speaking of ethics

By Saul Jay Singer

Going Through 'Withdrawal'

Mick Wiggins

"You can check out anytime you like, but you can never leave . . ."

—The Eagles, "Hotel California" (1977)

The bottom line is that you have simply *got* to withdraw from the representation.

It could arise in the context of the ultimate horror scenario for a lawyer: your client orders you to take action in violation of the District of Columbia Rules of Professional Conduct and, when you refuse, he makes credible threats to harm you and your family unless you do as you are told.

Or, it could arise in a variety of more common and mundane circumstances: an unforeseen and irresolvable conflict is thrust upon you; or your own business or personal interests rise to the level where you no longer can provide competent and diligent representation; or the client has disappeared from the face of the earth, or simply refuses to communicate with you or provide material cooperation with respect to advancing his or her own interests in the case; or, that all-time favorite—the client owes you a fortune in unpaid legal fees and either cannot or will not pay.

Or, the problem may be personal to you and wholly unrelated to any deficiency in the client: you become physically ill such that you can no longer diligently advance your client's interests; or you sustain an emotional trauma, or some family emergency arises, mandating a temporary leave of absence from your practice; or you decide that it is time to retire, and you need to transfer your matters and wind up your practice.

Or, perhaps you are faced with what is arguably the most extreme case where continued representation seems impossible: the client has fired you.

So, time to get out. But what ethical obligations must be considered before an attorney can withdraw? Are there any limitations presented by the Rules of Professional Conduct with respect to an attorney's attempt to pull out of a representation, and are there any particular minefields to avoid?

The analysis must start with Rule 1.16(b) (Declining or Terminating Representation), which begins by permitting a lawyer to withdraw if "withdrawal can be accomplished without material adverse effects on the interests of the client." This generally constitutes a *temporal* limitation, i.e., the rule permits withdrawal if the client has sufficient time to find another lawyer, and the new lawyer has sufficient time to get up to speed on the case. Thus, for example, if trial is set to commence in three days and the judge has made clear that she will not, under any circumstances, entertain any further continuance motions, the lawyer's withdrawal on the eve of trial would certainly have a "material adverse effect" on the client.

Many callers to the Legal Ethics Helpline, particularly unhappy clients, misunderstand the mandate of Rule 1.16(b) as prohibiting the lawyer's withdrawal unless the client can *successfully* retain alternative counsel. A client may think that "no other lawyer will take my case, so my lawyer's withdrawal has caused me irreparable and material adverse repercussions." While the withdrawing lawyer does have the ethical duty under Rules 1.4 (Communication) and Rule 1.16(d) to, *inter alia*, inform the client of his impending withdrawal; to advise the client to act expeditiously to secure alternative counsel to protect the client's interests; and to otherwise facilitate a smooth transition, including returning client files[1] and refunding all unearned fee advances,[2] the client's inability to retain new counsel will not create an ethical barrier under the rule to the lawyer's withdrawal.

Even where the lawyer's withdrawal will cause "material adverse repercussions" to the client, Rule 1.16(b) provides five scenarios pursuant to which such a lawyer may nonetheless withdraw: (1) the client persists in a course of action involving the lawyer's services; (2) the client has used the lawyer's services to perpetrate a crime or fraud; (3) the client, after being warned, fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services; (4) the lawyer will sustain unreasonable financial loss, or the client's conduct has made the representation unreasonably difficult; and (5) the lawyer believes in good faith that a tribunal will find other good cause for withdrawal.[3]

But—and this is a huge minefield into which many D.C. lawyers fall—all withdrawals from matters pending before a tribunal[4] are subject to Rule 1.16(c), which provides that:

> A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. *When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating a representation.*

(Emphasis added). What this effectively means is that with respect to matters formally pending before a tribunal, and regardless of the lawyer's grounds for withdrawal, the lawyer continues in every sense as counsel for the client—including *all* duties imposed by the Rules of Professional Conduct—until and unless (1) the lawyer files a motion to withdraw, and (2) *the court grants the motion*.

This ethical mandate may often put the lawyer in a horrific situation. For example, with a motion to withdraw pending, how is she supposed to continue to represent a client who has fired her? If the lawyer dares to show up at a scheduled hearing, the outraged client will justifiably protest that he has unambiguously dismissed her, but if she fails to appear, does she risk punishment from the Office of Bar Counsel for dereliction of her duty to competently and zealously continue to represent her client? If a lawyer faces an irreconcilable conflict with a second client, how can he proceed at all to continue to

represent the current client until the court decides to adjudicate his motion to withdraw? Do the D.C. Rules really expect a lawyer to continue to represent a client who has threatened the lawyer's family?

And the plot sickens: the Legal Ethics Helpline has received troubling calls from lawyers with the terrible question: "The court has denied my motion to withdraw; what do I do now?" All we can do is point them to the last sentence of Rule 1.16(c) and advise them to do the best they can under the circumstances, an admittedly trite and unhelpful response.

Another minefield in motions to withdraw, an issue of which some lawyers seem dangerously unaware, is the applicability of Rule 1.6 (Confidentiality of Information), which includes not only the lawyer's duty to protect attorney–client communications, but extends broadly to any information which the lawyer learns in the course of the representation, whether directly from the client or from any other source, the disclosure of which would prove to be either embarrassing or detrimental to the client. What this effectively means is that the lawyer cannot write in his or her motion to withdraw, or otherwise represent to the tribunal, that "client won't pay me; I have no idea where client is; client refuses to cooperate; client is psycho;" etc., all of which are protected as client secrets under Rule 1.6. Rather, the lawyer must employ the ultimate "vanilla" language, i.e., "a situation has arisen such that continued representation under the circumstances has been rendered impossible."

Thus, for example, in *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001), an attorney attached to his motion to withdraw letters he had written to his client that, *inter alia*, detailed the client's failure to cooperate, failure to pay legal invoices, and the client's false representations to the lawyer. The D.C. Court of Appeals easily found that the information presented was subject to Rule 1.6, and that the lawyer had violated his ethical duty to preserve client confidences and secrets.

Most judges understand very well the ethical limitations imposed by Rule 1.6, but that by no means prevents occasional calls from lawyers asking in sheer panic: "The court won't grant my motion to withdraw unless I provide necessary facts sufficient to support my motion; what do I do?" The terrible answer is: you are stuck; you must not provide Rule 1.6-protected information to the court.[5]

The only solution to this monumental problem that this writer can think of is for tribunals to make the adjudication of motions to withdraw a procedural priority so that lawyers are not left hanging in the ethical twilight zone—and, of course, that judges carefully consider the confidentiality restrictions imposed by Rule 1.6 in this context.

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.

Notes

1 *See*, *e.g.*, D.C. Bar Legal Ethics Committee Opinion 250 (Duty to Turn Over Files of Former Client to New Lawyer When Unpaid Fees Are Outstanding); Opinion 333 (Surrendering Entire Client File Upon Termination of Representation); and Rule 1.16, Comment 9.

2 *See* Legal Ethics Opinion 355 (Flat Fees and Trust Accounts) and "Speaking of Ethics" column "An E-Manceipation Proclamation," Wash. Law., Sept. 2010, at 12.

3 *See also*, Rule 1.16, Comments 7–8.

4 Pursuant to Rule 1.0(n), a "tribunal" broadly includes "a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity."

5 The only exception is one that is unlikely to be forthcoming in most withdrawal cases: a client's informed consent to disclose, which is the ultimate remedy to most Rule 1.6 problems.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE JAMES W. BEANE JR. Bar No. 444920. October 21, 2010. The D.C. Court of Appeals approved a petition for negotiated discipline and suspended Beane for six months with fitness, effective 30 days from the date of the opinion. Between 2007 and 2009, the Office of Bar Counsel opened seven separate investigations against Beane. In the four matters that are the subject of this petition, Beane failed to adequately communicate with his clients, provide competent representation, respond to court orders, and/or prosecute his clients' interests. In two cases, his clients' interests seriously were impaired when their respective appeals were dismissed. Additionally, Beane stipulated that in one case, he negligently misappropriated funds. Further, Beane stipulated that when Bar Counsel requested information about these complaints, he failed to timely respond. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.4(a), 1.4(b), 1.5(a), 1.16(d), 8.1(b), 8.4(d) and D.C. Bar Rule XI, § 2(b)(3).

IN RE RACHELE M. GAINES. Bar No. 463314. October 14, 2010. The D.C. Court of Appeals approved a petition for negotiated discipline and suspended Gaines for 30 days, stayed in favor of one year of unsupervised probation. The court noted that the continuing legal education requirement of the negotiated discipline had been satisfied. This matter was based on two consolidated cases. The first matter concerned Gaines' failure to represent the interests of her client who was an incapacitated ward. Specifically, after being appointed guardian, Gaines failed to visit the client, attend review meetings, file required reports with the court, and take necessary actions after she received notice of the decertification of her client's medical eligibility. The second matter concerned Gaines' actions while representing a client in a personal injury case. Specifically, Gaines failed to secure service of the complaint on the defendant, resulting in a dismissal of the complaint. Thereafter, Gaines failed to inform the client that the matter had been dismissed, and that she had left the employment of the firm that was contracted to handle the client's lawsuit. Additionally, Gaines filed misleading documents in court in her attempt to have the lawsuit reinstated. Rules 1.1, 1.3(a), 1.3(c), 1.4(b), 1.5(b), 1.14(a), 3.3(a)(1), 8.4(c), and 8.4(d).

Reciprocal Matters

IN RE ROBERT J. ABALOS. Bar No. 394349. October 21, 2010. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Abalos.

IN RE PAUL W. BERGRIN. Bar No. 477326. October 28, 2010. In a reciprocal matter from New York, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Bergrin.

IN RE IRA C. HATCH JR. Bar No. 376958. October 21, 2010. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Hatch.

IN RE EDWARD D. FAGAN. Bar No. 394334. October 28, 2010. In a reciprocal matter from New York and New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Fagan.

IN RE KEVIN J. HERON. Bar No. 375646. October 28, 2010. In a reciprocal matter from Pennsylvania, the D.C. Court of appeals imposed identical reciprocal discipline and disbarred Heron.

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Attorney Briefs

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James M. Garland has returned to the firm as partner in its litigation group… **T. Marshall Fawley III** has joined Wilson Elser Moskowitz Edelman & Dicker LLP as associate… **Allison M. Lefrak** has joined the World Organization for Human Rights USA as litigation director... **Andrew J. Varner** has joined Arnold & Porter LLP as partner in the firm's corporate and securities practice… **Charles W. Day Jr.** and **Donna Williams Rucker** have become partners at Gebhardt & Associates, LLP… **Virginia Duke** and **Gregory Jacobs** have joined Kilpatrick Townsend & Stockton LLP as associate in the firm's insurance recovery team… **Kenneth I. Juster** has joined Warburg Pincus LLC as managing director in the firm's New York office. He is also an adjunct senior fellow at Harvard University's Kennedy School of Government for the current academic year… **Jeffrey R. Houle** has joined DLA Piper LLP as partner in the firm's corporate and securities practice and chair of its defense and government services transactional practice.

Company Changes

Kent D. Talbert, former general counsel for the U.S. Department of Education, and Robert S. Eitel, former deputy general counsel for departmental and legislative service of the same agency, have formed **Talbert & Eitel, PLLC**, an education and employment law firm. The firm counsels agencies, companies, and institutions as well as individuals in the education sector… Kilpatrick Stockton LLP has merged with Bell, Rosenberg & Hughes LLP and Townsend and Townsend and Crew. The combined firm is known as **Kilpatrick Townsend & Stockton LLP**… Culley C. Carson IV has opened **The Carson Law Firm, PLLC** in Raleigh, North Carolina. The firm focuses its practice on business law, commercial real estate, construction, and technology.

Author! Author!

Oblon, Spivak, McClelland, Maier & Neustadt, L.L.P. partner **Jonathan Hudis** has edited the book *A Legal Strategist's Guide to Trademark Trial and Appeal Board Practice*, published by the American Bar Association. Firm partner **Robin Bren** as well as of counsels **Beth Chapman** and **David Kera** have contributed chapters to the book… **Mark V. Vlasic**, an adjunct professor at Georgetown University Law Center and a partner at Ward & Ward PLLC, has been named one of the "40 Under 40" international development leaders by Devex. Vlasic also has written the opinion piece "Justice for Haiti, via the Swiss," which was published in the October 3 edition of *The New York Times*… **Joel Miller** has published *The PTO Board of Patent Appeals and Interferences: Appellate Advocacy and Practice*, a procedural manual for appeals to the board… **Michael Ariens**, a professor of law at St. Mary's University in San Antonio, has written *Law School: Getting In, Getting Out, Getting On*, a how-to guide published by the Carolina Academic Press that takes the reader from the decision to attend law school through the bar exam and first job.

D.C. Bar members in good standing are welcome to submit announcements for this column. When making a submission, please include name, position, organization, and address. E-mail submissions to D.C. Bar staff writer Thai Phi Le at tle@dcbar.org.

Bar Counsel

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IN RE GREGORY VAN JUDICE. Bar No. 474017. October 28, 2010. In a reciprocal matter from Louisiana, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Judice.

IN RE VINCENT J. KROCKA. Bar No. 425902. October 21, 2010. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Krocka.

IN RE MARIA TERESA LOPEZ. Bar No. 499285. October 21, 2010. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Lopez.

IN RE BRIAN M. MILLER. Bar No. 429107. October 21, 2010. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Miller.

IN RE RICHARD C. SCALISE. Bar No. 125146. October 21, 2010. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Scalise.

IN RE JOHN A. YANCHEK. Bar No. 420350. October 21, 2010. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Yanchek.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE HOWARD D. DEINER. Bar No. 377347. October 1, 2010. Deiner was suspended on an interim basis on the grounds that he appears to pose a substantial threat of serious harm to the public.

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcbar.org/discipline and search by individual names.

IN RE DANIELE E. HERNDON. Bar No. 499759. On September 22, 2010, the Fourth District Subcommittee, Section 1 of the Virginia State Bar, publicly reprimanded Herndon.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE BRIGITTE L. ADAMS. Bar No. 426034. October 13, 2010. Adams was issued an informal admonition for failing to communicate, to provide competent representation, and to represent a client zealously and diligently within the bounds of the law while appointed to represent a client on appeal of his criminal matter in the District of Columbia Court of Appeals. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), and 1.4(b).

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.*