

speaking of ethics

By Saul Jay Singer

The following is the latest in a series of articles in which the Ethics Guru answers your questions about the District of Columbia Rules of Professional Conduct.

Dear Ethics Guru:

*The Cat in the Hat's my client,
one I truly do adore,
but he's not behind the kitchen sink,
he's not behind the door.
He's not up on the ceiling,
he's not down on the ground,
in fact, he isn't anywhere,
he's nowhere to be found.*

*But with a settlement on the table,
which ups the offer by half,
I wonder if I am able
to accept on Cat's behalf?*

T. Geisel, Esquire

Dear Dr. (It is “doctor,” isn’t it?) Geisel:

Not only can you not accept without first advising Cat of the specific offer on the table and obtaining his informed consent to settle, but you will probably have to withdraw from the representation.

Rule 1.4 (Communication) lays out the broad duty of a lawyer to “keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information” and to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Though this would clearly include the lawyer’s duty to communicate a settlement offer to the client, the drafters of the D.C. Rules, believing that such communications were particularly important, nevertheless adopted an additional rule:

A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case *shall* inform the client promptly of the substance of the communication.

Better Call Saul!

Rule 1.4(c) (emphasis added). As comment [1] strikingly notes: “Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.” Thus, in Legal Ethics Opinion 289 the Legal Ethics Committee ruled that the client generally cannot, through an advance agreement or instruction to counsel, waive his or her right to accept or reject a settlement:

A client’s right to accept or reject a settlement offer cannot be contracted away in advance . . . This rule is designed to preserve the client’s right to accept or reject a settlement offer, and it requires that a client be able to exercise his or her judgment at the time a settlement offer is communicated.

(Emphasis added). Thus, suppose Cat had instructed you at the beginning of the case “I’m a busy man—okay, okay, a busy anthropomorphic feline, whatever—and I don’t have time to waste. Do the best that you can to settle the case for as much as you can. Don’t even bother to bring any offer to me less than \$50K, and if \$50K is the best you can do, just accept it,” you would still have the ethical duty to bring offers less than \$50,000 to Cat, and you still could not accept an offer, even a very substantial one, without first obtaining your client’s informed consent.

That leaves you essentially in limbo because your client has disappeared and you have no way to communicate with him. Moreover, not having obtained Cat’s informed consent to disclose, Rule 1.6 (Confidentiality of Information) prevents you from telling anyone, including the trial judge, that your client is missing. Thus, for example, were the judge to ask “Where is your client, Dr. Geisel?” Rule 1.6 would prevent you from answering truthfully, and Rule 8.4(c), among others, would prohibit you from answering falsely. Similarly, you could not ethically answer the question “What is your client’s position on defendant’s settlement offer?”



Nick Wiggins

It is clear that, as the result of Cat’s disappearance, you are unable to go forward with the representation competently, diligently, zealously, etc., and, as such, you will have to withdraw.¹

Dear Ethics Guru:

*I think that I shall never see,
a client who timely pays his fee,
and doesn't expect my work for free,
or put cash flow in jeopardy.
Who pays expenses regularly,
whether hourly or contingency.
How I long for a client who, just once,
you see,
facilitates serenity.*

*Now, I have a client who every day
blows off my invoices, refuses to pay.
But he's into me for \$100K,
and I simply can't go on this way.*

*I've told him that I will withdraw,
but he claims that that's against the law.
"And if you dare withdraw," he says with
glee,
"I'll file a complaint with OBC."²*

*I must get out, but the action in tort
begins Monday morning in Superior Court.
Letters are written by fools like me,
but only God can set me free.*

Caitlyn Kilmer

Dear Ms. Kilmer:

Actually, the trial judge can also “set you free,” but he or she probably will decline to do so in this case.

A lawyer who seeks to withdraw from a representation must have a proper basis for doing so pursuant to Rule 1.16 (Declining or Terminating Representation). Rule 1.16(a) lays out three scenarios where a lawyer *must* withdraw from a representation, none of which apply here. Rule 1.16(b) identifies various bases for voluntary withdrawal, including two that arguably establish a legitimate basis for your

withdrawal in this case: Rule 1.16(b)(4), where the “representation will result in an unreasonable financial burden on the lawyer,” and Rule 1.16(b)(3), when the “client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”

Your client owes over \$100,000 and has refused all your demands for payment, so both these provisions would seem to provide ample basis to support your filing a motion to withdraw.³ As such, you need not be concerned about your client’s claim that you would be acting inappropriately if you seek to withdraw, nor should you lose any sleep over his threat to file a Bar complaint against you.

In addition, Rule 1.16(b) expressly permits a lawyer to withdraw from a representation at any time if, as stated in the introductory language to the Rule, “withdrawal can be accomplished without material adverse effects on the interests of the client.” This generally constitutes a temporal limitation, that is, the rule permits withdrawal if the client has sufficient time to find another lawyer, and the new lawyer has a reasonable opportunity to get up to speed on the case.⁴

In your case, however, trial is set to commence on Monday morning, and your client cannot reasonably, in less than a week, be expected to find and retain new counsel who could be prepared to go to trial in a matter of days. It is for this reason that it is improbable that the court, which has ultimate discretion in withdrawal matters and does not like to see its trial schedule slip, will let you out of the case, even where you have a deadbeat client on whose behalf you will have to incur the significant additional expenses of trial. Thus, in conclusion:

I think that I shall never see,
a lawyer so trapped in a case like thee.
Though Rule 1.16 provides a key,
the court will likely not agree.

Dear Ethics Guru:

*The outlook wasn’t brilliant in the trial
court that day,
I saw the vote as four to two, with eight
jurors to sway.
But when my best closing argument died,
at first, and my second did the same,
I feared that this would spell the end of
my client’s trial game.*

*A straggling few in the courtroom got up
in deep despair. The rest*

*clung to the hope which springs eternal in
the human breast;
they thought, “If only K.C. could come up
with a good and new approach,
we’d put up even money that those jurors
he could coax.”*

*But the record was now set in stone, the
law was well established,
and I suddenly needed a bathroom break,
I suddenly was famished.
So I decided that I’d just go for it, there
was not much to lose,
and if I was successful I would make the
evening news.*

*All eyes were fixed on me, that day, as all
logic I forsook,
I threw my legal papers down, and gave
them all a look.
Defiance flashed in my eyes, a sneer
curled K.C.’s lip,
as I gave it my last best shot to right the
sinking ship.*

*‘The law is an ass,’ quoth Mr. Bumble in
Dickens’ Oliver Twist,
and blindly applying an inequitable law
is an urge you must resist.
So do what’s right, ignore the law, I
respectfully insist,
so that all charges against us are sum-
marily dismissed.”*

*Oh, somewhere in this favored land the
sun is shining bright,
the band is playing somewhere, and
somewhere hearts are light;
and somewhere men are laughing and the
joy is unrestricted,
but there is no joy in Washington—my
client was convicted.*

K.C. at the Bar

Dear Mr. Thayer (Yes, I *know* who you are!):

Because the D.C. Legal Ethics Program may only provide informal guidance *prospectively*, I stress that I am not in any way commenting here on your conduct in this specific case but, rather, generally addressing the question of jury nullification under the D.C. Rules. Moreover, as the Legal Ethics Committee makes clear in Legal Ethics Opinion 320, “[w]hether a particular jury nullification argument contravenes the Rules of Professional Conduct is, of course, case-specific and outside the scope of the Committee’s inquiry.”

Though D.C. has no rule or statute expressly authorizing jury nullification, it

is well recognized under the common law that jurors may “acquit a defendant on the basis of their own notion of justice, even if they believe he or she is guilty as a matter of law.”⁵ However, your sad tale squarely presents a different question: whether it is ethical for a lawyer to appeal to the members of a jury to disregard the law.

In Legal Ethics Opinion 320, the Legal Ethics Committee determined that:

Current legal standards strongly disfavor jury nullification and prohibit express exhortations that a jury nullify the law. Accordingly, a lawyer may not, consistent with the rules of professional conduct, expressly urge a jury to disregard the law . . . The legal system continues, however, to permit juries to exercise the power to nullify.

However, the Committee goes on to carefully draw a line between a lawyer’s overt nullification arguments, which are unethical, and “good-faith arguments with incidental nullification effects,” which are permitted and, indeed, specifically contemplated by the Rules. Thus, “[a] lawyer may, within the bounds of zealous advocacy, advance arguments that have a good faith evidentiary basis even though those same arguments may also heighten the jury’s awareness of its capacity to nullify.” Though the Committee, acknowledging the difficulty inherent in such line-drawing, notes that “it is in practice often impossible to distinguish between these two forms of argument,” it nonetheless concludes “in the context of criminal advocacy that tension should be resolved in favor of permitting any evidentiary argument for which a reasonable good faith basis exists, provided that the lawyer exercises his ability to do so within the constraints of existing law.”

It would be well worth your while to review Opinion 320 for some examples of permitted and prohibited jury nullification arguments and to gain greater insight into the variables underlying this important ethics issue.

Dear Ethics Guru:

*The one-L student,
he’s overworked.
The two-L was prudent,
he summer-clerked.
But I will bet
against all odds,
there aren’t any*

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