A Look At DC Proposals To Curb Outside Counsel Guidelines

By **Deepika Ravi and Lauren Snyder** (January 5, 2021)

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In recent years, clients' outside counsel guidelines have gained attention, in part due to potential tension between lawyers' obligations under rules of professional conduct and obligations imposed by these guidelines.

In May 2019, the District of Columbia Rules of Professional Conduct Review Committee requested public comments on issues raised by some outside counsel guidelines so that it could implement changes to the D.C. Rules of Professional Conduct to address those issues. It received comments from academics, private practitioners, an in-house counsel, more than two dozen law firms, other groups or associations of lawyers, and two insurers of lawyers, but it did not receive any client comments.[1]

The top issues raised were concerns about a broad definition of the client and corresponding conflicts of interest, demands that could require a lawyer to breach her duty of confidentiality, and broad indemnification requirements that would exceed those covered by a lawyer's malpractice insurance.

In response, the committee issued proposed amendments to the D.C. rules on Nov. 12, 2020, making it the first jurisdiction in the nation to propose amendments to address issues raised by outside counsel guidelines. The committee is also seeking additional comments, which are due by Feb. 11.

Here, we explain the committee's proposals and highlight their practical impacts. Interested parties are encouraged to review the committee's report and consider submitting comments on these and other issues raised by outside counsel guidelines.

Who is the client?

Comments highlighted potentially problematic provisions requested by clients concerning the definition of the "client." Law firms, for example, highlighted the following three issues: (1) provisions that expand the definition of the "client" to include all affiliates, even future affiliates or every affiliate listed on a 10-K; (2) provisions that prevent representation of a client's competitors; and (3) provisions that redefine conflicts of interest, particularly with emphasis on issues that could arise at some time in the future.[2]

Based on comments received, the committee has determined that an overly broad definition of the client "threatens two central tenets of the D.C. Rules — the ability of a would-be client to engage her choice of competent counsel and the professional autonomy of practicing lawyers."[3] In response, the committee recommends amending Comment 25 to Rule 1.7, Conflict of Interest: General Rules, and Rule 5.6, Restrictions on Right to Practice, as well as Comment 4 to Rule 5.6.

In particular, the committee recommends that:

> the D.C. Rules be amended by removing Comment [25]'s open-ended invitation to corporate clients to designate the parent and all its affiliates as the 'client,' and

> revising Rule 5.6 and the comment thereto to provide that the provisions expressly set forth in the D.C. Rules establish the maximum permissible scope of conflicts restrictions.[4]

This would limit the identity of the client for conflicts purposes to entities that the lawyer is actually representing, plus any affiliates that function as the alter ego of such entities and any affiliates whose confidential information has been imparted to the outside counsel "in circumstances in which the [affiliate] reasonably believed that the lawyer was acting as the [affiliate's] lawyer as well as the lawyer for the organization client."[5]

These changes would make it a violation of the D.C. rules for a lawyer to agree to outside counsel guidelines that define the "client" more broadly than the entity the lawyer actually represents, as well as alter egos or affiliates that believe the lawyer was representing them.[6] The committee explained, however, that it was "interested in receiving suggestions as to other, possibly less far-reaching, approaches" to limit conflicts of interest.[7]

This revision is a significant change that will require lawyers and in-house counsel to reexamine their outside counsel guidelines. Previously, Comment 25 to Rule 1.7 presented an "open-ended invitation to corporate clients to designate the parent and all its affiliates as the 'client.'"[8] That comment is now being significantly limited, as described above, with the stated goal to provide "free choice of counsel" by limiting the definition of who the client is.

Despite what outside counsel guidelines can explicitly prohibit, however, lawyers and their corporate clients must have discussions about who the client is. The report even notes that outside counsel's objectively reasonable conclusion that an agreement with a client as to which affiliates are to be considered within the definition of "client" is permissible would constitute a safe harbor in terms of potential discipline for violating the D.C. rules.[9]

How broad can indemnification provisions be?

Comments identified outside counsel guidelines that impose broad indemnification provisions on lawyers or law firms, including indemnification of: "(1) clients for matters not resulting from the lawyers' negligence, recklessness, breach of contract, or willful misconduct; (2) non-clients such as officers, directors, or employees of the client; or (3) clients for acts of parties outside the lawyer's control."[10]

Commenters identified these provisions as potentially problematic because they make lawyers responsible for errors or omissions beyond those imposed by statutes or common law and because malpractice insurance will not cover them.[11] They also create potential conflicts of interest among the client, corporate officers and the lawyer, and could cause lawyers to be "more hesitant and cautious in their advice to clients."[12]

In response to such provisions, the committee has recommended that Rule 1.8(g), Conflict of Interest: Specific Rules be amended to:

> prohibit a lawyer from requesting or agreeing to any indemnification provision that holds a lawyer responsible for errors and omissions for which neither statutes nor common law impose liability, unless broader responsibility is required by law (e.g., certain government procurement contracts).[13]

This amendment would make it a violation of the D.C. rules for an attorney to agree to

these broad indemnification provisions.

This change essentially means that lawyers cannot agree to indemnify clients for conduct that would not be covered by malpractice insurance.

While this may appear to protect lawyers, it also keeps the cost of legal representation lower for all clients. Additionally, it allows lawyers to more freely offer legal advice, as one law firm comment suggested that overbroad indemnification clauses may cause lawyers to limit their advice for fear of incurring additional liability.[14]

Who owns work product?

Comments noted that some outside counsel guidelines state that the client will own its lawyers' work product, and some state that a lawyer may not even keep a copy of its own work product. Other outside counsel guidelines require that a lawyer not make any use of any information — including nonconfidential information such as legal theories — gained in connection with representation of a client when representing any future clients.

The committee cited a consolidated comment from 26 large law firms noting that it is "standard practice for lawyers to retain a copy of the client file, including their work product, and to use that work product as a resource for other clients and matters (subject, of course, to their confidentiality obligations to current and former clients."[15]

The committee also pointed out that existing D.C. rules already protect confidentiality of client information and prohibit a lawyer from using such information to a client's disadvantage, for the lawyer's benefit, or for the benefit of a third party.[16] However, the committee noted that this issue is not squarely addressed by the D.C. rules and is addressed only by implication in Footnote 2 to D.C. Legal Ethics Opinion 250, which provides that a lawyer must bear the cost of copying the client file if he or she wishes to retain a copy of the file.[17]

In response, the committee has recommended that D.C. Rule 1.16, Declining or Terminating Representation, be amended to make clear that a lawyer may retain a copy of former clients' files.[18] The committee also recommended amending Comment 41 to Rule 1.6, Confidentiality of Information, to clarify that a lawyer is not only permitted, but ethically obligated, to use "growing knowledge of the law on behalf of each successive client."[19]

This recommendation would align with existing D.C. ethics opinions concluding that a legal theory is not a client secret, and that lawyers have an ethical obligation to use "growing expertise to represent clients to the best of their ability."[20]

This change cuts against what some outside counsel comments described as a belief by some clients that "if they pay for an outside lawyer's creation of a document or acquisition of knowledge, that document or information should belong to them — just as a purchased machine, building, or vehicle belongs to them."[21]

Importantly, the proposed amendment to Rule 1.16 would not require a lawyer to retain a copy of his client file over the client's objection — but if the lawyer wishes to do so, the amendment would give the lawyer an ethical hook to justify retaining a copy of the file over the client's objection.

In contrast, the proposed amendment to Rule 1.6, Comment 41, would impose an affirmative obligation on lawyers to use nonconfidential knowledge gained from a prior

representation in future representations.

The practical effect of this change is twofold — lawyers can use growing expertise to build their practice, and clients will be able to hire attorneys entitled to use their specialized and evolving expertise to efficiently represent their clients.

Can clients amend outside counsel guidelines unilaterally?

The committee briefly noted that "some OCGs reserve to the client the right to alter the OCGs unilaterally."[22] The committee has recommended that Rule 1.16, Declining or Terminating Representation, be amended to clarify that, if a lawyer has agreed that his client may unilaterally change the terms of representation, and if a client makes such a change that the lawyer is unwilling to accept, the lawyer may withdraw from the representation.[23]

The proposed amendment would supplement existing rules permitting withdrawal where continued representation would violate the D.C. rules or other law, or where "obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult."[24]

The report includes a relatively short analysis of this issue and the proposed amendment, perhaps because the effect of this amendment is not as far-reaching as the other amendments proposed by the committee.

The proposed amendment to Rule 1.16 does not prohibit an attorney from agreeing to let her client unilaterally amend the terms of the representation, and as the committee points out, existing Rule 1.16 already permits a lawyer to withdraw from a representation in certain circumstances.

So, as a practical matter, the effect of the proposed amendment is merely to clarify that among other circumstances permitting withdrawal, a lawyer may withdraw if, having agreed that a client may exercise this power, the client does so in a manner to which the lawyer is unwilling to consent.

What other issues do outside counsel guidelines raise?

The committee considered three additional issues raised by outside counsel guidelines, on which it did not propose any amendments to the D.C. rules in its report.

First, the committee briefly discussed some clients' requirements that a law firm advise the client or obtain client consent before (1) representing a competitor of the client in an unrelated matter, or (2) accepting representation of a prospective client that is not a competitor of the lawyer's current client, where the issue involved may be of interest to the client. The committee determined that these client requests are covered by existing D.C. Rules 1.6 and 1.18 and did not propose any amendments to the rules.[25]

Second, the committee did not recommend any amendments in response to some clients' requirements that outside counsel comply with a client's internal code of conduct. The committee did, however, "urge ... clients to limit requests along these lines to specific elements of the client code of conduct that appropriately and consistently can be applied to outside counsel."[26]

Third, the committee did not propose any amendments to the D.C. rules addressing some

clients' requests to audit lawyers' internal files, but cautioned both lawyers and clients that any such outside counsel guideline provisions must conform to the D.C. rules' confidentiality requirements.[27]

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[1] D.C. Rules of Professional Conduct Review Committee, Draft Report Proposing Changes to the D.C. Rules of Professional Conduct Relating to Client-Generated Engagement Letters and Outside Counsel Guidelines 4 (Nov. 12, 2020), https://www.dcbar.org/getmedia/47f95789-27ca-4369-bbf4-3cab2097c32e/Draft-Report-on-OCGs-for-comment-11-12-2020-FN ("Report").

[2] Id. at 11.

[3] Id. at 10.

[4] Id. at 12.

[5] Id. at 12-13 (alteration in original) (citations omitted).

[6] Id. at 13.

[7] Id.

[8] Id. at 12.

[9] Id. at 13.

[10] Id. at 14.

[11] Id. at 15.

[12] Id. See also Maryland State Bar Ass'n, Ethics Docket No. 2010-03 (2009).

[13] Report at 16.

[14] Id.

[15] Id. at 17.

[16] Id.

[17] Id. at 18 (citing D.C. Bar Legal Ethics Comm., Op. 250 n.2 (1994)).

[18] Report at 20.

[19] Id.

[20] D.C. Bar Legal Ethics Comm., Op. 175 (1986); see also D.C. Bar Legal Ethics Comm., Op. 275 (1997).

[21] Report at 4.

[22] Id. at 21.

[23] Id.

[24] Id. (quoting D.C. Rule 1.16).

[25] Id. at 13.

[26] Id. at 21.

[27] Id.