District of Columbia
Court of Appeals

No. M287-24

BEFORE: Blackburne-Rigsby, Chief Judge, and Beckwith, Easterly, McLeese, Deahl, Howard, and Shanker, Associate Judges.

O R D E R

(FILED – May 14, 2025)

In December 2024, the court sent out for public comment a group of proposed amendments to the Rules of Professional Conduct (RPC) and the explanatory comments to those rules. The amendments were proposed by the D.C. Bar and primarily relate to issues raised by client demands in engagement letters. In sum, the proposed amendments would (1) make it ethically impermissible for a lawyer to enter into an engagement or similar agreement that restricts the lawyer's right to practice beyond the limitations imposed by the conflict rules; (2) make it ethically impermissible for a lawyer to agree to be responsible for errors or omissions beyond the liability imposed by statutes and the common law; (3) add comments indicating that lawyers can retain copies of client documents, as long as the lawyers maintain confidentiality of those documents; (4) add a comment stating that lawyers cannot ethically agree to certain restrictions on their future use of information gained during the representation of a client; and (5) permit lawyers to ethically withdraw from a representation if the lawyer has agreed that the client can make unilateral changes to the engagement agreement, the client does so, and the lawyer does not consent to the change.

The court received two comments. Two law professors who teach in the area of professional responsibility opposed the proposed amendments relating to restrictions on practice, arguing that (1) clients can have legitimate reasons for asking lawyers to agree to such restrictions; (2) such agreements have not been shown to actually interfere with the ability of clients to obtain legal representation; and (3) the proposed amendments are overbroad. The Law Firm General Counsel

Roundtable (LFGC Roundtable) submitted comments in favor of the proposed amendments.

The court has decided to adopt in part the amendments proposed by the D.C. Bar. Specifically, the court adopts the following amendments: (1) a revised comment [25] to Rule 1.7, providing that agreements precluding representation of other clients in circumstances that do not preclude representation under the RPC do not expand the scope of the RPC; (2) a new comment to Rule 5.6 noting concerns that can be raised by such agreements; (3) with minor revisions, the proposed amendment to Rule 1.16(d) and a new comment to that rule indicating that lawyers can ethically retain copies of client documents, as long as the lawyers maintain confidentiality with respect to those documents; (4) new language in Rule 1.6(b) clarifying that client "secrets" "generally does not refer to legal knowledge or legal research, to knowledge the lawyer has obtained about the regulatory environment in which a client operates, or to information that is generally known in the local community or in the trade, field, or profession to which the information relates;" and (5) a new comment to Rule 1.6 explaining that agreements restricting a lawyer's use of information obtained during the course of a representation have the potential to raise concerns about the ability of clients to obtain lawyers and the ability of lawyers to represent other clients competently and zealously

Clean and redlined versions of the RPC and comments as amended are included below. The amendments will go into effect September 15, 2025.

Restrictions on the right to practice. The D.C. Bar proposed amendments to Rule 5.6 and comments to Rules 1.7 and 5.6, relating to certain agreements to restrict practice beyond the limitations imposed by the conflict rules. The court agrees with an aspect of the proposed amendments. Current comment [25] to Rule 1.7 indicates that an agreement between a lawyer and a client can expand the scope of the ethical prohibitions against conflicts of interest. The court is not persuaded that scope of the RPC's restrictions on conflicts of interest should be subject to expansion by private agreement to make conduct unethical even though that conduct is not actually a conflict of interest as the RPC define that concept. The court therefore agrees that comment [25] should be amended to eliminate that approach. Specifically, the court adopts the following revised comment [25], to replace the existing comment: "Agreements between a lawyer and a client precluding representation of other clients in circumstances that do not preclude representation under R. 1.7 through 1.12 will not expand the scope of those rules."

On the other hand, the court is not persuaded that the RPC should broadly make unethical any engagement or similar agreement that restricts the lawyer's right to practice beyond the limitations imposed by the conflict rules. First, the comment from the law professors persuasively indicates that such agreements can sometimes be reasonable. Second, as far as the court is aware, no other jurisdiction has enacted a comparable ethical rule. Third, the court is concerned about the breadth of the proposed language. For example, the proposed language seemingly would make it unethical for a lawyer to agree to work solely on behalf of single client for a given period. The court therefore declines to adopt remainder of the proposed amendments to the text of Rule 5.6.

The court does, however, acknowledge the possibility that some agreements restricting the ability of a lawyer's right to practice could unduly interfere with the general ability of clients to obtain lawyers or lawyers' ability to engage in public service or could undermine the integrity of the profession. The court therefore adopts a revised version of the proposed new comment [4] to Rule 5.6: "Although a lawyer may agree to work exclusively on behalf of a single client for a given period, in light of the strong policy in favor of providing a free choice of counsel, *see, e.g.*, *Jacobson Holman PLLC v. Gentner*, 244 A.3d 690, 700-03 (D.C. 2021), outside of such an exclusive relationship, a lawyer should not agree to restrictions a client seeks to place on the lawyer's ability to represent other individuals or entities whose representation is not otherwise precluded by these rules if those restrictions would unduly interfere with the general ability of clients to obtain lawyers or lawyers' ability to engage in public service or would undermine the integrity of the profession."

Agreements by lawyers to be responsible for errors or omissions beyond the liability imposed by statutes and the common law. The D.C. Bar proposed an amendment to Rule 1.8(g) that would make it ethically impermissible for a lawyer to agree to be responsible for errors or omissions beyond the liability imposed by statutes and the common law. The court is not persuaded, however, that an adequate case has been made in support of the proposed amendment. Both the D.C. Bar Report and the comment from LFGC Roundtable indicate that insurers will not give malpractice insurance to cover the additional liability that would be contemplated by such agreements. If that is true, lawyers presumably will simply not be willing to enter into such agreements. Neither the D.C. Bar Report nor the LFGC Roundtable's comment identifies a specific case in which a lawyer or law firm agreed to such a provision.

Retention of copies of client documents. With minor revisions, the court adopts the proposed amendment to Rule 1.16(d) and a new comment to that rule indicating that lawyers can ethically retain copies of client documents, as long as the lawyers maintain their duties of confidentiality. The court agrees that it should not be unethical to retain copies of client documents. To clarify that the amendment addresses only the RPC, rather than regulating the substance of engagement agreements, the court rewords the proposed amendment to Rule 1.16(d) as follows: "It is not misconduct for a lawyer to retain copies of documents relating to the client."

Restrictions on the use of information. The D.C. Bar proposed the addition of a comment to Rule 1.6 stating that lawyers cannot ethically agree to certain restrictions on their future use of information gained during the representation of a client. The court declines to adopt the proposed comment for several reasons.

First, the proposed comment fits awkwardly with the current text of Rule 1.6, which broadly defines "secret" to include "information gained in the professional relationship that the client has requested be held inviolate." Although D.C. Legal Ethics Op. 175 (1986) expresses the view that that legal theories are not "information" for purposes of this definition, *id.* at 2, that would not be immediately apparent to a reader of Rule 1.6 and the comments thereto. Moreover, the proposed comment would also apply to some factual information, such as "how a particular industry operates."

Second, the proposed comment addresses a topic that in the court's view would be better addressed at least in part in the text of the rule rather being entirely subordinated to a comment.

Third, the proposed comment seems unclear about exactly what types of agreements are intended to be prohibited. It first suggests that client confidences and secrets are limited to "information of and about the client." It then indicates that client confidences and secrets do not include "information about the law in general, how a particular industry operates, or how legal principles may apply to specific types of cases." Finally, it refers to lawyers' use of their "evolving expertise" and prohibits agreements "restricting such use." The court believes that it would be important for any prohibition to be more clearly expressed.

Finally, the court is not confident that every agreement that in any way restricts the subsequent use of information beyond client secrets and confidences

(even if those are more narrowly defined than under the current rule) should be precluded.

The court does agree, however, that such agreements have the potential to raise concerns about the ability of clients to obtain lawyers and the ability of lawyers to represent other clients competently and zealously. The court therefore has decided to make the following changes to Rule 1.6 and the comments thereto.

First, the court has decided to add a sentence at the end of Rule 1.6(b) stating, "'Secret' generally does not refer to legal knowledge or legal research, to knowledge the lawyer has obtained about the regulatory environment in which a client operates, or to information that is generally known in the local community or in the trade, field, or profession to which the information relates." As the D.C. Bar Report points out, New York's version of Rule 1.6 contains similar language in its definition of "confidential information." Adding such a provision would seem to address to a significant degree the concerns raised by the D.C. Bar Report.

Second, the court has decided to add new comment [41] to Rule 1.6, stating: "Agreements that restrict the subsequent use of information that is not a client secret or confidence can raise concerns about the general ability of clients to obtain lawyers and the ability of lawyers to represent other clients competently and zealously. Such agreements should be viewed with caution."

Optional withdrawal in response to unilateral changes to the terms of a representation. The D.C. Bar proposes the addition of a new paragraph to Rule 1.16 (and a related comment) permitting optional withdrawal by a lawyer if the client insists on a unilateral change to the terms of the representation and the lawyer does not agree to the change. The court declines to adopt this proposal. Neither the D.C. Bar Report nor LFGC Roundtable comment provides a concrete example of an engagement agreement in which a lawyer or law firm agreed to continue representing the client even if the client makes unilateral changes to the terms of an engagement to which the lawyer or law firm does not consent. In the absence of such information, the court is not able to assess the nature or extent of the stated concern about such agreements. The court also notes that, as far as the court is aware, no other jurisdiction has adopted a similar provision.

PER CURIAM

Clean versions of amended rules and comments:

Rule 1.6:

(b) . . . 'Secret' generally does not refer to legal knowledge or legal research, to knowledge the lawyer has obtained about the regulatory environment in which a client operates, or to information that is generally known in the local community or in the trade, field, or profession to which the information relates.

. . .

Comment [41]: Agreements that restrict the subsequent use of information that is not a client secret or confidence can raise concerns about the general ability of clients to obtain lawyers and the ability of lawyers to represent other clients competently and zealously. Such agreements should be viewed with caution.

Rule 1.7:

. . .

Comment [25]: Agreements between a lawyer and a client precluding representation of other clients in circumstances that do not preclude representation under R. 1.7 through 1.12 will not expand the scope of those rules.

Rule 1.16(d): . . . It is not misconduct for a lawyer to retain copies of documents relating to the client.

. . .

Comment [12]: Information contained in copies of client documents retained by the lawyer following the conclusion of a representation may not be revealed or used where such revelation or use is prohibited by Rule 1.6 or other of these Rules (e.g., Rule 1.9, 1.7, 3.3).

Rule 5.6:

. . .

Comment [4]: Although a lawyer may agree to work exclusively on behalf of a single client for a given period, in light of the strong policy in favor of providing a free choice of counsel, *see, e.g.*, *Jacobson Holman PLLC v. Gentner*, 244 A.3d 690,

700-03 (D.C. 2021), outside of such an exclusive relationship, a lawyer should not agree to restrictions a client seeks to place on the lawyer's ability to represent other individuals or entities whose representation is not otherwise precluded by these rules if those restrictions would unduly interfere with the general ability of clients to obtain lawyers or lawyers' ability to engage in public service or would undermine the integrity of the profession.

Redlined versions of amended rules and comments:

Rule 1.6:

(b) . . . ‘Secret’ generally does not refer to legal knowledge or legal research, to knowledge the lawyer has obtained about the regulatory environment in which a client operates, or to information that is generally known in the local community or in the trade, field, or profession to which the information relates.

. . .

Comment [41]: Agreements that restrict the subsequent use of information that is not a client secret or confidence can raise concerns about the general ability of clients to obtain lawyers and the ability of lawyers to represent other clients competently and zealously. Such agreements should be viewed with caution.

Rule 1.7:

[25] ~~The provisions of paragraphs [20] through [23] are subject to any contrary agreement or other understanding between the client and the lawyer. In particular, the client has the right by means of the original engagement letter or otherwise to restrict the lawyer from engaging in representations otherwise permissible under the foregoing guidelines. If the lawyer agrees to such restrictions in order to obtain or keep the client’s business, any such agreement between client and lawyer will take precedence over these guidelines. Conversely, an organization client, in order to obtain the lawyer’s services, may in the original engagement letter or otherwise give informed consent to the lawyer in advance to engage in representations adverse to an affiliate, owner or other constituent of the client not otherwise permissible under the foregoing guidelines so long as the requirements of Rule 1.7(c) can be met.~~Agreements between a lawyer and a client precluding representation of other clients in circumstances that do not preclude representation under R. 1.7 through 1.12 will not expand the scope of those rules.

Rule 1.16(d): . . . It is not misconduct for a lawyer to retain copies of documents relating to the client.

. . .

Comment [12]: Information contained in copies of client documents retained by the lawyer following the conclusion of a representation may not be revealed or used where such revelation or use is prohibited by Rule 1.6 or other of these Rules (e.g., Rule 1.9, 1.7, 3.3).

Rule 5.6:

. . .

Comment [4]: Although a lawyer may agree to work exclusively on behalf of a single client for a given period, in light of the strong policy in favor of providing a free choice of counsel, *see, e.g.*, *Jacobson Holman PLLC v. Gentner*, 244 A.3d 690, 700-03 (D.C. 2021), outside of such an exclusive relationship, a lawyer should not agree to restrictions a client seeks to place on the lawyer's ability to represent other individuals or entities whose representation is not otherwise precluded by these rules if those restrictions would unduly interfere with the general ability of clients to obtain lawyers or lawyers' ability to engage in public service or would undermine the integrity of the profession.

Comment [45] . . .