.

7 Pursuant to the first clause of the Rule 1.6(e)(3) exception, Larry would have been able to disclose Carol's confidences to the extent necessary to defend himself against her complaint to OBC. However, such response by Larry was rendered unnecessary when OBC dismissed her complaint and, as such, there is no "formally instituted" disciplinary charge pending against him that could provide any ethical justification for disclosing client secrets.

8 As to a lawyer's duty to a former client, *see* Rule 1.9 (Conflict of Interest: Former Client).

Disciplinary Actions Taken by the Board on Professional Responsibility Hearing Committees on Negotiated Discipline

IN RE CLARISSA THOMAS-EDWARDS. Bar No. 434607. February 10, 2009. The Board on Professional Responsibility's Ad Hoc Hearing Committee recommends that the D.C. Court of Appeals accept Thomas-Edwards' petition for negotiated disposition for two consolidated matters and publicly censure Thomas-Edwards for violations of Rules 1.4, 1.14(a), 1.15(a), and 1.16(d).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE MICHAEL J. BEATTIE. Bar No. 450873. February 2, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Beattie by consent.

IN RE STEPHEN B. COHEN. Bar No. 182303. February 19, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Cohen. Cohen pleaded guilty to criminal charges in the United States District Court for the District of Columbia, including one felony count of willfully failing to collect and pay payroll taxes to the Internal Revenue Service on behalf of C&R Calvert, in violation of 26 U.S.C. § 7202, and one misdemeanor count of willfully failing to collect and pay sales taxes to the D.C. Office of Tax and Revenue on behalf of C&R Calvert, in violation of D.C. Code § 47-4102(b). Cohen's actions involve moral turpitude, per se, and disbarment is mandatory pursuant to D.C. Code § 11-2503(a).

Reciprocal Matters

IN RE MICHAEL H. DITTON. Bar No. 436463. February 11, 2009. On remand from the D.C. Court of Appeals, with directions to augment the record to consider: (1) whether the misconduct found by the Virginia disciplinary system constitutes misconduct in the District of Columbia; and (2) whether the conduct warrants substantially different discipline, the Board on Professional Responsibility determines that Ditton's misconduct constitutes misconduct in the District of Columbia and that a five-year suspension is within the range that could have been imposed if the case had come as an original matter. In this hybrid of reciprocal and original discipline, the board recommends the D.C. Court of Appeals suspend Ditton for five years with fitness, effective immediately. Ditton filed frivolous actions against multiple parties, one of which was filed after the court ordered him not to file any further actions. Ditton also was convicted in Virginia of public drunkenness, driving under the influence, and obstructing the Sheriff's efforts to evict him from his home.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE WILLIAM S. BACH. Bar No. 448392. February 26, 2009. The D.C. Court of Appeals ordered Bach disbarred for collecting an unreasonable fee and intentionally misappropriating client funds while serving as a court-appointed conservator for an incapacitated, 92-year-old ward of the Probate Division of the

Superior Court. In a concurring opinion, a member of the division noted the severity of the sanction of disbarment in this particular case and suggested the full court revisit the *Addams* decision, establishing the presumption of disbarment in cases involving intentional misappropriation. *In re Addams*, 579 A.2d 190 (D.C. 1990) (en banc). Rules 1.5(a) and 1.15(a).

IN RE BRYAN A. CHAPMAN. Bar No. 439184. February 5, 2009. The D.C. Court of Appeals issued an opinion on December 31, 2008, suspending Chapman for 60 days, with 30 days stayed, in favor of one year probation within which time Chapman must complete continuing legal education courses in employment discrimination law, federal court procedure, and professional responsibility. The opinion stated that the suspension was to commence from the date of the opinion. On February 5, 2009, the court granted the Office of Bar Counsel's motion to conform the effective date of discipline with D.C. Bar Rule XI, § 14(f), and issued an amended opinion, striking the language "commencing from the date of this opinion" in the order paragraph of the original opinion, thus making the suspension effective 30 days from the date of the original opinion.

Reciprocal Matters

IN RE DOUGLAS M. BORTHWICK. Bar No. 451764. February 12, 2009. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Borthwick for one year, stayed in favor of two years' probation with California's conditions and an actual suspension of 60 days.

IN RE ROBERT J. CORRY JR. Bar No. 467296. February 12, 2009. In a reciprocal matter from Colorado, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Corry one year and one day, stayed pending the successful completion of a three-year probationary period subject to all conditions imposed in Colorado.

IN RE ROYAL DANIEL III. Bar No. 237503. February 5, 2009. In a reciprocal matter from Colorado, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Daniel.

IN RE L. GILBERT FARR. Bar No. 957365. February 5, 2009. In a reciprocal matter from New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Farr.

IN RE CHARLES E. MCCLAIN SR. Bar No. 439941. February 12, 2009. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred McClain.

IN RE MERRILYN FEIRMAN. Bar No. 375519. February 19, 2009. In a reciprocal matter from Tennessee, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Feirman for two years with fitness.

IN RE PATRICK J. SMITH. Bar No. 296822. February 19, 2009. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Smith for six months, nunc pro tunc, to July 13, 2008.

Interim Suspensions Taken by the District of Columbia Court of Appeals

IN RE NAZANIN M. NASRI. Bar No. 414007. February 6, 2009. Nasri was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE MICHAEL W. RYAN JR. Bar No. 469430. February 6, 2009. Ryan was suspended on an interim basis based upon discipline imposed in Maryland.

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.dcbar.org/discipline and search by individual names.

IN RE JUDY RAYE MOATS. Bar No. 429996. On December 15, 2008, the Fifth District Section II Subcommittee of the Virginia State Bar publicly reprimanded Moats.

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.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*

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