the Public Lawyer
Volume 17, No. 1 No Higher Calling Winter 2009

Ethics: Not All Relative

By Katherine Mikkelson

> Relativity applies to physics, not ethics.
>
> *Albert Einstein, theoretical physicist*

We're all confronted with ethical issues everyday, from the mundane (can you take two papers from the newspaper coin box since they didn't deliver your paper last Saturday?) to the ridiculous (a company failed to bill you for your new laptop despite your repeated attempts to correct the error). Sometimes the shades of gray are too layered to provide a clear answer. Check out these scenarios illustrating some common ethical dilemmas and ask yourself: What would you do?

SHILLS v. DUFFY
Outsourcing Obligations
Scene 1
Lynette B. Thoreau, an assistant county attorney, represents the county council of Hardin County, including council member Dwight Duffy. Duffy is sued for sexual harassment by Nita Shills, his former assistant. Per county policy, Thoreau contacts the firm of Bigger & Bigger to outsource the case. The county used this firm, which was initially hired by Thoreau's predecessor, once before. Thoreau finds a boilerplate questionnaire designed to check for conflicts. She reviews it and finds it thorough. She adds the question "Has the firm ever represented someone named Nita Shills?" and then emails it off to Kyle Bigger. Bigger is a managing partner whom she has never met but with whom she has had several phone conversations. He emails it back a few days later; and seeing no conflicts indicated, Thoreau engages the firm. She sends a note off to Duffy telling him that Bigger & Bigger will be representing him.

Scene 2
Thoreau is quietly working in her office one afternoon when she gets an angry phone call.

"Thoreau, this is Joseph Little. I'm representing Nita Shills. I don't know how you missed this, but there's a conflict. Bigger & Bigger represented Ms. Shills in a nasty divorce proceeding several years ago."

"But I questioned them about possible conflicts," protests Thoreau.

"Not well enough, apparently. When Bigger & Bigger represented her, her name was Nita Johnson."

Thoreau hangs up with a sick feeling in her stomach.

Question: What could Thoreau have done differently?
ABA Formal Opinion 08-451 (Aug. 2008) (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services) provides some insight. It states in part:

> A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them.

> In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6.[1]

Thoreau was not as thorough as her name implies. The formal opinion specifically mentions the applicability of Model Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers). Rule 5.1(b) states that a lawyer having direct supervisory authority over another shall make reasonable efforts to ensure that such lawyer conforms to the rules of professional conduct. In effect, the outsourced lawyer becomes an extension of the outsourcing entity. The formal opinion goes on to note the several steps that, at a minimum, should be taken by the outsourcing lawyer. These include conducting reference checks, investigating the background of the outsourced lawyer, and interviewing principle lawyers. Thoreau did none of these things and instead relied upon her predecessor having vetted this firm sometime in the past. She did not even meet with Bigger, having only had phone conversations with him in the past. Although she disclosed to Duffy that Bigger & Bigger would be representing him, she failed to obtain client consent for the disclosure of any material protected by Rule 1.6 (Confidentiality of Information), which inevitably would follow.

The formal opinion also discusses the need, under Rule 1.6, of the outsourcing lawyer to safeguard information against inadvertent or unauthorized disclosure by the lawyer who is participating in the representation of the client. The opinion specifically notes that the outsourcing lawyer needs to verify that the outsourced lawyer does not also do work for adversaries of the client on the same or substantially related matters. In such an instance, another provider should be used. Here, Thoreau's due diligence did not go far enough to ensure that no conflicts existed. She should have determined any previous names used by Shills and checked with the firm regarding all names used.

Question: Is there anything Thoreau can do to remedy this problem?
Thoreau will have to start over and find another firm to represent Duffy.

BEWARE THE SNAKE EYE
Vicarious Disqualification . . . or Not?
In September 2007, the Slyperin city attorney began investigating contracts for computer services entered into by the city's Department of Building Services. The investigation revealed kickback payments to Drake Malboeuf, a department employee.

In December 2007, Alan Cummings, a partner with Potter & Cummings, was elected Slyperin city attorney. He adopted a blanket policy of screening himself from any matters involving his former firm or any of its clients regardless of whether he had any significant involvement.

In February 2008, Cummings and his investigators learned that Malboeuf deposited $300,000 in checks from a computer company, Snake Eye Systems, a client of Potter & Cummings. While with Potter & Cummings, Cummings reviewed a memo from a junior associate concerning Snake Eye Systems, for which he billed six minutes. Cummings immediately screened himself from the matter, and his deputy city attorney referred the matter to the U.S. attorney's office for possible criminal prosecution. The deputy then filed a civil complaint naming Malboeuf and Snake Eye Systems, alleging a kickback scheme in which Malboeuf received payments for computer services that were never performed.

Cummings ordered lawyers working on the case to report directly to Deputy City Attorney Minnie Gontrall and not to discuss the case with him. These lawyers maintained locked files and computerized records that were inaccessible to Cummings.

In April 2008, the city filed an amended complaint, alleging additional counts of negligent misrepresentation. Snake Eye Systems moved to disqualify Cummings and the city attorney's office based upon conflict of interest violations.

Question: Should the city attorney and his office be disqualified?

In most states, the answer would be no. In fact, the ABA addressed this issue in a formal ethics opinion in 1975 (Formal Opinion 342). The ABA did not extend automatic disqualification to the entire government legal office because "the government's ability to function would be unreasonably impaired."[2]

The ABA went on to add that "[a]lthough vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by [the Model Rules]."[3] Model Rule 1.10 (Imputation of Conflicts of Interest: General Rule) and most state rules do not impute an individual government lawyer's disqualification to all other members of the organization.

Additionally, Rule 1.11(d) states that a lawyer currently serving as a public officer or employee is subject to Rule 1.7 (Conflict of Interest: Current Clients) and Rule 1.9 (Duties to Former Clients) and shall not participate in a matter in which the lawyer participated "personally and substantially" while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing.

In this instance, it would be a stretch to say that the six minutes that Cummings billed constituted personal and substantial participation.

That being said, a recent case from California represents the minority view. In *City & County of San Francisco v. Cobra Solutions, Inc.*,[4] the court held that automatic vicarious disqualification of the entire city attorney's office was required. While noting that California has not adopted the model rules, the court nevertheless pointed out that an ethical screen was not sufficient because the city attorney's position as the head of the office could affect the office's disposition of the city attorney's former client, even where seemingly unrelated policy decisions were concerned. Additionally, the lawyers who serve under the head of the office "cannot be entirely isolated from policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants."[5] Lastly, the court pointed out that public perception of the integrity of the office was at risk.

PRO SE OR THE HIGHWAY
Is Disclosure of Lawyer Involvement Required?
Scene 1

City Attorney Larry Dakota is approached by an unpaid law student intern, Jenny Horn, who wants to work on a meaty project. Horn proposes a service project where she will help pro se litigants file complaints for housing code violations. Dakota is delighted; he has wanted to close the local slumlord down for years, and now he can do it with unpaid help. Horn drafts pleadings for one resident then organizes a block meeting with residents and lines up other plaintiffs, all under the supervision of Assistant City Attorney Sarah Williams. Horn uses her first pleading as a boilerplate, and the residents file several lawsuits.

Scene 2

Nas T. Dwillings is hired by the slumlord to defend all the suits. Dwillings looks at the complaints and realizes that they are better than the average pro se pleading and that some lawyer must be behind the suits. He does some sleuthing of his own and discovers Horn at one of his buildings taking photos and confronts her.

"Who are you, and just what the hell do you think you're doing?"

"I'm . . . I'm working on a special project," Horn stutters.

"Oh, a law student are you?" Dwillings guesses. "I bet the state licensing board would love to know about you practicing law without a license."

"I'm not practicing law without a license. Sarah Williams of the city attorney's office approved everything," Horn tearfully replies.

Dwillings cackles, "Even better. I'll file misconduct charges against the city attorney with the state bar for non-disclosure of its involvement in these suits!"

Question: Should Dakota, Williams or Horn have disclosed his/her involvement in this case?
It turns out that states are quite divergent on this issue, so the answer will depend on your geography. Some states have expressed the view that in a pro se matter, the identity of the supervising or assisting lawyer must be disclosed on the theory that failing to do so would be misleading the court and adversary counsel.[6] Other states—such as Arizona, Illinois and Maine—have weighed in, stating that no disclosure is required.[7] And at least two states, Alaska and Virginia, have qualified disclosure based on the circumstances of the assistance.[8]

Interestingly, ABA Formal Opinion 07-446 (May 5, 2007) (Undisclosed Legal Assistance to Pro Se Litigants), opines that disclosure of assistance depends on whether the fact of the assistance is material to the matter. In other words, would it constitute fraudulent or dishonest conduct in violation of Rules 1.2 (d) (Scope of Representation), 3.3(b) (Candor Toward the Tribunal), 4.1(b)(Truthfulness in Statements to Others), or 8.4(c) (Misconduct)? The opinion points out that it is not material if litigants receive assistance with documents submitted. The ABA Committee on Ethics and Professional Responsibility states that it does not share the concern that litigants who do so receive "special treatment" or "otherwise unfairly prejudice other parties to the proceeding." In fact, the committee noted that if a lawyer provides effective assistance, it will be evident to the court; and if the assistance is ineffective, the pro se litigant will not have received an unfair advantage.[9]

The opinion goes on to note that nondisclosure of legal assistance is not a violation of Rule 8.4(c) since the lawyer is not making an affirmative statement by the client, attributed to the lawyer, that the documents were prepared without legal assistance; thus, the lawyer is not being dishonest within the meaning of the rule. Additionally, because the lawyer is making no statement at all to the forum regarding the scope of the representation, the lawyer may be obligated under Rule 1.2 and Rule 1.6 (Confidentiality of Information) not to reveal the representation.

Katherine Mikkelson is the Division's associate director.

Endnotes
1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (Aug. 5, 2008).
2. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975).
3. *Id*.
4. 38 Cal. 4th 839 (2006).
5. *Id*. at 854.
6. Colo. Bar Ass'n Ethics Comm. Op. 101 (Jan 17, 1998, with addendum of Dec. 16, 2006); Conn. Legal Ethics Informal Op. 98-5 (Jan. 30, 1998); Del. State Bar Ass'n Comm. on Prof'l Ethics & Conduct Op. 1994-2 (May 6, 1994); Ky. Bar Ass'n Ethics Op. E-343 (Jan. 1991); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 613 (Sept. 24, 1990).
7. Ariz. Ethics Op. 06-03 (July 2006); Ill. State Bar Ass'n Op. 849 (Dec. 9, 1983); Me. State Bar Ethics Op. 89 (Aug. 31, 1988); Va. Legal Ethics Op. 1761 (Jan. 6, 2002); Va. Legal Ethics Op. 1592 (Sept. 14, 1994); L.A. County Bar Ass'n Ethics Op. 502 (Nov. 4, 1999); L.A. County Bar Ass'n Ethics Op. 483 (Mar. 20, 1995).
8. Alaska Ethics Op. 93-1 (Mar. 19, 1993) (a lawyer's assistance must be disclosed unless the lawyer merely helped the client fill out forms designed for pro se litigants); Va. Legal Ethics Op. 1127 (Nov. 21, 1988) (failure to disclose that a lawyer provided active or substantial assistance, including the drafting of pleadings, may be misrepresentation).
9. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446 (May 5, 2007).