DC Bar - Ethics Opinion 391

Lawyers and Law Firms That Contemplate Agreeing with Governments to Conditions That May Limit or Shape Their Law Practices

The committee has received inquiries from bar members related to prospective agreements between a government and lawyers or law firms with conditions that may limit or shape their law practices. Lawyers and law firms must consider whether such conduct will raise issues under the District of Columbia Rules of Professional Conduct. These could include conflicts of interest for current or future engagements adverse to that government, improper restrictions on the lawyers' right to practice, and interference with the lawyers' professional independence. If a conflict is found to exist, obtaining a valid waiver may be difficult.

Lawyers acting on behalf of a government in seeking, negotiating, or implementing such agreements also must examine the Rules of Professional Conduct, particularly those regarding restrictions on lawyers' right to practice and lawyers' professional independence.

Applicable Rules

- Scope
- 1.3 (Diligence and Zeal)
- 1.7 (Conflicts of Interest)
- 1.10 (Imputed Disqualification: General Rule)
- 1.16 (Declining or Terminating Representation)
- 5.4 (Professional Independence of a Lawyer)
- 5.6 (Restrictions on Right to Practice)

Discussion

We see at least three elements of the D.C. Rules of Professional Conduct that should be examined by lawyers or law firms that contemplate entering into agreements with a government with conditions that may limit or shape their law practices. These are (1) conflicts of interest for current or future matters adverse to that government, (2) improper restrictions on a lawyer's practice, and (3) interference with a lawyer's professional independence. The second and third elements also should be reviewed by lawyers who act on behalf of the government in seeking, negotiating, or implementing such agreements.

Potential Conflicts of Interest

A lawyer must represent her clients "zealously and diligently."[1] This includes the right of each client to conflict-free representation,[2] because a conflicted lawyer may be tempted, consciously or otherwise, to pull her punches in advocating for or otherwise representing her client.

Conflicts of interest are not limited to adversity between a lawyer's clients. A lawyer's own financial, personal, or other interests also may create a conflict (sometimes called a "personal interest" conflict) between her clients and her.[3] For this reason—

- a lawyer shall not represent a client with respect to a matter if . . . the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.[4]

By way of example, a lawyer seeking employment with the office that is prosecuting her client has a conflict of interest under this rule.[5]

A personal interest conflict of a single lawyer is not imputed to other lawyers in her firm, *unless* the conflicted lawyer's interest "present[s] a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm."[6] Where every lawyer in a firm is affected, however, the non-imputation rule does not apply.

A lawyer may proceed despite the existence of a such a conflict only if two conditions are satisfied: First, the lawyer must "reasonably believe" that she can "provide competent and diligent representation to each affected client."[7] This is an objective test.[8] Second, the lawyer must "disclose the possible conflict to his client"[9] and receive the client's "informed consent" to the conflict "after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[10]

We recognize that a government typically comprises multiple agencies and that in some circumstances, such a structure may mean that a conflict with one agency need not be measured against the government as a whole.[11] The current position of the U.S. Department of Justice, however, is that a private lawyer's adversity to any element of the federal government constitutes a conflict with the entire executive branch, if not the entire U.S. government.[12]

A major concern of this opinion is how a firm that enters into an agreement with conditions that may limit or shape their law practice would deal with a current or proposed matter in which its client's position is directly adverse to a program or policy in which the government in question has a strong interest.

A firm facing such a conflict ordinarily has three options. It can (1) seek a client

waiver if it reasonably believes that the conflict will not impair the representation of that client, (2) decline (or withdraw from) the representation,[13] or (3) remove the cause of the conflict.[14]

As for the waiver option, if a law firm does not know what actions on their part might trigger adverse government action, the firm may be unable to provide the requisite "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[15] That would mean, in turn, that clients could not provide the informed consent that is a prerequisite to a valid waiver. Similarly, if the precise nature and breadth of the commitments made by a law firm are unclear or are subject to change unilaterally by the government, the firm cannot be confident of its ability to remove the cause of the conflict because the conflict may reignite with little or no notice.

Given the foregoing, any lawyer or law firm that contemplates entering into an arrangement of this nature must examine whether the arrangement would prevent the firm from providing conflict-free representation to clients—existing and new—who are adverse to the relevant government.

Restrictions on a Lawyer's Right to Practice

Agreements with conditions that may limit or shape a lawyer's practice may implicate Rule 5.6(b), which prohibits lawyers from making agreements "in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between parties."[16]

This jurisdiction long has taken a broad view of this prohibition and the closely related restriction in Rule 5.6(a) regarding post-employment restrictions on a lawyer's practice.[17] A 2002 decision of the D.C. Court of Appeals stressed the need to prohibit conditions whose effect is to limit the access of future clients to lawyers of their choosing—particularly "'lawyers, who by virtue of their background and experience, might be the very best available talent to represent [such] individuals.'"[18] In 2021, the Court of Appeals ruled that in addition to violating the Rules of Professional Conduct, agreements prohibited by Rule 5.6 are void as against public policy.[19]

Importantly, Rule 5.6 applies not only to a lawyer who agrees to limit her practice, but to any lawyer who makes such an agreement (i.e., to lawyers on both sides of such a negotiation). Further, a lawyer who induces or assists another lawyer in violating the Rules of Professional Conduct is herself guilty of a violation.[20] Thus, a lawyer who represents the government in negotiating such an agreement also should consider this rule.

Professional independence of a lawyer

Rule 5.4(c) provides that a lawyer "shall not permit a person who recommends . . . the

lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such services." At least one ethics opinion has concluded that this rule prohibits not only acceding to a third party's direction as to the services to be provided to a client, but also to taking third-party direction as to whether to accept or decline a particular prospective client:[21] "[B]y agreeing in advance to provide a legal service to an unknown individual with unknown legal needs, a lawyer improperly places limitations on the exercise of his or her independent professional judgment as to whom he or she will accept as a client and what legal services will be provided."[22] Thus, if an official of a government with which a lawyer has made an agreement of the type discussed here recommends the lawyer to a prospective client and then directs the lawyer to take on that client or specifies what services the lawyer may or may not provide to that client, the lawyer must examine whether following such direction would violate this rule.

Conclusions

Lawyers and law firms that contemplate agreeing with a government to conditions that may limit or shape their law practices must examine whether such conduct will create issues under the Rules of Professional Conduct. This might include conflicts of interest for engagements (existing or new) adverse to that government, improper restrictions upon the lawyers' right to practice, or interference with the lawyers' professional independence. If a conflict is found to exist, obtaining a valid waiver may be difficult. Lawyers who represent the government in seeking, negotiating, or implementing such agreements also must consider their responsibilities under the Rules of Professional Conduct.[23]

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1. Rule. 1.3.

2. *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *see* Preventing Conflicts of Interest Between the Department of Justice and Private Counsel Engaged by the Government, Memorandum from the Deputy Attorney General to All Component Heads [of the Department of Justice], at 1 (May 9, 2025) (noting that "like any client, the United States is entitled to the conflict-free representation of its attorneys.") (https://www.justice.gov/dag/media/1399976/dl?inline).

3. *E.g.*, *In re Evans*, 902 A.2d 56 (D.C. 2007) (conflict created by lawyer's personal financial interest).

4. D.C. Rule 1.7(b)(4).

5. D.C. Legal Ethics Opinion 210 (1990), *clarified*, D.C. Legal Ethics Opinion 367 (2014).

6. Rule 1.10(a)(1).

7. Rule 1.7(c).

8. *Id*. cmt. 30.

9. D.C. Legal Ethics Opinion 367 (2014).

10. Rule1.7(c), cmt. 30

11. *See, e.g.*, D.C. Legal Ethics Opinion 367 (2014).

12. Preventing Conflicts of Interest Between the Department of Justice and Private Counsel Engaged by the Government, Memorandum from the Deputy Attorney General to All Component Heads [of the Department of Justice], at 1 (May 9, 2025) (announcing policy of not engaging "private counsel who contemporaneously are directly adverse to the United States"; citing ABA Model Rule of Professional Conduct 1.7(b)(4)) (https://www.justice.gov/dag/media/1399976/dl?inline).

13. *See* Rule 1.16(a)(1) & cmt. 1.

14. D.C. Legal Ethics Opinion 367 (2014).

15. Rule 1.7(c)(1).

16. *See* Rule. 5.6(b). The ABA Model Rule speaks of "the settlement of a *client* controversy," ABA Model R. Prof. Conduct r. 5.6(b) (emphasis added), which this is not. The D.C. rule is broader, though—addressing settlements of controversies between *parties*. A comment to the D.C. rule speaks of "settling a claim on behalf of a client," Rule 5.6 cmt. 3, but another provision states that although the comments "are intended as guides to interpretation, . . . the text of each Rule is controlling." D.C. Rules, Scope ¶ 6. Furthermore, the D.C. Bar, in proposing what became the D.C. Rules of Professional Conduct, deleted the modifier "private" from the phrase, "controversy between private parties," which at that time appeared in Model Rule 5.6(b). Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar 210 (Nov. 19, 1986). The Bar stated by way of explanation that it "saw no reason why paragraph (b) should apply only to settlements involving private parties." *Id*.

17. *E.g.*, *Jacobson Holman, PLLC v. Gentner*, 244 A.3d 690 (D.C. 2021); *In re Hager*, 812 A.2d 904, 918 (D.C. 2002); *Neuman v. Akman*, 715 A.2d 127 (D.C. 1998); D.C. Bar Ethics Op. 335 (2006) (Rule 5.6(b) violated by settlement provision restricting plaintiff's lawyer from disclosing public information).

18. *In re Hager*, 812 A.2d 904, 918 (D.C. 2002) (quoting ABA Formal Opinion 93-371 (1993)); *accord Jacobson Holman*, 244 A.3d at 700-03; *Neuman*, 715 A.2d at 130

(stressing need to "protect future clients against having only a restricted pool of attorneys from which to choose" (quoting 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 5.6:201, at 824 (2d ed. Supp. 1997))).

19. *Jacobson Holman*, 244 A.3d at 702.

20. Rule 8.4, cmt. 2.

21. Ohio Bd. Prof. Conduct Op. 2019-7 (Aug. 2, 2019) (https://ohioadvop.org/wp-content/uploads/2019/12/Adv-Op-2019-07-Final.pdf).

22. *Id*.

23. It has been suggested that if an agreement is the product of coercion, that fact might constitute a complete or partial defense to a charge of violating the Rules of Professional Conduct. Because our purview is limited to questions arising under the D.C. Rules of Professional Conduct, this opinion does not address those issues.