

Get a job—it's personal!

Changing jobs and personal interest conflicts of interest

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Paul Hurdle is US Conflicts Counsel and a member of the Conflicts Clearance Group and Ethics Committee in the Dentons US region. In that role, he facilitates compliance by the Firm and its professionals with the applicable Rules of Professional Conduct, including the rules regarding conflicts of interest. This includes a wide range of support functions within the Firm, including the intake of new matters, the resolution of conflicts of interest, the review of professionals joining the Firm, the adoption of best practices within the Firm for compliance with applicable ethical requirements, and the training of Firm personnel with respect to the foregoing.

Mr. Hurdle currently serves as Chair of the Legal Ethics Committee of the District of Columbia Bar. This committee issues Legal Ethics Opinions interpreting the DC Rules of Professional Conduct in response to inquiries from members of the DC Bar and others.

Mr. Hurdle is also Senior Counsel in Dentons' Real Estate practice group. His practice focuses on commercial real estate loan origination, securitization and servicing, especially defeasance transactions.

Prior to joining the Firm, Mr. Hurdle was in-house counsel with Wells Fargo Bank for five years, where he supported the Real Estate Banking Group, the Commercial Real Estate Finance Group and the Structured Products Servicing Group.

Mr. Hurdle was a Lieutenant in the US Navy Judge Advocate General's Corps in the Pacific during the Vietnam conflict.

When it gets personal

DC Rule 1.7 (b)(4)

When it gets personal – DC Rule 1.7 (b)(4)

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(4) 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.

When it gets personal – DC Rule 1.7 (c)

(c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if ***each potentially affected client*** provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the ***possible adverse consequences*** of such representation.

When it gets personal – Comment [7]

- Subjective test
- Objective test

Comment [7] to DC Rule 1.7:

[7] Paragraphs (b) and (c) are based upon two principles: (1) that a client is entitled to wholehearted and zealous representation of its interests, and (2) that ***the client as well as the lawyer must have the opportunity to judge and be satisfied that such representation can be provided.*** Consistent with these principles, paragraph (b) provides a general description of the types of circumstances in which representation is improper in the absence of informed consent.

When it gets personal – Comment [7]

The underlying premise is that disclosure and consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide ***wholehearted and zealous representation*** of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. ***Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.***

When it gets personal – DC Rule 1.7 (b)(4)

- Factors
 - Role of the lawyer
 - “Targeted, communicated and reciprocated” interest
 - DC LEO 210 (1990)
 - DC LEO 367 (2014)

Who's the boss?

Who's the boss?

- Corporations (including nonprofits)
- DC Rule 1.7, Comment [21]

[21] As is provided in Rule 1.13, the lawyer who represents a corporation, partnership, trade association or other organization-type client is deemed to represent that specific entity, and not its shareholders, owners, partners, members or “other constituents.” Thus, for purposes of interpreting this rule, the specific entity represented by the lawyer is the “client.” ***Ordinarily that client’s affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer.*** Generally, the lawyer for a corporation is not prohibited by legal ethics principles from representing the corporation in a matter in which the corporation’s stockholders or other constituents are adverse to the corporation.

Who's the boss? (cont'd)

See D.C. Bar Legal Ethics Committee Opinion No. 216. A fortiori, and consistent with the principle reflected in Rule 1.13, the lawyer for an organization normally should not be precluded from representing an unrelated client whose interests are adverse to the interests of ***an affiliate (e.g., parent or subsidiary)***, stockholders and owners, partners, members, etc., of that organization in a matter that is ***separate from and not substantially related to*** the matter on which the lawyer represents the organization.

Who's the boss? (cont'd)

- Federal Government
 - 18 U.S.C. §207 (1962) – the “Seven Restrictions” (Post-Employment)
 - 5 C.F.R. pt. 2641
 - §2641.302
 - a) *Designation*. For purposes of 18 U.S.C. 207(c) only, and §2641.204, the Director of the Office of Government Ethics may designate agency “components” that are distinct and separate from the “parent” agency and from each other. Absent such designation, the representational bar of section 207(c) extends to the whole of the agency in which the former senior employee served.

Who's the boss? (cont'd)

- An eligible former senior employee who served in the parent agency is not barred by section 207(c) from making communications to or appearances before any employee of any designated component of the parent, but is barred as to any employee of the parent or of any agency or bureau of the parent that has not been designated. An eligible former senior employee who served in a designated component of the parent agency is barred from communicating to or making an appearance before any employee of that designated component, but is not barred as to any employee of the parent, of another designated component, or of any other agency or bureau of the parent that has not been designated.

Who's the boss? (cont'd)

- 18 U.S.C. §208 – Criminal Conflicts of Interest
- 5 C.F.R. pt. 2635, Subpart F (1989) – implements the foregoing
- §2635.603
- (b) An employee is seeking employment once he has begun seeking employment within the meaning of paragraph (b)(1) of this section and until he is no longer seeking employment within the meaning of paragraph (b)(2) of this section.

Who's the boss? (cont'd)

- (1) An employee has begun seeking employment if he has directly or indirectly:
 - (i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), the term negotiations means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;

Who's the boss? (cont'd)

- (ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was:
 - (A) For the sole purpose of requesting a job application; or
 - (B) For the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions; or

Who's the boss? (cont'd)

- (iii) Made a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.
- (2) An employee is no longer seeking employment when:
 - (i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or
 - (ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

Who's the boss? (cont'd)

- 3) For purposes of this definition, a response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

Who's the boss? (cont'd)

- DC Government
 - DC LEO 268 (1996)

“We disagree with the assumption of Opinion 92 that the entire City and all of its constituent agencies must always and necessarily be considered the lawyer’s client for conflict of interest purposes. Thus, a lawyer may under certain circumstances perform services for a particular City agency client without having to notify and obtain the consent of private clients that she is representing against another City agency that is not considered the same client. Nevertheless, even if Rule 1.7(b)(1) does not apply because the lawyer is not opposing her own client, she may be required by Rule 1.7(b)(2)-(4) to notify and seek the consent of one or both clients if her representation of one would substantially interfere with her representation of the other, or if her independent judgment in either client’s behalf would be adversely affected by her responsibilities to a third party or by her own personal interests.”

What to do?

What to do?

- Disclosure and consent (DC Rule 1.7(c))
- Withdrawal from representation
- Suspending job search

What about my company?

What about my company?

- Imputation
- DC Rule 1.10(a):

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, unless:

(1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm.

The buck stops here

The buck stops here

- Subordinate lawyers

- DC Rule 5.2

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's **reasonable resolution** of an **arguable question** of professional duty.

The buck stops here (cont'd)

- Supervisory lawyers
 - DC Rule 5.1
 - a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules of Professional Conduct.
 - (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

The buck stops here (cont'd)

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer has direct supervisory authority over the other lawyer or is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Conclusion

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Thank you

The logo for Dentons, featuring the word "DENTONS" in white, uppercase letters inside a purple arrow-shaped box pointing to the right.

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