

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:

As counsel for Flexxon Corporation defending against Plaintiff's fraud claim, I received a settlement offer from counsel for Plaintiff, which, of course, I must communicate to my client pursuant to Rule 1.4(c). Flexxon has real liability in the case, the potential damages are huge, and I think the offer is one that my client would have to be nuts not to accept. (Can an entity be insane?)

However, Flexxon's chair says "No way we settle; we are going to litigate to the death—verily, even unto the gates of hell!" Three board members have each separately ordered me to go back to Plaintiff with a counteroffer, albeit with entirely different offers. Flexxon's CEO, who seems most able to listen to reason, says "Grab the deal before Plaintiff changes her mind!" The janitor, an employee of the corporation whose opinions seem to be outcome determinative in important company decisions, says "You should seek guidance from our insurer regarding whether to settle, and follow its advice."

What do I do? Whose directions do I follow? Since there is an internal dispute regarding settlement strategy, can I choose to follow the CEO's direction, since that is truly in the corporation's best interests?

—Who's the Boss

Dear Who's the Boss:

As we all know, there is no such thing as a "corporation"—it is a wholly fictional construct, except to the extent that it is created by law as some "body." But how does a body made up of various moving parts make decisions, and how does it determine which goals to pursue and which actions to take in furtherance of those goals?

Comment 1 to Rule 1.13 probably says it best:

Ask the Ethics Guru: Your Client—An Entity

An organizational client is a legal entity, but it cannot act except through its officers, directors, employers, shareholders, and other constituents.

But this raises your question: *which* of the entity's "officers, directors, employers, shareholders, and other constituents" will direct your activities? The answer is found in Rule 1.13(a):

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

The duly authorized constituent—who may actually be specified in the corporate bylaws—is usually the board chairperson, high corporate officer, or the like, but it could be anybody. Absent substantive law to the contrary, the corporation could designate an accountant or other staff member, or, for that matter, the janitor who cleans the office at night. The lawyer's duty will be to communicate with, and to take direction from, the "duly authorized constituent" on all matters related to the representation.

Dear Ethics Guru:

I have a related question. I have been representing a pro-tenant organization, Death to Landlords, for many years with no problems—except for that little incident a few years ago, which you may have heard about when one of my client's constituents took the name of the organization perhaps a bit too literally. However, I am now faced with a "battle of the boards" where two distinct groups are claiming to be the organization's properly constituted board. You will not be surprised to learn that each group is giving me entirely different directions regarding my representation, and each is threatening to file a Bar complaint against me if I follow the directions of the other. What, oh what, am I to do?

—Lost at Sea



Nick Wiggins

Dear Lost:

How the heck do I know? I'm your friendly neighborhood Ethics Guru, not a leading authority on corporate law, and I certainly don't know any facts regarding the backstabbing schemes and intrigue going on over there. Though I get paid big bucks (he said, somewhat facetiously) to write this column and to answer questions and not to duck them, I am going to have to dodge answering yours head on because it squarely presents questions of fact and substantive law.

But I can, nonetheless, give you some meaningful guidance. First, understand very well that your duty, first and always, is to the *organization* and not to any of its constituents, and any action that you take must be focused like a laser on furthering the best interests of the organization within the scope of the law and the Rules of Professional Conduct. If it is clear to you that Board A is Death to Landlord's properly constituted board and that Board B's claim is frivolous and lacks basis in fact and law, then you may continue to represent the organization, taking your direction from the duly authorized constituent designated by Board A. If, however, you cannot resolve the question of who controls the entity, you must withdraw from the representation (subject to all conditions of Rule 1.16). What will then likely happen is that Board A and Board B will each retain separate counsel and duke it out in court, and the prevailing party will decide whether to retain you as counsel for the organization—assuming that you are still interested in the gig.

Dear Ethics Guru:

For more than five years, I have served as outside counsel for MegaCorp, Inc., one of the largest wireless service providers in the United States. I understand that my duty under Rule 1.5(b) is to provide a writing to the Client's duly authorized constituent—in this case, the company chair—specifying the

basis of the rate, the scope of the lawyer's representation, and the expenses for which the client will be responsible, but new matters have suddenly begun to come in every few days and the chair is starting to turn vicious when I ask him several times a week to execute a new retainer agreement for the new cases. Given his, shall we say, keen displeasure, is there some way around the clear mandate of Rule 1.5?

—Sick and Tired of Getting Screamed at

Dear Sick and Tired:

I've got some good news for you! Contrary to popular opinion, when a lawyer is paid hourly, there is no ethical requirement to have the client sign the retainer agreement. However, as I regularly advise my readers, just because the D.C. Rules usually do not require a writing doesn't mean that it isn't a real good idea to do it that way. In this case, however, if your client doesn't want to be bothered with having to sign each new retainer, you do not have any ethical obligation to exhort him to do so. Now, leave your poor chair alone and let him return to running his company!

Dear Ethics Guru:

Direct, succinct question: As in-house counsel for Diablo Corporation, I represent the company in a wrongful termination/sexual harassment case brought by Debbie Debit, a former company accountant. May I also simultaneously represent a Diablo constituent—Plaintiff's former supervisor, Barry Beelzebub—who also has been named as a defendant?

—Wants to Do the Right Thing

Dear Right Thing:

A direct question like yours deserves a direct answer—which, of course, means that you're not going to get one. This is because the answer is: it depends.

It is not uncommon for an entity and one or more of its constituents to be named as co-defendants in an action. The seminal question for a lawyer seeking to enter into such a joint representation is whether the lawyer can meet his or her duty of competence, diligence, and loyalty to *each* client without conflict. Moreover, this is an issue that must be constantly monitored throughout the representation, because no matter how consistent the apparent interests of clients in a joint representation may appear at the onset, there exist inherent risks of a future conflict of interest raising its ugly head.

For example, in your sexual harassment case, the interests of Diablo and Beelzebub may seem to be precisely aligned, but what would you do if Beelzebub testifies at deposition that, notwithstanding Diablo's claims to the contrary, he never received sexual harassment training, nor had he ever received any information regarding the existence of any company sexual harassment policy, formal or otherwise? Under such circumstances, any position you take would be acting contrary to the interests of one of your clients in a material respect and, as such, you would be forced to withdraw from the case.

Other problems can, and often do, arise under Rule 1.6, the duty to maintain client confidences and secrets. As D.C. Bar Legal Ethics Committee Opinion 296 notes:

A lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another.

Say, for example, that well into the representation Beelzebub suddenly advises you that he wants to tell you a "secret," which he instructs you not to disclose to *anyone*, and, before you can respond, he blurts out that he was fired from his previous position for sexual harassment. Here, too, you would have an irreconcilable conflict: You have a duty to Beelzebub not to disclose his secret, but you also have a duty to Diablo to make the disclosure, as it is certainly relevant and material to the company's interests in the case. Here, too, you would have no choice but to withdraw.

And if you are thinking that should any conflict between your two clients develop, you would simply withdraw from representing Beelzebub and continue to represent Diablo, forget it, dude. First, under Rule 1.9, Beelzebub would be a "former client" to whom you would still owe the duty of confidentiality, which duty transcends the representation—indeed, it transcends the life of the client. Second, Rule 1.9 would forbid you from represent-

ing Diablo in the same (or a substantially related) matter in which the company's interests are materially adverse to Beelzebub's interests. As such, you could not represent Diablo, which, unable as a matter of law to represent itself pro se, would be forced to retain outside counsel . . . and it would likely not be pleased.

These are issues that you should be careful to discuss *in advance* with all clients in a potential joint representation. In many cases, it may be best for the entity to retain separate counsel at the inception of the case to represent the constituent, but that is a tactical issue, not necessarily an ethical one.

A related question: Lord Voldemort, counsel for Plaintiff Debbie Debit, hired an outside investigator, Dick Gumshoe, and, without first seeking my consent, Gumshoe interviewed several persons, including Diablo's chair; Norm Numbercruncher, a current Diablo accountant; and Barbara Bookkeeper, a former Diablo accountant. Is it ethically permissible for Voldemort and Gumshoe to do this?

The rules here are fairly straightforward: Under Rule 4.2, Voldemort may not communicate, or cause Gumshoe to communicate, about the subject of the representation with a person represented by counsel without first obtaining the consent of that counsel. Under Rule 4.3, Gumshoe may speak to an unrepresented person, but he must first identify himself as an investigator for Plaintiff in the case with interests adverse to Diablo.

In this case, you represent Diablo *only*, and not the chair personally, Numbercruncher, or Bookkeeper—all of whom, for purposes of this question, I will assume are unrepresented by counsel. Rule 4.2(b) permits Voldemort to communicate directly with a current Diablo employee such as Numbercruncher without your knowledge or consent, if he complies with the Rule 4.3 mandate as I discussed above. Similarly, subject to Rule 4.3, Gumshoe may speak directly to a former Diablo employee such as Bookkeeper, but he may not seek to discover privileged Diablo information from her. See Legal Ethics Opinion 287. However, Voldemort's/Gumshoe's communication with the chair violates Rule 4.2(c) because the chair is a Diablo employee with authority to bind the company in the Debit case and, as Diablo's "decision maker" in the litigation, he is considered to be a party with whom direct communication is prohibited.

Dear Ethics Guru:

How can I become as erudite and conversant about the D.C. Rules of Professional Conduct as you?

—A Future Lawyer and a Big Fan

Dear Fan:

Read the rules daily, hourly, if possible. Keep a copy on your desk and on your nightstand for easy reference. Make them your friend. And, if you have any ethics questions, call the Legal Ethics Helpline at the D.C. Bar.

Legal Ethics Counsel Saul Jay Singer, Hope Todd, and Erika Stillabower are available for telephone inquiries at 202-737-4700, ext. 3232, 3231, and 3198, respectively, or by e-mail at ethics@dcbar.org.

Disciplinary Action Taken by the Board on Professional Responsibility

Original Matters

IN RE LILY MAZAHERY. Bar No. 480044. October 4, 2013. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Mazahery and require her to pay restitution in the amount of \$3,241.92, plus interest at the legal rate. This disciplinary case arose from Mazahery's representation of two refugees and the collection of donations for a woman on death row in Iran. In the first matter, Mazahery represented pro bono Mr. Sanjari, an Iranian dissident and former political prisoner with whom she was engaged in a personal relationship, in his efforts to travel to and then settle in the United States. In the second matter, Mazahery represented pro bono Mr. Batebi, a photojournalist and former political prisoner, in his efforts to leave Iraq and settle in the United States. Also associated with her representation of Mr. Batebi, in the third matter, Mazahery submitted a fraudulent claim to United Bank, wherein she stated that she "did not authorize or participate in" a disputed transaction. In the third matter, Mazahery collected donations in a campaign to save the life of Akram Mahdavi, a woman in prison in Iran awaiting execution. The Board found that Mazahery violated Rules 1.1(a) and (b) (competence) in the Batebi matter; Rules 1.4(a) and (b) (communication) in the Batebi and Sanjari matters; Rules 1.6(a)(1), (a)(2), and (a)(3) (client confidences) in the Batebi and Sanjari matters; Rule 1.7(b)(4) (conflicts of interest) in

the Sanjari matter; Rule 8.1(a) (false statements in a disciplinary matter) in the Mahdavi matter; Rule 8.4(b) (criminal conduct) in the United Bank matter; Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation) in the Mahdavi, Batebi, Sanjari, and United Bank matters; and Rule 8.4(d) (conduct that seriously interferes with the administration of justice) in the Mahdavi matter. Rules 1.1(a), 1.1(b), 1.4(a), 1.4(b), 1.6(a)(1), 1.6(a)(2), 1.6(a)(3), 1.7(b)(4), 8.1(a), 8.4(b), 8.4(c), and 8.4(d).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE DONNA BARNES DUNCAN. Bar No. 329144. October 10, 2013. The D.C. Court of Appeals disbarred Duncan by consent, effective immediately.

IN RE LEROY E. GILES JR. Bar No. 379651. October 17, 2013. The D.C. Court of Appeals granted Giles's petition for reinstatement.

IN RE EDWARD N. MATISIK. Bar No. 463786. October 17, 2013. The D.C. Court of Appeals suspended Matisik for 60 days, with the additional requirements that before he is reinstated he must (1) prove his fitness to practice law and (2) make restitution in the amount of \$1,940, plus interest at the legal rate of 6 percent. While retained in three matters involving three separate clients, Matisik failed to provide competent representation and to serve his clients with skill and care, failed to represent his clients zealously and diligently and to act with reasonable promptness, failed to communicate with his clients and keep them reasonably informed, failed to communicate in writing the basis or rate of the legal fee, failed to withdraw from representation when impaired, and failed to return papers and property after termination of representation. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), 1.5(b), 1.16(a)(2), and 1.16(d).

Reciprocal Matters

IN RE ALLEN BRUFISKY. Bar No. 64956. October 17, 2013. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Brufsky for 91 days with fitness, effective immediately. In Florida, Brufsky admitted that he had engaged in a conflict of interest.

IN RE CHRISTOPHER M. JOHNS. Bar No. 433783. October 24, 2013. In a

reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Johns, *nunc pro tunc* to October 9, 2013. Johns had consented to disbarment in Maryland while facing allegations that he had misappropriated entrusted funds.

IN RE GLENN C. LEWIS. Bar No. 955500. October 17, 2013. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Lewis, effective immediately. In Virginia, Lewis was found to have violated rules relating to neglect, failure to communicate with a client, charging an unreasonable fee, misappropriation of entrusted funds, failure to respond to disciplinary authorities, a criminal act reflecting adversely on attorney's fitness, and dishonesty.

IN RE LEODIS C. MATTHEWS. Bar No. 284182. October 17, 2013. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Matthews for one year, stayed in favor of two years' probation with 30 days of actual suspension served with the same conditions imposed in California, effective immediately. In California, Matthews admitted that he had engaged in a conflict of interest.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE FRANK B. CEGELSKI. Bar No. 414766. October 10, 2013. Cegelski was suspended on an interim basis based upon discipline imposed in New York.

IN RE ALAN S. GREGORY. Bar No. 411664. August 2, 2013. Gregory was suspended on an interim basis pursuant to D.C. Bar R. XI, § 3(c), on the ground that he failed to respond to an order issued by the Board on Professional Responsibility in a matter involving an allegation of serious misconduct.

IN RE GARLAND H. STILLWELL. Bar No. 473063. October 21, 2013. Stillwell was suspended on an interim basis based upon discipline imposed in Maryland.

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.dcb.org/discipline and search by individual names.

IN RE JOHN B. BLANK. Bar No. 208660. On May 3, 2013, Connecticut's State-wide Grievance Committee reprimanded Blank by consent for neglecting a legal matter entrusted to him.

IN RE CHRISTOPHER B. SHEDLICK. Bar No. 1010480. On August 27, 2013, the Attorney Grievance Commission of Maryland reprimanded Shedlick for violations of rules relating to supervision of nonlawyer assistants, professional independence of a lawyer, and communications regarding a lawyer's services.

IN RE TODD L. TREADWAY. Bar No. 479233. On August 8, 2013, the Virginia State Bar Disciplinary Board publicly reprimanded Treadway by consent for failing to respond to a lawful demand for information.

IN RE MALIK J. TUMA. Bar No. 420616. On July 22, 2013, the Attorney Grievance Commission of Maryland reprimanded Tuma for failure to respond to Bar Counsel.

IN RE RACHEL L. YOSHA. Bar No. 423700. On January 16, 2013, the Supreme Court of Arizona reprimanded Yosha for violations of ethical rules relating to conduct prejudicial to the administration of justice, meritorious claims and contentions, and expediting litigation.

Informal Admonition Issued by the Office of Bar Counsel

IN RE HARRY TUN. Bar No. 416262. October 10, 2013. Bar Counsel issued Tun and informal admonition. While dealing, on behalf of a client, with a third party who was unrepresented by counsel, Tun gave advice to the unrepresented person even though there was a potential conflict of interest. Rule 4.3(a)(1).

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 at www.dcattorneydiscipline.org. 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.dccourts.gov/internet/opinionlocator.jsf.

From the President

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are supported by those charged. Indeed, unjustified and unnecessary arrests are often the first steps that lead young men of color down the path of the "redesigned" system of racial caste that Michelle Alexander has so aptly identified as "the New Jim Crow."

In response to these troubling reports, the Metropolitan Police Department (MPD) has said that the "arrest numbers reflect the increased presence of law enforcement often demanded by residents who want order restored in communities long considered neglected," *The Washington Post* reported in July. Police Chief Cathy L. Lanier pointed out that there are other variables that contribute to these racial disparities, including the "complex relationship" between race, poverty, education, and employment.

The Washington Lawyers' Commit-

tee has requested additional data from the MPD and is presently conducting a detailed study of the collateral consequences of arrests and convictions on jobs, housing, and eligibility for public benefits.

So what is the solution? There are no silver bullets and the answers are not simple. According to Rod Boggs, executive director of the Lawyers' Committee, "this issue continues to be a matter of urgent priority for the Lawyers' Committee and it will need the ongoing support and assistance of the pro bono bar in our city."

Part of the answer may be legislation that decriminalizes possession of marijuana, as has been proposed by D.C. Councilmember Tommy Wells, as well as a broad reexamination of our city's drug laws and arrest policies. The reality is that arrests of minority members of our community occur before lawyers normally become involved. Accordingly, as lawyers, we must broaden our remedial scope to support enhanced diversity training for police and, most important, expanded opportunities for quality education and gainful employment for the residents of all the wards of the District.

Reach Andrea Ferster at aferster@railstotrails.org.



ANNUAL JUDICIAL EVALUATIONS

Dear Colleague:

We urge you to participate in the annual evaluation of selected judges serving on the D.C. Court of Appeals and the Superior Court of the District of Columbia. Your voice truly matters in this process.

Completed evaluations are an important tool for the Chief Judges and the D.C. Commission on Judicial Disabilities and Tenure to use in maintaining and improving the administration of justice in the District of Columbia.

You are eligible to participate if:

- You appeared before one or more judges scheduled for evaluation (see http://www.dcb.org/judicial_evaluations.cfm); **and**
- Your appearance(s) took place between July 1, 2011 and June 30, 2013.

If you do not receive an invitation from Research USA, an independent vendor administering the survey, and you are eligible to participate, please request a link to the survey directly from Research USA at dcbjudiciaevaluation@researchusa.com.

Evaluations are due by 10 p.m. Eastern time on January 12, 2014.

Thank you for your participation.

Mary Ann Snow, Chair, D.C. Bar Judicial Evaluation Committee