speaking of ethics

By Saul Jay Singer

Get A Job!

Mick Wiggins

Sha na na na – sha na na na na,
Dip dip dip dip dip dip dip dip
Mum mum mum mum mum mum
Get a job

—Silhouettes (1957)

. . . but not necessarily through the submission of an application to an opposing party or to opposing counsel without first obtaining the informed consent of your client.

—D.C. Bar Legal Ethics Committee (July 2014)

Hannibal, Lector & Associates, LLC, had a well-earned reputation for being perhaps the worst law firm for lawyers in the District of Columbia. Things took an even greater turn for the worse when Peter Partner, whose tyrannical "management style" included screaming, hurling invectives, and publicly demeaning staff, was appointed head of litigation. Things got steadily worse as Peter reduced Alice Associate to tears and then fired a senior lawyer for "dereliction of duty" for daring to ask for a few days off to be with his family while his father underwent emergency open heart surgery. Not surprisingly, many of Hannibal's litigators have commenced an active search for alternative employment.

By a quirk of fate, the possibility of a new position fell right into the lap of Lilly Litigator, one of Hannibal's most senior trial attorneys. Perhaps the highest compliment to an attorney is a client referral from an opposing counsel, but Lilly goes one better: she is solicited by an opposing counsel to work at his firm.

In one of Hannibal's most important and high-profile cases, Lilly is lead counsel for plaintiff Vanessa Victim against defendant Con Corporation, represented by the Voldemort Law Firm and Larry Lawyer. A few days before the commencement of trial, Larry sets up a lunch meeting, which Lilly eagerly anticipates will be for the purpose of extending Con Corporation's settlement offer. However, she is flabbergasted when Larry advises that he has discussed her with Voldemort's senior managing partner, who instructed Larry to encourage Lilly to apply immediately for a newly available partner position at the firm.

When Lilly points out that were she to "switch sides" before the completion of the Victim case, her conflict would be imputed to Voldemort, which would have to withdraw from the case,[1] Larry quickly says, "no, no, just submit a résumé for now. We will not take any further steps, and we will wait until after the Victim case is over before deciding whether to extend a formal offer of employment to you."

"By the way," adds Larry, "what the heck is going on over there at Hannibal, Lector? The word on the street is that Hannibal's litigation counsel are all ready to abandon ship. We have received résumés from many of your staff, including an inquiry that arrived last week from Attila Attorney, whom we consider to be one of the finest and toughest litigators in the District; frankly, we were relieved to hear that he was too busy on other matters to work on the Con Corporation case. We immediately mailed a letter of interest inviting him to call us to set up an interview, and we made clear our plan to actively pursue him. As I recall, we also received a résumé from Alice Associate and a number of other Hannibal lawyers for an advertised associate position, but we received literally hundreds of submissions and all we have done so far is to send out form responses to all applicants thanking them for their interest and stating that their applications are under consideration."

Lilly knows both Attila and Alice very well. Attila is "all that" and then some. Alice, an outstanding young lawyer with a bright future, has performed some minor work on the Victim matter, conducting flawless legal research on an esoteric issue. Desperate to get away from Peter, Alice has scatter-shot more than 100 résumés to legal employers in the last two months, including one sent to Parent Corporation, the parent entity for Con Corporation, which is seeking candidates for an in-house corporate counsel position.

Ducking Larry's question, Lilly responds, "Now, as to the Con Corporation case, I assume that your client will be making a settlement offer . . . ." Larry laughs, throws the tip on the table, stands up to leave, and says, "See you in court, counsel."

Lilly understands very well that if Peter even gets an inkling that she is considering alternative employment, he would immediately fire her . . . and he'd probably invent and disseminate some fabricated story about her alleged incompetence. As such, she says nothing to anybody about her discussion with Larry and immediately turns her attention to preparing for the Victim trial.

* * *

Pursuant to D.C. Rule 1.7(b)(4), a lawyer has a "personal conflict" when

> the lawyer's professional judgment on behalf of the client will be or *reasonably may be* adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(Emphasis added). This rule has exceptionally broad applicability; a lawyer has a conflict under this rule not only where there exists an actual personal conflict, but even in cases where it is objectively *possible* for the lawyer to "pull his punches" in his representation or where the lawyer may have *any* incentive not to exercise the full extent of her duties of competence, zealousness, and diligence for the client's benefit. Thus, the question squarely presented by our hypothetical is whether, having considered employment with Voldemort, Lilly, Attila, and Alice have personal conflicts.

Almost a quarter century ago, the D.C. Bar Legal Ethics Committee issued

Legal Ethics Opinion 210 (1990) (Representation of Criminal Defendants by Attorney Seeking Position as Assistant U.S. Attorney) in which it determined that a lawyer representing criminal defense clients against the U.S. Attorney's Office in the District may continue to represent those clients (and may accept new clients) only if each client provides consent[2] to the representation notwithstanding the lawyer's conflict. In perhaps its most significant ruling for lawyers seeking employment with an opposing party or opposing counsel, the committee adopted a "first active step" test to determine when the lawyer must seek the client's informed consent. Pursuant to this test, the first active step may occur even when the lawyer simply calls a potential employer to inquire about how to apply for a position, and it certainly occurs when the lawyer submits a résumé.

Were the "first active step" test to be applied to our hypothetical, all three Hannibal lawyers would have a Rule 1.7(b)(4) personal conflict: Lilly, through her substantive discussions with Larry regarding employment with Voldemort, and Attila and Alice, through their résumé submissions.

In Legal Ethics Opinion 367, however, the committee, recognizing the dramatic increase in lawyer mobility that has come to characterize the contemporary legal marketplace, adopted an analysis of this important question that was both more comprehensive and more nuanced. Yet, as the committee pointedly notes: "There is no 'bright line' test for determining the point during the employment process when a personal interest conflict arises, and that point may vary" and, as a result, significant difficulties remain, particularly for subordinate lawyers.[3]

Even under the expanded guidance provided by LEO 367, a lawyer will often face the daunting task of determining whether to disclose his application for employment to the client, thereby potentially jeopardizing his continued satisfactory employment, or not to disclose, thereby risking an ethical violation. For example, all the Hannibal lawyers here face a particularly difficult challenge because Peter will sack them if he learns about what he will surely characterize as their "insubordination and attempted defection."

Under the new test developed by the Legal Ethics Committee, a lawyer seeking employment with an adversary or an adversary's counsel will not likely have a personal conflict under Rule 1.7(b)(4) unless he or she meets each of two factors:

> (1) The lawyer must have a material and active role in representing the client; *and*
> (2) The lawyer's interest in the adversary or adversary's counsel must be targeted, communicated, and/or reciprocated.

1. The lawyer's role in representing the client. There exists a sliding scale for the materiality of the lawyer's role in representing the client, depending on the work the lawyer performs on the case and the extent of her communication with the client and with the adversary. As LEO 367 explains: "for purposes of this analysis, a lawyer should generally be considered to have an active role if the matter remains pending and the lawyer is either currently working on the matter or expects to be undertaking work on the matter in the future."

Under our hypothetical, the Victim case is very much pending—indeed, it is active and headed to trial—and, as lead counsel and as the face of Hannibal to both the client and opposing counsel, Lilly clearly has the deepest possible involvement in the representation, and her role is nothing if not material. At the other end of the spectrum, Attila has had no involvement in the case whatsoever; the client may not even know who he is, let alone have ever spoken to him and, although Attila is well-known to Larry, that familiarity is in no way related to work on the Victim case.

Alice presents a more interesting question. She has never communicated with Victim or Larry Lawyer and, though she did perform some work on the matter, it was only to conduct behind-the-scenes legal research. Moreover, with the case about to go to trial, there is nothing to suggest that she will have any continuing involvement in the case. As such, Alice could argue that her involvement in the Victim case is such that her professional judgment on behalf of Victim would not likely be adversely affected so as to create a personal interest conflict.[4]

2. The extent that lawyer's interest in the adversary or adversary's counsel is targeted, communicated, and/or reciprocated. Here, too, there exists a sliding scale applicable to the lawyer's interest in the outside position and to the extent of his efforts toward securing the position. At one extreme is the lawyer who sprays the market with résumés hoping that even one prospective legal employer might respond. In such cases, "a personal interest may not arise until a potential employer expresses specific interest in the lawyer."[5] At the other extreme is a lawyer with an outstanding offer of employment which the lawyer is considering, or a lawyer whose interest in the prospective employer is targeted and specific, who has directed a résumé to a particular employer, or who has had communications with the employer regarding employment.

Lilly is perhaps the ultimate example of someone who has had a specific, detailed, and targeted conversation with her adversary's counsel. In marked contrast, Alice scatter-shot the market with more than 100 résumés; the résumé she sent to Voldemort was anything but targeted; and the response she received from Voldemort was a mere form letter acknowledging her application.[6]

While we do not know for certain, it is highly unlikely that someone of Attila's stature would saturate the market with his résumé, so his inquiry to Voldemort was almost certainly specifically targeted. Moreover, he received from Voldemort not only an individual response, but also a strong letter of interest. However, because Attila had no role whatsoever in representing Victim, he has not met *both* factors and is, therefore, unlikely to have a personal conflict.

The bottom line is that, under our facts, only Lilly satisfied both factors, and thus only she has the "taint" of a personal conflict. There are only three possible steps that Lilly may take to cure her personal conflict:

1. Discontinue the prospective employment process. Lilly must advise Larry that she is withdrawing from any consideration for a position at Voldemort until the Con Corporation matter is completed. However, she would nonetheless retain a continuing personal conflict should she continue to subjectively harbor an interest in pursuing such employment in the future.[7]

2. Withdraw from representing the client.[8] In doing so, Lilly would have to make certain that she meets all the requirements of Rule 1.16 (Declining or Terminating Representation)—including Rule 1.16(c), which, under our facts, may require her to file a formal motion to withdraw and to continue her representation of Victim notwithstanding her conflict until the court grants the motion.[9]

3. Disclose the personal conflict to the client and secures the client's consent to the representation, as per Rule 1.7(c), pursuant to which a lawyer with a personal conflict may continue to represent the client if:

(1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and

(2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

Under Rule 1.7(c)(2), the lawyer must undertake *both* a subjective self-assessment and an objective analysis to determine whether, notwithstanding the client's informed consent, the lawyer will be able to go forward devoting no less than 100 percent of her efforts to the client without a thought to her own interests.[10]

Conclusion and practice tip: Legal Ethics Opinion 367 does not establish a bright line test for precisely when and under what circumstances a lawyer seeking employment with an adverse party or counsel develops a personal conflict under Rule 1.7(b)(4). Where possible, a lawyer should seek guidance from a supervisory lawyer but, given the broad scope of Rule 1.4 (Communication), there is a general presumption that information in the lawyer's possession regarding the representation must be communicated to the client. If any doubt exists, the lawyer should probably err on the side of caution and wait until after the case is over before pursuing employment with an adversary, withdraw from the representation, or seek informed consent from the client to continue the representation.

Legal Ethics counsel Saul Jay Singer, Hope Todd, and Erika Stillabower are available for telephone inquiries at 202-737-4700, ext. 3232, 3231, and 3198, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 *See* Rule 1.10(b).

2 Among the modifications to the D.C. Rules in the 2007 revisions was to change the "consent" requirement to "informed consent," which, under the current definition, "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." *See* Rule 1.0(e).

3 The Legal Ethics Committee suggests that subordinate lawyers uncertain whether their interest in employment with an adversary creates a personal conflict may consult with a supervisory lawyer and, in some instances, follow the decision of the supervisor and take refuge under the safe harbor provision of Rule 5.2(b) (Subordinate Lawyers). *See, e.g.*, Saul Jay Singer, "Obedience" (Wash. Law., Jan. 2009, at 12). However, such a resolution is, at the very least, impractical for lawyers with supervisors like Peter Partner.

4 As to Alice's application to Parent Corporation, Comment [21] to Rule 1.7 recognizes that a lawyer who represents a corporate entity is not deemed to represent its subsidiaries, affiliates, or "other constituents," presumably including corporate parents, unless the entities share a unified corporate legal department or are otherwise essentially alter egos of each other. As such, Alice would not have a personal conflict at all with respect to her application to Parent Corporation even were she Hannibal's lead counsel in the Victim case and even were Parent Corporation to extend a formal offer of employment to her.

5 LEO 367. However, "a non-targeted and general response (e.g., a notification that the application has been received and nothing more)" does not create a personal conflict. *Id.*

6 Note that this result marks a significant departure from LEO 210, pursuant to which Alice, under the "first active step" test, would have had a personal conflict the moment she mailed the résumé to Voldemort.

7 As such, Larry's telling Lilly that Voldemort will wait until after the Victim case is over before making the employment decision will not cure Lilly's conflict if she still expects to pursue employment with Voldemort after the Victim case reaches its final resolution.

8 Although the District of Columbia, unlike ABA Model Rule jurisdictions, does not generally permit "ethical screens" [*see* Rule 1.0(l) definition], one specific exception to the rule permits the screening of a lawyer with a Rule 1.7(b)(4) personal conflict. *See* Rule 1.10(a)(1). Thus, other Hannibal, Lector lawyers could continue to represent Victim if Lilly withdraws and is ethically screened from any participation in the case.

9 For a discussion of Rule 1.16 and the requirement to file a motion to withdraw, *see* Saul Jay Singer, "Going Through 'Withdrawal'" (Wash. Law., Jan. 2011, at 12).

10 For a discussion of Rule 1.7(b)(4) conflicts, *see* Saul Jay Singer, "Rule 1.7(b)(4) Conflicts: When It's Personal" (Wash. Law., Sept. 2013, at 14).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE MIKEL D. JONES. Bar No. 456094. August 21, 2014. The D.C. Court of Appeals disbarred Jones. Jones pleaded guilty and was convicted in the United States District Court for the Eastern District of Pennsylvania of 1 count of conspiracy to commit mail and wire fraud; 14 counts of aiding and abetting mail fraud; 14 counts of aiding and abetting wire fraud; and 1 count of aiding and abetting money laundering. Mail fraud is a crime of moral turpitude *per se,* for which disbarment is mandatory under D.C. Code § 11-2503(a)(2001).

Reciprocal Matters

IN RE STANLEY E. GREENIDGE. Bar No. 113993. August 21, 2014. In a reciprocal matter from Massachusetts, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Greenidge for one year, stayed in favor of three months' suspension and nine months' probation subject to the terms imposed in Massachusetts. In Massachusetts, Greenidge was found to have engaged in neglect of a client matter and subsequent dishonesty in an effort to understate his income to avoid paying a malpractice judgment against him.

IN RE ROBERT J. GREENLEAF. Bar No. 349795. August 21, 2014. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Greenleaf. The Maryland Court of Appeals found that Greenleaf's online interactions with a police officer posing as a 14-year-old girl constituted sexual solicitation of a minor.

IN RE LAWRENCE HOROWITZ. Bar No. 418405. August 21, 2014. In a reciprocal matter from New York, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Horowitz for three years with fitness. In New York, Horowitz was found to have engaged in misconduct, including a failure to timely return client property and dishonesty.

IN RE JEFFREY L. KRAIN. Bar No. 326884. August 21, 2014. In a reciprocal matter from New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Krain for six months with fitness. In New Jersey, Krain was found to have, *inter alia*, failed to supervise a nonlawyer employee, assisted a nonlawyer in the unauthorized practice of law, and engaged in dishonesty.

IN RE PIERCE H. O'DONNELL. Bar No. 168674. August 21, 2014. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended O'Donnell for one year, stayed in favor of six months' suspension followed by two years' probation. In California, O'Donnell was found to have solicited campaign contributions from his employees and then illegally reimbursed the employees for those contributions from his own personal funds.

IN RE SANDY FREDERICKA THOMAS-BELLAMY. Bar No. 1011060. August 21, 2014. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Thomas-Bellamy for six months with fitness. In Maryland, Thomas-Bellamy stipulated that sufficient evidence could be presented to demonstrate that she failed to deposit unearned fees in trust, neglected multiple client matters, and failed to respond to Maryland Bar Counsel's lawful requests for information.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE RUNAN ZHANG. Bar No. 465022. August 27, 2014. Zhang 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.dcattorneydiscipline.org and search by individual names.

IN RE JOHN S. BURSON. Bar No. 360151. On June 19, 2014, the Court of Appeals of Maryland reprimanded Burson who, as managing partner of a law firm, failed to ensure that the firm's lawyers did not "robo-sign" documents or that notaries public did not falsely notarize documents.

IN RE DALE W. DOVER. Bar No. 375473. On July 28, 2014, the Virginia State Bar Disciplinary Board publicly reprimanded Dover by consent for misconduct involving a lack of candor to a tribunal and a lack of fairness to an opposing party.

IN RE DENISE T. FISCHER-HERMAN. Bar No. 439305. On March 20, 2014, the Supreme Court of Florida reprimanded Fischer-Herman by consent for failure to respond to an official inquiry of a disciplinary agency.

IN RE MARK A. KEY. Bar No. 458725. On July 13, 2010, the North Carolina State Bar Disciplinary Hearing Commission censured Key for filing a notice of appeal while suspended from the practice of law and for failing to promptly return a client's file.

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 at www.dcattorneydiscipline.org. Court opinions are printed in the Atlantic Reporter *and are also available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.*

DC BAR

ANNUAL JUDICIAL EVALUATIONS

Dear Colleague:

We urge you to participate in the annual evaluation of selected judges serving on the D.C. Court of Appeals and the Superior Court of the District of Columbia. Your voice truly matters in this process.

Completed evaluations are an important tool for the Chief Judges and the D.C. Commission on Judicial Disabilities and Tenure to use in maintaining and improving the administration of justice in the District of Columbia.

You should participate if:

- You had a case pending before one or more of the judges scheduled for evaluation (http://www.dcbar.org/judicial-evaluations.cfm); **and**
- Your case was pending during the 24-month evaluation period (July 1, 2012–June 30, 2014)

You should receive an invitation on November 18 from Research USA, an independent research organization administering the survey. If you do not receive the invitation and are eligible to participate, please request a link to the survey directly from Research USA at dcbarjudicialevaluation@researchusainc.com.

Evaluations are due by 11:59 p.m. eastern time on January 11, 2015.

Thank you for your participation.

Mary Ann Snow, Chair, D.C. Bar Judicial Evaluation Committee