speaking of ethics

By Heather Bupp-Habuda

When a Lawyer Is a Guardian

Mick Wiggins

In the District of Columbia a lawyer can be appointed as a guardian for an incapacitated individual, as can someone who is not educated in the law. Is it significant ethically that the lawyer is acting as a nonlawyer guardian? Are a lawyer's ethical duties different when acting in nonlawyer capacities generally? The former question was recently brought to the D.C. Bar Legal Ethics Committee for guidance. The latter question has been addressed under distinct factual situations in Opinions 226 (1992) and 306 (2001).

Many lawyers find that the practice of law is only one part of the whole professional picture because of varied interests and overlapping business concerns. In Opinion 226 the committee opined, "The Rules of Professional Conduct erect no bar to a lawyer engaging in another business, separate from his or her law practice, so long as the lawyer's engagement in that other business does not result in violations of applicable provisions of the Rules." The circumstances in Opinion 226 giving rise to the separate business issue were complicated by the lawyer's performing multiple roles for affiliated entities including in-house counsel, outside counsel, and licensed real estate broker. The lawyer wanted to know, inter alia, whether his nonlawyer performance of real estate brokerage services would be consistent with the D.C. Rules of Professional Conduct.

In Opinion 306 a practicing lawyer was also a licensed insurance broker. She wanted to sell insurance simultaneously from the same office and potentially to the same clients who had retained her for legal services. Referring to Opinion 226, the committee reiterated that "a lawyer performing multiple professional roles . . . should comply with applicable provisions of the Rules of Professional Conduct regardless of which 'hat' she is wearing."

The committee found that when a lawyer is "selling insurance to non-clients, she is *not* functioning as a lawyer or dealing with individuals whom she has represented as a lawyer." Op. 306 (emphasis added). Nonetheless, as a member of the Bar, she must still comply with the relevant rules of professional conduct that would apply to lawyers acting in nonlawyer capacities. *See, e.g.,* D.C. Rules of Prof'l Conduct R. 1.8(a) (transactions with client), 1.7(b)(4) (professional judgment adversely affected by lawyer's responsibility to third party or lawyer's own financial interests), 8.4 (lawyer may not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation").

The key to the analysis in these two opinions is the determination that the attorney–client relationship is not usually created when a lawyer is acting as a nonlawyer, such as an insurance agent or real estate broker. If the interaction is between a lawyer acting in a nonlawyer role and a customer, as opposed to a (former or current legal) client, no attorney–client relationship is created.

A lawyer performing a nonlawyer role may inadvertently create an attorney–client relationship, however. *See* Ops. 306, 316 (2002) (discussing how a lawyer may create an attorney–client relationship without intending to do so). "It is well-established that neither a written agreement nor the payment of fees is necessary to create an attorney–client relationship." *In re Lieber,* 442 A.2d 153, 156 (D.C. 1982); *see In re Russell*, 424 A.2d 1087 (D.C. 1980). A client's perception of an attorney as his counsel is a significant consideration in determining whether a relationship exists. *Lieber*, 442 A.2d at 156.

In Opinion 336 (2006) there was no opportunity for an attorney–client relationship to be formed, inadvertently or otherwise. The inquiring lawyer was appointed by the Superior Court of the District of Columbia pursuant to D.C. Code § 21-2043 to be the "permanent general guardian" for an incapacitated individual who was presumed to be a homeless immigrant. After suffering a stroke that left him partially paralyzed, the individual was hospitalized under a name and social security number that were given to the hospital at the time of admission. The court acted upon this information. The court-appointed lawyer-guardian soon learned that the incapacitated individual's identity was false and he had no way of determining a true identity. By then the individual was totally nonverbal and unable to write or comprehend communications.

The inquiring lawyer sought guidance from the Legal Ethics Committee on how to resolve a potential conflict between his duties under the D.C. Rules of Professional Conduct and the D.C. guardianship statute. (Guardians appointed under this statute are *not* required to be a lawyer. D.C. Code § 21-2043 (2001); Op. 306, n.3. This is different from the situation where a lawyer is appointed as a guardian ad litem in a child abuse and neglect proceeding and is the child's lawyer. Op. 295 (2000).) The lawyer was concerned about whether he could continue to use the name that the incapacitated individual had been using; whether he had any affirmative duty to disclose information about the incapacitated individual's false identity to third parties; and whether he must follow the guardianship laws or the rules of professional conduct whenever a conflict between them arises.

According to the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility, a "client–lawyer relationship presumes that there can be effective communication between client and lawyer, and that the client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives." ABA Formal Op. 404 (1996); *see also* D.C. Rules of Prof'l Conduct R. 1.2, 1.4, 1.14. Finding no indication that a prior or current attorney–client relationship existed between the incapacitated individual and the inquiring lawyer, the Legal

Ethics Committee opined that the ethical duties of the lawyer sprung only from his nonlawyer role of guardian.

Had the inquirer established a client–lawyer relationship, Rules 1.2, 1.6, and 1.16, among others, would apply. As it is, Rules 3.3(a)(1), 3.3(d), and 8.4(c) govern the inquirer's conduct, notwithstanding the fact that he is not functioning as counsel to the incapacitated individual. Specifically, Rule 3.3(a)(1), which mandates candor to a tribunal, provides that "[a] lawyer shall not knowingly . . . [m]ake a false statement of material fact or law to a tribunal." Comment 2 to Rule 3.3 provides that "[t]here may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Rule 3.3(d) provides in pertinent part that "[a] lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly reveal the fraud to the tribunal unless compliance with this duty would require disclosure of information otherwise protected by Rule 1.6, in which case the lawyer shall promptly call upon the client to rectify the fraud." Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

As a result, the committee decided that the lawyer could not continue to use the name that the incapacitated individual was using and that failure to disclose the false identity would be the equivalent of misrepresentation. This is true whether the lawyer was appearing before a tribunal, completing paperwork to continue benefits, attesting to guardianship of the incapacitated individual, or cashing the incapacitated individual's benefit checks.

The common thread in Opinions 226, 306, and 336 is recognizing which provisions of the D.C. Rules of Professional Conduct are relevant and applying them. If an attorney–client relationship exists or ever existed, all of the ethical obligations to a client attach, regardless of the lawyer's professional activities. Where a lawyer is acting in his nonlawyer capacity as well as his capacity as a lawyer *in the same transaction or matter*, the rules apply because the attorney–client relationship is present. *Cf.* ABA Formal Op. 328 (1972) (holding that a lawyer who engages in another occupation must comply with legal ethical standards in his or her other professional capacity whenever that other occupation "is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law"). If, as in Opinion 336, no attorney–client relationship ever existed, several rules would not apply, but at minimum Rules 1.3(b), 1.7(b), 1.8(a), 3.3(a), 3.3(d), 8.3, and 8.4(c) would remain in effect no matter the setting.

One of the initial steps in addressing an ethical query is to determine who the client is. A lawyer's ethical obligations can often be best examined from this viewpoint. A lawyer who performs multiple professional roles, however, needs to determine first with certainty if he or she indeed has or had a legal client before asking who the client is.

Some additional guidance on these issues can be found in ABA Model Rule 5.7. Beginning February 1, Bar members will have the benefit of that guidance when new Rule 5.7 and other amendments to the D.C. Rules of Professional Conduct take effect. A markup showing the changes between the current and new rules can be viewed at www.dcbar.org/newrules.

Legal ethics counsel Heather Bupp-Habuda can be reached at 202-737-4700, ext. 232, or ethics@dcbar.org.

The 2006 Cohen & Cohen Mock Trial Competition

Congratulations to Winners Jordi De Llano & Nicole Herter

Cohen & Cohen, PC proudly sponsored the fourth annual Cohen & Cohen Mock Trial Competition at The George Washington University Law School on Thursday, November 9th. The competition was officiated by Judge Ricardo Urbina. A record number of upper-level law students competed in the contest which began in early September. The Cohen & Cohen, PC Mock Trial Competition provides a forum for soon-to-be trial lawyers to compete and showcase their trial skills.

Pictured above (from left to right): Dean Lawrence, winner Nicole Herter, The Honorable Judge Ricardo Urbina, winner Jordi De Llano, and Wayne Cohen.

Cohen & Cohen P.C. ATTORNEYS
(202) 955 - 4529
1821 Jefferson Place, NW
Washington, DC 20036
www.CohenandCohen.net

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL WASHINGTON DC
(202) 994 - 6261
2000 H Street, NW
Washington, DC 20052
www.law.gwu.edu