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Professional Perspective

Ethical Implications of Outside Counsel Guidelines

Amy E. Richardson, Hilary P. Gerzhoy, and Lauren E. Snyder,
Harris, Wiltshire & Grannis

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Contributed by Amy E. Richardson, Hilary P. Gerzhoy, and Lauren E. Snyder, Harris, Wiltshire & Grannis

Introduction

In recent years, Outside Counsel Guidelines have embraced an expansive definition of the "client" in representation agreements that includes subsidiaries, affiliates, or parent companies of the entity to which the lawyer's services pertain. They have also begun to 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.

Both trends have potentially deleterious implications for the ethics rules. By embracing expansive definitions of "client" and barring lawyers from working for client competitors, OCGs are in tension with two central philosophies underlying the Rules of Professional Conduct: a client should be able to choose his or her lawyer, and a lawyer should enjoy professional autonomy.

Outside Counsel Guidelines and ABA Model Rules 1.7 and 1.9

ABA Model Rule 1.7

ABA Model Rule 1.7 prohibits a lawyer from representing a client where that representation poses a conflict of interest. While a lawyer is precluded from advancing two or more adverse positions in the same litigation or other proceeding before a tribunal, other current client conflicts can be overcome by satisfying criteria delineated in 1.7(b).

Under Rule 1.7(a), a concurrent conflict of interest exists where, "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

The Rule is motivated by a desire to ensure that clients receive effective and unbiased representation. See comment 1 to Rule 1.7(a) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.")

Yet, Rule 1.7(b) explicitly contemplates that lawyers may nonetheless represent a client notwithstanding the existence of a concurrent conflict of interest provided that "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing."

The Rules provide that so long as clients give informed consent, a lawyer is free to represent multiple clients who are adverse, so long as they are not directly adverse in the same matter before the same tribunal. Doing so allows a client the freedom to choose the lawyer she thinks will best represent her interests.

ABA Model Rule 1.9

ABA Model Rule 1.9 states that a lawyer "who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent."

Comment 3 to Rule 1.9 explains that matters are "'substantially related' … if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Comment 3 explains that "[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation."

In ABA Formal Opinion 99-415, evaluating Rule 1.9, the Committee held that "only direct adversity of interests meets the threshold 'material adversity' sufficient to trigger the prohibitions established in Rule 1.9." Where there is "direct adversity

that is material to the new matter, the lawyer must determine whether it is permissible to seek the consent of one or both clients before he undertakes the new representation."

Just as Rule 1.7 permits a lawyer to represent a client with a concurrent conflict so long as the clients are not directly adverse in the same matter before the same tribunal and all clients give informed consent, Rule 1.9 permits a lawyer to represent a client whose interests are materially adverse to a former client, provided she obtain informed consent. As explained in the comments to Rule 5.6, this is so because clients should have the "freedom" to select the lawyer of their choosing.

OCGs that Run Afoul of Rules 1.7 and 1.9

Increasingly, OCGs now prohibit a lawyer from representing a client's competitors regardless of whether a true conflict of interest exists. Doing so is in direct tension with Rules 1.7 and 1.9 which contemplate that even in the presence of many conflicts of interest, a client can nonetheless give informed consent to the representation. OCGs that forbid a lawyer from representing any client competitors go beyond what the Rules prohibit. In doing so, they privilege the interests of the current client promulgating the OCGs over any future would-be clients of the lawyer.

The Comments to Rule 1.7 make clear that representing multiple clients who are economically adverse does not, by itself, create a conflict of interest. Comment 6 to Rule 1.7 states that "simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients." Comment 24 also provides that "[o]rdinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients."

Courts have upheld the notion that adverse business interests do not create ethical conflicts of interest under the disciplinary rules. See, e.g., the D.C. District Court's opinion in Curtis v. Radio Representatives, Inc. (holding simultaneous representation of competitors in different matters did not create a conflict of interest); see also the Supreme Judicial Court of Massachusetts' opinion in Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP (finding "that the simultaneous representation by a law firm in the prosecution of patents for two clients competing in the same technology area for similar inventions is not a per se violation of Mass. R. Prof. Conduct 1.7").

Particularly "[i]n a specialized industry served by few lawyers, those lawyers will often represent multiple business competitors" and this "increase[s] the likelihood that a lawyer may undertake a representation for one client that later turns out to be adverse to plans of another client that had not been disclosed or perhaps not even formulated when the representation began." D.C. Bar Legal Ethics Comm., Op. 356 (2010). However, those are risks that sophisticated clients may be willing to take and the ethics authorities "do not read the rules to discourage that freedom of choice by clients."

By prohibiting lawyers from representing competitors, many of whom fall precisely into the category contemplated by Comment 6 and Comment 24 to Rule 1.7, OCGs create false conflicts of interest where no true adversity exists and run contrary to the core principle that clients should enjoy freedom in selecting their counsel. They are especially problematic in niche practice areas, where expertise is critical, but the number of trained lawyers is limited.

OCGs and Rule 1.6

OCGs that restrict counsel from representing competitors may require a lawyer to reveal information about existing or prospective clients that would otherwise be protected by their ABA Model Rule 1.6 duty of confidentiality in order to take on the representation. In recent years, OCGs have required client consent before a lawyer is permitted to represent a client competitor. That requires a lawyer to disclose the identity of a prospective client to her current client even if the representation poses no actual conflict under Rule 1.7.

By way of example, assume counsel represents insurance Company X in a contract case and Company X has OCGs requiring consent to represent its competitors. Company X's OCGs would prohibit counsel from representing insurance Company Y in a federal investigation without revealing Company Y's identity to Company X even though the representation of Company Y does not pose a Rule 1.7 conflict. However, the release of that information could be harmful to Company Y. See Hope A. Comisky & Jessica K. Davis, "Corporate Outside Counsel Policies–Who Do You Represent and Who Can You Represent?" ("By requiring a law firm to obtain the consent of a corporate client before representing a client deemed a

'competitor,' the law firm is required to disclose the identity of another client even where the services are wholly unrelated and no actual conflict exists.")

Pursuant to Rule 1.6, subject to limited exceptions, "a lawyer shall not reveal information relating to the representation of a client." Courts in different jurisdictions have recognized that disclosure of a client's name could run afoul of Rule 1.6. For example, the D.C. Court of Appeals has recognized that "[d]isclosure of a client's identity falls within the scope of Rule 1.6(a)(1)"—namely, "a lawyer shall not knowingly reveal a confidence or secret of the lawyer's client"—and that revealing a client's identity could run afoul of Rule 1.6 if the client requests her identity remain confidential or disclosure would be detrimental to the client. *In re Hager*, 812 A.2d 904, 920 (D.C. 2002), reinstatement granted, 878 A.2d 1246 (D.C. 2005).

Similarly, the New York Bar Association's Committee on Professional Ethics held that "the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless constitute 'secrets' of the client which the lawyer may not disclose" absent the client's express consent. Opinion 720 (1999) (analyzing the similar Rule 1.6 in New York). Should Company Y decline to give consent to reveal its identity to Company X, Company X's OCG would force counsel to decline the representation even though the Rules governing conflicts no restriction.

The Risks of Defining the Client to Include All Affiliates and Subsidiaries

Similarly, OCGs that define the client to include all subsidiaries and affiliates of a company run counter to the Rules. The Comments to Rule 1.7 explicitly note that "[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 … " See also Comment 21 to Rule 1.7 of the D.C. Rules of Professional Conduct ("[T]he 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.").

Many courts have held that the existence of an attorney-client relationship with one corporate affiliate does not create, by default, an attorney-client relationship with all corporate affiliates. See *GSI Commerce Solutions, Inc. v. BabyCenter, LLC* (restating the general proposition that a lawyer who represents a corporation does not, by virtue of that representation, represent any constituent or affiliated organization).

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." The ABA's Committee on Ethics and Professional Responsibility stated in ABA Formal Opinion 95-390 that whether a lawyer represents a corporate affiliate of his client … depends … upon the particular circumstances."

Comment 34 to Rule 1.7, addressing the organization as client, explains that there can be circumstances where "there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates." Nonetheless, trends in OCGs have taken that "understanding between the lawyer and the organizational client" too far. By agreeing to more limiting OCGs, law firms give up the flexibility provided by the Rules.

OCGs that Function Like Non-Competes Violate Rule 5.6

ABA Model Rule 5.6 and its Comments emphasize that clients should enjoy the "freedom…to choose a lawyer" and that lawyers should enjoy "professional autonomy." Rule 5.6 prohibits a lawyer from entering into a post-employment non-compete agreement with her law firm as a condition of employment precisely because a non-compete infringes on a client's right to choose her lawyer, and a lawyer's professional autonomy. "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." OCGs that prevent a lawyer from representing any client competitor—whether true adversity exists or not—and that define the "client" expansively, do the very thing Rule 5.6 prohibits.

Rule 5.6 prohibits post-employment non-competes "[b]ecause they limit a client's freedom in choosing a lawyer and a lawyer's professional autonomy." D.C. Bar Legal Ethics Comm., Op. 368 (2015) (citing Neuman v. Akman; see also Stevens v. Rooks Pitts & Poust (stating that the "underlying public policy" of Rule 5.6 is "ensuring a client's choice of counsel"). The Ohio Board of Professional Conduct recently held that a lawyer cannot agree to a settlement offer that includes a

prohibition on soliciting clients with similar claims because a lawyer "is ethically prohibited from participating in the acceptance of an offer that includes a provision that restricts his or her right to practice." Ohio Board of Prof'l Conduct, Advisory Op. 2019-04 (2019) (relying on Rule 5.6); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381 (1994) ("[R]estricting a lawyer from ever representing one whose interests are adverse to a former client would impermissibly restrain a lawyer from engaging in his profession.").

Rule 5.6 has been interpreted expansively to prohibit things like financial disincentives to leave a firm, including disincentives to take clients. See the Oregon Court of Appeals' decision in Gray v. Martin (agreement precluding withdrawing partner from receiving certain partnership benefits if he resumed active practice of law in designated counties violated Oregon's version of 5.6); see also Conn. Bar Ass'n Prof'l Ethics Comm., Op. 89-26 (1989) (partnership agreement imposing financial disincentives not related to benefits upon retirement upon departing partner who subsequently competes with former firm violates Rule 5.6); D.C. Bar Legal Ethics Comm., Op. 325 (2004) (agreement to distribute earned but undistributed profits only to partners who continued to practice with post-merger firm did not fall within retirement exception of Rule 5.6(a)); N.C. St. Bar Council, Ethics Op. 2008-08 (2008) (firm could not require departing attorney to pay firm 70% of fees in matters he took with him); Ariz. St. Bar Rules of Prof'l Conduct Comm., Op. 09-01 (2009) (firm could not require associate to pay $3,500 marketing fee to firm for each client or prospective client she represented upon her departure).

Both lawyers and clients benefit from Rule 5.6's bar on restrictive covenants, as explained by the ABA ethics committee:

> Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status. [Furthermore,] a general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status.

ABA Comm. on Prof'l Ethics, Formal Op. 300 (1961) (quoting ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 266 (1945)).

In a 1987 Comment, the District of Columbia Bar's Legal Ethics Committee stated:

> While a law firm undoubtedly has a legitimate interest in maintaining its clients, we are hesitant to announce views that unduly restrict the ability of lawyers to change relationships in order to advance their careers, or that prevent or unduly hinder clients from obtaining legal representation from attorneys of their own choosing who may have formed new associations.

D.C. Bar Legal Ethics Comm., Op. 181 (1987), reprinted in 115 Daily Wash. L. Rptr. 1141, 1146 (June 4, 1987); see also Neuman v. Akman ("[T]he bar on restrictive covenants among lawyers [is] a protection for both clients and lawyers"); D.C. Bar Legal Ethics Comm., Op. 241 (1993) (same).

As the authorities cited above explain, Rule 5.6 prohibits a lawyer from signing non-competes or other restrictive agreements because they not only restrict a lawyer's professional autonomy, but they also unduly hinder the ability of a client to choose her lawyer. OCGs that define "client" in an over-expansive way, and that ban a lawyer from representing any client competitor whether or not a true conflict exists, are simply another form of a non-compete agreement, this time generated by the client. By effectively preventing a firm from representing willing clients at the outset of the representation, these OCGs eviscerate Rule 5.6.

Conclusion

Law firms should resist OCGs that seek to impose definitions of "client" and "conflicts of interest" beyond those imposed by the Rules. Expanding the definition of either term so as to encompass more than is contemplated by the Rules is contrary to one of the central tenets of the Rules: clients should enjoy the freedom to choose their lawyers, and lawyers should enjoy professional autonomy.