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How Corporate Counsel Can Push Back on Outside Counsel Guidelines by Citing the Ethics Rules

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In recent years, clients have begun to insist that their corporate counsel sign Outside Counsel Guidelines ("OCGs") that restrict a lawyer from providing services to competitors of the client, even if the work is unrelated to the work being performed for the client and the lawyer has no confidential client information relevant to the work. Those OCGs have also begun to define the "client" as all subsidiaries, affiliates, or parent companies of the entity to which the lawyer's services pertain. Both trends restrict a lawyer from representing a host of potential clients in the future. How can outside corporate counsel push back?

The two trends cited above directly implicate ABA Model Rules of Professional Conduct 5.6, 1.7 and 1.9. By citing these Rules, and the restrictions they impose, corporate counsel may gain headway in negotiating more permissive OCGs.

Banning a Lawyer from Representing Client-Competitors Runs Afoul of ABA Model Rules 1.7, 1.9, and 5.6

ABA Model Rules 1.7 and 1.9 ("Rule 1.7" and "Rule 1.9") prohibit a lawyer from representations that pose a conflict of interest absent informed consent. Per Rule 1.7, most concurrent client conflicts can be overcome with the informed consent of all clients. Similarly, Rule 1.9 permits a lawyer to represent a client whose interests are materially adverse to a former client, provided she obtain informed consent. This is so because the Rules acknowledge that a client should have the "freedom" to select the lawyer of her choosing, and lawyers should enjoy professional autonomy. ABA Model Rule 5.6, Comment 1.

ABA Model Rule 5.6 ("Rule 5.6") prohibits a lawyer from entering into any post-employment non-compete agreements with her law firm because they infringe on a client's right to choose her lawyer and a lawyer's professional autonomy. The ABA has explained, "An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer." Rule 5.6 Comment 1; *see also* N.C. State Bar, Agreement for Division of Fees Entered Upon Lawyer's Departure from Firm, 2012 Formal Ethics Op. 12 (January 25, 2013) (a prohibition on restrictive covenants in a partnership, shareholder, operating, employment, or similar type agreement "protects the freedom of clients to choose a lawyer and promotes lawyer mobility and professional autonomy").

Courts, too, have upheld the notion that adverse business interests do not create ethical conflicts of interest under the disciplinary rules. *See, e.g., Curtis v. Radio Representatives, Inc.*, 696 F. Supp. 729, 736-37 (D.C. 1998) (holding simultaneous representation of competitors in different matters did not create a conflict of interest); ABA Formal Op. 05-434 (Dec. 8, 2004) at 140 (direct adversity under Rule

1.7 requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests).

OCGs that prevent a lawyer from representing any client competitor—whether true adversity exists or not—do the very thing Rule 5.6 prohibits. While a traditional non-compete is imposed on the lawyer by her firm, OGCs are non-competes in disguise being imposed on the lawyer by her client. Importantly, both non-competes have the same effect: they limit a lawyer's professional autonomy and limit the client's ability to choose a lawyer.

Defining the "Client" Expansively Implicates ABA Model Rules 1.7, 1.9, and 5.6

Similarly, OCGs that define the client to include all subsidiaries and affiliates of a company also implicate the Rules. ABA Model Rule 1.7, Comment 34 notes, "A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary… Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter."

Courts have held that the existence of an attorney-client relationship with one corporate affiliate does not create an attorney-client relationship with all corporate affiliates. *See GSI Commerce Solutions, Inc. v. BabyCenter, LLC*, 618 F.3d 204, 210 (2d Cir. 2010) (a lawyer who represents a corporation does not, by virtue of that representation, represent any constituent or affiliated organization); *Apex Oil Co. v. Wickland Oil Co.*, No. CIV-S-94-1499-DFLGGH, 1995 WL 293944, at *2 (E.D. Cal. Mar. 2, 1995) (holding that even though the entities at issue are co-subsidiaries managed by the same legal department, the co-subsidiaries are not the same client for the purpose of the current client conflicts rule). In evaluating whether or not a conflict exists, courts look to "the reasonableness of the client's belief that counsel cannot maintain the duty of undivided loyalty it owes a client in one matter while simultaneously opposing that client's corporate affiliate in another." *GSI Commerce Solutions, Inc., LLC*, 618 F.3d at 210; see also Anthony E. Davis and Noah Fiedler, *The New Battle Over Conflicts of Interest: Should Professional Regulators—or Clients—Decide What Is a Conflict?*, 24 No. 2 Prof. Law. 28 (June 14, 2017).

By agreeing to a more expansive definition of the client in OCGs, law firms give up the flexibility provided by the Rules. Moreover, such OCGs enable an individual client to harm competition by placing unnecessary restrictions on available legal representation.

Practical Tips for Negotiating and Managing OCGs

If presented with OCGs that define the client overbroadly or prohibit representation of competitors, you might take the position with your potential client that these restrictive agreements run afoul of the ABA Rules of Professional Conduct, namely Rules 1.7, 1.9, and 5.6, which caution against restrictive agreements that limit a client's freedom to select counsel of her choosing and a lawyer's professional autonomy. If the potential client refuses to modify OCGs, then consider the long-term implications of the representation. It may unduly burden your future practice or harm future clients. Being aware of the risks and assessing them at the outset will, at the very least, prevent headaches down the line.

Procedurally, consider implementing firm-wide rules that govern what terms your firm will accept in OCGs and having a designated management committee member negotiate all OCG terms. Having an established protocol for negotiating OCGs will reduce the need for the client relationship or billing partner to negotiate terms and potentially harm the relationship. In addition, make sure that a firm employee is keeping track of OCGs the firm agrees to in order to run additional as-needed conflict

checks, e.g., agreeing to represent a company and its subsidiaries alters the firm's conflict profile. That employee should also ensure compliance with Most Favored Nation ("MFN") agreements with existing clients, because agreeing to certain terms in OCGs may require the firm to offer similar terms to current clients under existing MFNs.

A majority of states have adopted rules that largely track the Model Rules, so we use them as guidance. *See* Alphabetical List of Jurisdictions Adopting Model Rules, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/. Before relying on specific rules cited above, be sure to check your jurisdiction's rules.

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