speaking of ethics

By Hope C. Todd

Lawyer Bankruptcy and Client Money

Mick Wiggins

Unfortunate economic conditions have prompted several calls by D.C. Bar members to the Ethics Help Line inquiring: 1) whether a lawyer must report a filing for bankruptcy to the District of Columbia Office of Bar Counsel (OBC), and 2) whether a lawyer's law license will be impacted by filing for bankruptcy. Although the short answers are "no" and "no," there are important ethical implications that arise from each of these questions.

The act of filing for bankruptcy protection does not constitute conduct that triggers a lawyer's mandatory duty to report various violations and occurrences to OBC.[1] In the District of Columbia, there are only three rules governing lawyer conduct that require mandatory reporting to OBC—Rule 8.3 of the D.C. Rules of Professional Conduct and Sections 10 and 11 of Rule XI of the District of Columbia Court of Appeals' Rules Governing the Bar[2]—such that failure to report could result in disciplinary consequences.[3]

Rule 8.3(a) determines when a lawyer is *required* to inform OBC about unethical conduct by *another* lawyer:[4] "a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects . . ." must report that lawyer's conduct to "the appropriate professional authority."[5]

Although Rule 8.3 does not require a lawyer to report his or her own ethical misconduct, there are two other rules that require a D.C. lawyer to self-report in certain instances. Pursuant to Section 10(a) of Rule XI, if a lawyer is convicted of *a crime* or pleads guilty or *nolo contendere* to *a criminal charge* in a District of Columbia court, a court outside of the District, or any federal court, the lawyer must, within 10 days from the date of such a finding or plea, file a certified copy of the court record or docket entry of the finding or plea with the D.C. Court of Appeals and with the Board on Professional Responsibility.[6] Additionally, Section 11(b) of Rule XI requires that any member of the D.C. Bar, "upon being subjected to professional disciplinary action by another disciplining court, shall promptly inform Bar Counsel of such action in writing."[7]

Although a member of the D.C. Bar is not required to report a filing for bankruptcy protection to the disciplinary system, an applicant for *admission* to the D.C. Bar is required to answer whether he or she "has ever filed a petition for bankruptcy" and to provide requested details about such filing(s) on the application for admission. Indeed, admissions committees nationwide are interested in an applicant's ability to manage his or her finances,[8] and filing for bankruptcy is a relevant factor in evaluating that ability. The heart of this inquiry involves not so much a concern about an individual's financial history but, rather, reconciling any potential deficiencies in an individual's past financial conduct with the future certainty that, as a lawyer, the applicant will be held to the highest standard of care as a fiduciary of other people's money. As D.C. Bar Counsel Wallace E. "Gene" Shipp so often aptly declares, "If you can't trust your lawyer with your money, who can you trust?"

A lawyer has a *fundamental* ethical obligation to protect client property in the lawyer's possession. Thus, the "safekeeping of property" rules in *every* jurisdiction require that a lawyer maintain and preserve the property of clients and third parties separate from the lawyer's own property. Whether a lawyer's bar license will be impacted by a bankruptcy filing will depend largely on whether the lawyer is properly maintaining his or her operating and client accounts prior to any filing.

What does it mean to keep client money "separate?" Simply put, it means that a lawyer must place client money into a trust account or into an escrow account.[9] It means that a lawyer must not place client funds into the lawyer's personal account or business operating account.[10] The mixing of client and lawyer money, known as "commingling," is a serious ethical violation.

Why must client money be held separately? To protect the clients' funds: 1) from the lawyer's business and personal creditors (should the lawyer, for example, file for bankruptcy); 2) from the lawyer's intentional or negligent spending or "borrowing" of the funds for the lawyer's own business or personal purposes; and in some cases 3) until a claim against the funds by a third party can be adjudicated. As the California Supreme Court articulated many years ago:

> The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases, that such commingling will result in the loss of the client's money … inherently there is danger in such practice for frequently unforeseen circumstances arise jeopardizing the safety of the client's funds, and as far as the client is concerned the result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney.[11]

Are there any exceptions to the duty to maintain client funds separately? Yes. D.C. Rule 1.15(d) permits a lawyer to treat *advances in fees and expenses* as the lawyer's property if—and *only* if—the client gives informed consent to that arrangement. As the D.C. Bar Legal Ethics Committee explained recently in Legal Ethics Opinion 348:

> Rule 1.15(d) permits the deposit of advance fees into a lawyer's operating account provided that the client provides informed consent. Such fees are treated as the lawyer's property, although she has the obligation to and must have the wherewithal to repay them promptly if she does not earn them. To ensure

that the consent provided by a client is "informed consent," the lawyer must explain that, unlike fees deposited in a trust account, these fees can be attached by the lawyer's creditors because legally they are the lawyer's property.[12]

Admittedly, the exception in Rule 1.15(d) creates a hole in the ability of the ethics rules to protect funds that clients are otherwise entitled to have returned to them. In *In Re Mitchell*, the exception led to a disciplinary problem for a lawyer who failed to promptly communicate to his client that the lawyer had filed for bankruptcy. In that matter, the client's unearned $10,000 fee advance had been deposited into the lawyer's operating account and, thus, upon the lawyer's filing for bankruptcy, had become part of the property of the lawyer's estate, subject to the provisions and preferences established under the substantive law.[13] To be clear, the disciplinary violation in *Mitchell* was not the loss of the client's advanced fee to the lawyer's creditors but, rather, the court found the problem resulted from the lawyer's failure to take reasonable measures to protect the client's interests by promptly notifying the client about the bankruptcy.[14]

A final consideration for any lawyer contemplating bankruptcy is that he or she will likely need to disclose the existence of all trust accounts in the filing. Such disclosures allow the bankruptcy trustee to search for debtor assets and to ensure that the lawyer is not hiding his or her own assets in the trust accounts.[15]

In conclusion, whether bankruptcy is an unlikely possibility or an imminent probability, maintaining and preserving clients' funds separate from lawyers' funds pursuant to Rules 1.15(a) and 1.19(a) is assuredly the best way to protect clients' property from lawyers' creditors. No doubt, such care also goes a long way in protecting lawyers from being caught up in the disciplinary system.

Notes

1 A quick survey of the rules and procedures of other bars, as is the case in the District of Columbia, suggests that Maryland, Virginia, California, Florida, New York, and Texas do not require a lawyer to report a bankruptcy filing to either the state bar or to the state's lawyer disciplinary authority.

2 As a condition of membership, the D.C. Bar requires lawyers to file a registration statement with their annual membership dues, which includes certain demographic information such as current residence and office addresses, telephone numbers, and other jurisdictions in which they are admitted to practice law, including date of admission. *See* Rule II, Section 2(3) of the D.C. Court of Appeals' Rules Governing the Bar. Failure to comply with Rule II may result in an administrative suspension.

3 Rule XI is available at www.dcbar.org/inside_the_bar/structure/bar_rules/rule11.cfm.

4 This requirement, however, is subject to the confidentiality requirements of Rule 1.6 and other law. *See* Rule 8.3(c).

5 This rule, which is very broad, requires a D.C. lawyer not only to report known misconduct of another D.C. lawyer to OBC, but also to report known misconduct of a lawyer not admitted in the District of Columbia to that lawyer's appropriate disciplinary authority (e.g., to the jurisdiction(s) in which the other lawyer is admitted).

6 *See* Rule XI, Section 10. Disciplinary Proceedings Based Upon Conviction of Crime.

7 Rule XI, Section 11(a). Reciprocal Discipline (a) Definition. As used in this section, (1) "state" shall mean any state, territory, or possession of the United States, and (2) "disciplining court" shall mean (a) any court of the United States as defined in Title 28, Section 451 of the United States Code; (b) the highest court of any state; and (c) any other agency, commission, or tribunal, however denominated, that is authorized to impose discipline effective throughout a state.

8 For example, Maryland, Virginia, California, Florida, New York, and Texas all require individuals seeking admission to the Bar to indicate on their written applications whether they have ever filed for personal bankruptcy.

9 *See* Rules 1.15(a) and 1.19(a). Pursuant to Rule 1.15(e) of the Rules of Professional Conduct and Appendix B of the Rules Governing the Bar, Interest on Lawyers' Trust Accounts (IOLTA) should be used for all client funds that "are nominal in amount or expected to be held for a short period of time." An IOLTA is a type of pooled clients' trust account in which the interest revenue accrued is forwarded quarterly by the banking institution to the D.C. Bar Foundation for the benefit of legal services providers.

10 Similarly, the lawyer's money must not be kept in a

trust account or escrow account. Rule 1.15(f) clarifies that a lawyer may place "a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against the account."

11 *See In re Hessler* 549 A.2d 700 (DCCA 1988), *quoting Clark v. State Bar*, 39 Cal.2d 161, 246 P.2d 1, 5 (1952) (*citing Peck v. State Bar*, 217 Cal.47, 51, 17 P.2d 112, 144 (1932)).

12 D.C. Legal Ethics Op. 348 (Accepting Credit Cards for Payment of Legal Fees) (2009).

13 This column does not address the underlying law related to the filing of a petition for bankruptcy under either Chapter 7 or Chapter 11 of the United States Bankruptcy Code. 11 USCS 7 (2008); 11 USCS 11 (2008).

14 *See In Re Mitchell*, 727 A.2d 308 (D.C. 1999). At the time of the court's decision, Mr. Mitchell's client had been able to recover only $4,200 of the unearned legal fees through a settlement with the bankruptcy trustee that occurred 18 months after the bankruptcy petition was filed. The court found that in failing to notify his client until 16 months after the filing, Mr. Mitchell had failed to "take timely steps to the extent reasonably practicable to protect the client's interest under Rule 1.16." Significantly, the court reasoned that pursuant to the Bankruptcy Code, the client may, in fact, have been able to arrive at a better settlement with the bankruptcy trustee earlier in the proceeding and, in any event, should have been given that opportunity by his counsel.

15 Intentionally hiding lawyer assets in a trust account is likely to constitute both commingling under 1.15(a) and dishonest conduct under Rule 8.4(c).

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.

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

IN RE GARLAND H. STILLWELL. Bar No. 473063. June 4, 2009. The Board on Professional Responsibility's Hearing Committee Number Eleven recommends that the D.C. Court of Appeals accept Stillwell's petition for negotiated disposition and suspend him 60 days for violation of Rules 1.7(b)(1) and 8.4(c).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE RICHARD W. ALLISON JR. Bar No. 491626. June 30, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Allison. Allison pleaded guilty to charges of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343, and 1349, crimes involving moral turpitude per se, for which disbarment is mandatory under D.C. Code § 11-2503(a) (2001).

IN RE MICHAEL RJ DAVIS. Bar No. 470652. June 1, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Davis by consent.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Reciprocal Matters

IN RE BINCY Y. ABRAHAM. Bar No. 467279. June 11, 2009. In a reciprocal matter from New Jersey, the D.C. Court of Appeals suspended Abraham three months with fitness as identical reciprocal discipline. Abraham was suspended in New Jersey for violating New Jersey Rules of Professional Conduct 1.15(a) (failure to safeguard funds), 1.7 (conflict of interest), 5.4(c) (allowing third party to direct and regulate lawyer's professional judgment in rendering legal services to others), 8.4(c) (misrepresentation), and 1.15(d) (record keeping).

IN RE VINCENT M. AMBERLY. Bar No. 365590. June 25, 2009. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed substantially different discipline and suspended Amberly 30 days. The Virginia State Bar Disciplinary Board admonished Amberly and ordered that he complete six hours of continuing legal education within a year. The Virginia board found that by failing to serve a counterclaim on the opposing party, but then misrepresenting that he had served the counterclaim in court pleadings in open court and to Virginia Bar Counsel, Amberly (1) knowingly made a false statement of fact or law to a tribunal, (2) knowingly made a false statement of fact or law in the course of representing a client, (3) knowingly made a false statement of material fact in connection with a disciplinary matter, and (4) engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on his fitness to practice law.

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.*