

**DISTRICT OF COLUMBIA BAR**  
**RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE**

**REPORT TO THE BOARD OF GOVERNORS  
PROPOSING CHANGES TO THE  
D.C. RULES OF PROFESSIONAL CONDUCT  
RELATING TO  
CLIENT-GENERATED ENGAGEMENT LETTERS AND  
OUTSIDE COUNSEL GUIDELINES**

**(JANUARY 2022)**

As approved by the Board of Governors and  
transmitted to the D.C. Court of Appeals (March 2022)

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## **I. Introduction and Executive Summary**

### **A. Background**

In recent years, a number of issues have arisen regarding the relationship between clients and prospective clients, on the one hand, and outside counsel, on the other. These issues typically arise in the context of engagement letters or outside counsel guidelines (collectively, “OCGs”) generated by large institutional clients that require outside counsel serving such clients, as a matter of contract, to engage or refrain from engaging in specified conduct or practices.

The D.C. Rules strike a balance between allowing clients and lawyers latitude to contract with one another as they see fit, on the one hand, and protecting essential elements of the practice of law, on the other. These essential elements include access to legal services, confidentiality of client information, loyalty to clients, and the independence of lawyers.

Some believe that this balance is being upset by a growing profusion of OCGs that overreach, unduly restrict the public’s access to legal representation, compromise confidentiality, and impair the professional independence of lawyers. In some cases, these types of OCGs reflect nothing more than clients using the same processes to procure legal services that they use for such other procurements as office furniture and catering services. In other instances, such OCGs may reflect a shift in the economic balance between corporate clients and private practitioners.

Why do institutional clients prescribe OCGs? The responses to the Rules of Professional Conduct Review Committee’s (“Committee”) May 2019 and November 2020 requests for comments did not include any explanation from the client perspective of the need for such provisions. Some outside counsel who provided comments offered their views on why clients are requesting such provisions, including the following:

- A leading participant in a particular economic sector may want to make it more difficult for newer, smaller companies to gain a competitive foothold there. Conflicting outside lawyers who are knowledgeable about the sector can be part of this strategy.
- Some corporate executives, if non-lawyers, do not always understand that a law firm that represents the company in one matter can sue the company’s affiliate in another matter if the second matter is unrelated to the first.
- Business enterprises want to minimize their risks, wherever and however they can. They may see their outside lawyers as appropriate sharers of those risks.

- Clients believe 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.

Whatever the reason, OCGs such as these can have a deleterious effect on aspects of the legal profession that make the profession valuable to clients.

## **B. Requests for Public Comment**

In May 2019, the Committee solicited public comment on issues that may be raised by OCGs. The resulting nine comments came from academics; private practitioners; an in-house counsel; a combined comment that represented the views of more than two dozen law firms that were its signatories; and several comments from organizations and associations that represent lawyers or interests of specific groups of lawyers; and two insurers of lawyers. By far the concerns mentioned most frequently were overbroad definitions of what constitutes a conflict of interest (sometimes couched as an overbroad designation of who is to be considered the “client”) and demands that would require breaches of lawyers’ duties of confidentiality. Another prominent concern was indemnification requirements that are broader than those created by law and covered by existing forms of lawyers’ malpractice insurance (i.e., negligence/malpractice, intentional torts, breach of contract, and breach of fiduciary duty). Yet another was client demands for ownership of, and control over, the lawyer’s work product, coupled with restrictions on any subsequent use of “information” acquired by the lawyer during the representation.

The Committee received two comments from the “in-house” perspective. One comment, which came from an association of lawyers, questioned the need for any changes to the Rules, contending that the conflicts and indemnification issues are business or economic, rather than ethical, in nature. This commenter stated that such matters accordingly should be negotiated between in-house and outside counsel rather than made subjects for potential professional discipline. The second comment came from an in-house attorney who expressed concern that larger companies in a specialized industry could lock up the limited universe of knowledgeable outside counsel by imposing restrictions on their other engagements, thereby limiting the ability of other companies in the industry to obtain effective representation.

Additional issues that were raised included:

- Client requests for the right to amend OCG conditions unilaterally.
- Requirements that outside counsel comply with the client’s internal code of conduct.
- Client requests for the right to audit internal records and files of outside counsel.

Based largely upon the public comments received in response to the May 2019 request for comment, the Committee prepared an extensive draft report that included the text of proposed changes to the Rules. In November 2020 the Committee requested public comment on the proposed amendments. One comment, from a major U.S. legal malpractice insurer, was received in response to the November 2020 request.

### **C. Summary of Recommendations**

The proposed amendments would limit certain practices that: (1) restrict the ability of prospective clients to engage counsel of their choice; (2) impose restrictions on lawyers' independence and right to practice; (3) can render outside counsel liable for damages sustained by clients or others through no fault of such counsel; (4) restrict a lawyer's right to retain a copy of a client's file, including the lawyer's work product; (5) restrict a lawyer's right to make use of general, non-confidential information acquired in the course of a representation; and (6) can compel outside counsel to accept clients' unilateral changes in the terms of a representation.

The proposed amendments would:

- Amend Rules 1.7 and 5.6 to remove the existing open-ended permission for a lawyer and client to expand the scope of what constitutes a conflict of interest under the D.C. Rules, except where broader coverage is required by other law;
- Amend Rule 1.8 to prohibit a lawyer from proposing or accepting conditions that impose liability on a lawyer that is broader than the liability imposed by statute or common law;
- Amend Rule 1.16 to make clear that a lawyer may retain copies of client files, including the lawyer's work product, but may not use that work product in other matters if the Rules' confidentiality provisions prohibit such use;
- Amend Rule 1.6 to make clear that a lawyer may use general (i.e., not client-specific) knowledge gained during a representation for the benefit of subsequent clients; and
- Amend Rule 1.16 to provide that where a lawyer has agreed (or is claimed by her client to have agreed) that the client may make unilateral changes in the terms of a representation, the lawyer may withdraw if the client makes a material change to which the lawyer is unwilling to assent.

## II. Discussion

### A. Conflicts of Interest and Identification of the “Client”

#### 1. Background

Some OCG terms define the “client” as including all subsidiaries, affiliates, or parent companies of the entity to which the lawyer’s services pertain, regardless of whether the services relate to those affiliated entities or involve access to confidential information of those entities, and in some instances, regardless of whether the lawyer even can identify such entities. Other terms restrict a lawyer from providing services to competitors of the client, even if such services are unrelated to the work performed for the client and the lawyer has no confidential information of the client relating to the lawyer’s work for its competitor.

##### a. D.C. Rules: Conflicts of Interest

D.C. Rules 1.7, 1.9, and 1.10 set out the familiar general rules governing conflicts of interest. A lawyer may not represent adverse parties in the same matter.<sup>1</sup> Absent a valid waiver,<sup>2</sup> a lawyer may not (1) oppose her own current client in a matter, (2) engage in a representation that is likely to adversely affect, or be adversely affected by, representation of another client, or (3) represent a client where the lawyer’s judgment may be affected adversely by her own personal interests.<sup>3</sup> A lawyer may not, without a valid waiver, oppose a former client in a matter that is the same as, or substantially related to, the former representation.<sup>4</sup> Except for so-called personal interest conflicts, most conflicts of individual lawyers are imputed to their entire law firm or corporate legal department.<sup>5</sup> And, the mere fact that two entities are commercial competitors ordinarily does not constitute a conflict.<sup>6</sup>

Comment [21] to D.C. Rule 1.7 states that when a lawyer represents an organization, the lawyer:

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<sup>1</sup> D.C. Rule 1.7(a).

<sup>2</sup> See D.C. Rule 1.7(c). D.C. Rule 6.5 excludes a limited class of short-term pro bono representations from the normal conflicts rules.

<sup>3</sup> D.C. Rule 1.7(b).

<sup>4</sup> D.C. Rule 1.9.

<sup>5</sup> D.C. Rule 1.10.

<sup>6</sup> D.C. Rule 1.7 cmt. ¶ 10.



[I]s deemed to represent that specific entity, and not its shareholders, owners, partners, members or “other constituents.” \* \* \* Ordinarily the client’s affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer. \* \* \* A fortiori . . . , the 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.<sup>7</sup>

The comment to Rule 1.7 mentions several potential exceptions. These include the receipt by the lawyer of confidential information regarding affiliates of the represented entity, situations where one corporate entity is the “alter ego” of the represented entity,<sup>8</sup> and situations where the proposed adverse representation is likely to have a material adverse effect on the organizational client.<sup>9</sup>

The Committee knows of no dispute about the wisdom of the policies reflected in the foregoing rules<sup>10</sup> and is not proposing to change any of them. The complaints of private practitioners, as reflected in the public comments, flow from Comment [25], which was adopted at the same time as Comment [21]. Comment [25] states that the rules for organizational representation:

[A]re 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.<sup>11</sup>

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<sup>7</sup> D.C. Rule 1.7 cmt. ¶ 21.

<sup>8</sup> D.C. Rule 1.7 cmt. ¶ 23.

<sup>9</sup> D.C. Rule 1.7 cmt. ¶¶ 22-24.

<sup>10</sup> The current ABA Model Rules take a similar position on representation of organizational clients, ABA Model R. 1.7 cmt. ¶ 34, though at one time the issue was hotly debated, *see* ABA Formal Op. 95-390 (1995) (current ABA position adopted over several dissents).

<sup>11</sup> D.C. Rule 1.7 cmt. ¶ 25. Comments [21] and [25] were proposed in 1993, D.C. BAR, RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE, REPORT TO THE BOARD OF GOVERNORS OF THE DISTRICT OF COLUMBIA BAR: PROPOSED AMENDMENTS TO THE DISTRICT OF COLUMBIA RULES OF PROFESSIONAL

Comment [25] also states that an organizational client may permit the lawyer to engage in representations that otherwise would not be permissible under these guidelines.<sup>12</sup>

Many of the public comments contended that Comment [25]’s potentially limitless expansion of the normal conflict rules is swallowing the rules themselves—to the detriment of potential clients, clients (whether they realize it or not), and lawyers.

### **b. Rule 5.6 and Future Clients’ Choice of Lawyer**

The legal profession exists to serve clients, and lawyers must perform such service with skill,<sup>13</sup> zeal,<sup>14</sup> and diligence.<sup>15</sup> That commitment is limited in numerous ways, however, by the D.C. Rules.

D.C. Rule 5.6<sup>16</sup> prohibits conditions whose effect is to limit the access of *future* clients to lawyers of their choosing—particularly “to lawyers, who by virtue of their background and experience, might be the very best available talent to represent [such] individuals.”<sup>17</sup> Rule 5.6 provides:

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CONDUCT 21-23, 28 (Dec. 8, 1993) (“Peters Report”), and promulgated by the D.C. Court of Appeals effective November 1, 1996. The ABA Model Rules contain a comment similar to D.C. Comment [25]. ABA Model R. 1.7 cmt. ¶ 34 (recognizing viability of “an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates”).

<sup>12</sup> D.C. Rule 1.7 cmt. ¶ 25.

<sup>13</sup> D.C. Rule 1.1(b).

<sup>14</sup> D.C. Rule 1.3(a).

<sup>15</sup> *Id.*

<sup>16</sup> Similar provisions appear in the ABA Model Rules of Professional Conduct and the rules of many U.S. jurisdictions.

<sup>17</sup> *In re Hager*, 812 A.2d 904, 918 (D.C. 2002) (quoting ABA Formal Opinion 93-371 (1993)); *accord Jacobson Holman PLLC v. Gentner*, 244 A.3d 690, 700-03 (D.C. 2021); *Neuman v. Akman*, 715 A.2d 127, 130 (D.C. 1998) (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)). In *Gentner*, the Court of Appeals went so far as to hold that contractual provisions violating Rule 5.6(a) are “unenforceable as against public policy.” 244 A.3d at 702-03.

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between parties.

The current Rules appear to limit restrictions on a lawyer's right to practice only where the restrictions arise out of law firm partnership agreements<sup>18</sup> or settlements of controversies between parties.<sup>19</sup> Within those two contexts, though, those rules have been read broadly both in this and other jurisdictions.<sup>20</sup>

At least two ethics opinions from outside this jurisdiction have said that the limitations set out in Rule 5.6 apply to OCGs.<sup>21</sup> In 1994, the American Bar Association's Standing Committee on Ethics and Professional Responsibility concluded that an OCG forbidding outside counsel from all future representations adverse to the corporate client would violate Model Rule 5.6(a), even though that rule refers only to "employment" and not to "engagement":

"The Comment to Model Rule 5.6(a) states two reasons for the rule. First, such an agreement would limit a lawyer's 'professional autonomy.' Second, a restrictive covenant barring future adverse representation would limit 'the freedom of clients to choose a lawyer.'"<sup>22</sup>

Although the ABA opinion addressed only adverse representations occurring after the end of the current representation, it said—importantly—that Model Rule 1.9, which governs conflicts involving former clients, sets the ceiling as well as the floor for such situations, and that "an

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<sup>18</sup> See D.C. Rule 5.6(a) (covering "a partnership, shareholders, operating, employment, or other similar type of agreement"). The same phrase appears in ABA Model Rule 5.6(a).

<sup>19</sup> See D.C. Rule 5.6(b).

<sup>20</sup> See, e.g., *Jacobson Holman PLLC v. Gentner*, 244 A.3d 690, 700-03 (D.C. 2021); D.C. Bar Legal Ethics Op. 335 (2006) (finding unethical a settlement agreement provision restricting plaintiff's lawyer from disclosing public information). Opinion 335 also discusses opinions from D.C. and other jurisdictions, as well as the ABA Standing Committee on Ethics and Professional Responsibility, that find unethical a broad range of restrictions on attorneys' practices.

<sup>21</sup> ABA Formal Op. 94-381 (1994); Ass'n of the Bar of the City of N.Y. Formal Op. 2007-3.

<sup>22</sup> ABA Formal Op. 94-381, at 2 (1994); accord DC Rule 5.6, cmt. ¶ 1.

agreement denying the lawyer the opportunity to represent any interest adverse to a former client is an overbroad and impermissible restriction on the right to practice.”<sup>23</sup> Although the ABA opinion noted that “a current client’s interests should assume a certain priority for the lawyer,”<sup>24</sup> it concluded that Rule 5.6 applies to OCGs and that Rule 1.9 establishes the ceiling as well as the floor for analyzing former client conflicts.

The second opinion, issued in 2007 by the Association of the Bar of the City of New York,<sup>25</sup> did not respond to a specific request but was prepared as guidance in analyzing corporate family conflicts.<sup>26</sup> The opinion stated, along the lines of Comment [25] to D.C. Rule 1.7, that lawyer and client may agree upon which affiliates the lawyer is undertaking to represent. It cautioned, however, that:

[A] lawyer may not ask for nor may a lawyer agree to any . . . restriction unnecessarily compromising the strong policy in favor of providing the public with a free choice of counsel. Thus, the law firm and client should be mindful of entering into an agreement which places excessive restrictions on the lawyer’s right to practice, *for example, by restricting the law firm from any representation adverse to hundreds of corporate affiliates, both here and abroad.*<sup>27</sup>

The overwhelming majority of the comments submitted in response to the Committee’s May 2019 solicitation, as well as extensive commentary, have convinced the Committee that the problem of overbreadth in identifying the “client” for conflicts purposes is a substantial one that 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. As one respected ethics commentator has said, “When restrictions on the practice of law become bargaining chips between parties, the integrity of the profession is threatened.”<sup>28</sup> Moreover, even the committee that recommended what now is Comment [25] stated that:

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<sup>23</sup> ABA Formal Op. 94-381, at 3 (1994).

<sup>24</sup> *Id.*

<sup>25</sup> This organization subsequently has been renamed the New York City Bar Association.

<sup>26</sup> Ass’n of the Bar of the City of N.Y. Formal Op. 2007-3.

<sup>27</sup> *Id.* (citations omitted; emphasis added).

<sup>28</sup> Joanne Pitulla, *Co-opting the Competition: Beware of Unethical Restrictions in Settlement Agreements*, A.B.A.J., Aug. 1992, at 101 (quoted in Colo. Bar Ethics Op. 92 (1993)).

[C]orporate clients should not have it both ways. If an organization desires to conduct its business, as many do, through subsidiaries and affiliates in order to obtain the significant legal and economic benefits that flow from that choice, it should not be permitted to argue for the broad proposition that it is a single, unified organization for purposes of applying conflict of interest principles to the lawyers and law firms who represent its many enterprises.<sup>29</sup>

## **2. Comments Received by the Committee**

### **a. Comment from Legal Academics**

Among the comments received by the Committee in 2019 was that of several legal academics. They stated that the conflicts rules represent an effort to strike a balance among the interests of clients, lawyers, and non-clients seeking access to legal services. Because such access is essential, protecting lawyer autonomy serves the interest not only of lawyers but also those who may need their services. For this reason, they continued, the conflicts rules should not be treated as simply a matter for private agreement between lawyers and their current clients. Although it is true that clients can fire their lawyers, they should not be able to impose a conflicts definition “that significantly expands protection for clients at the expense of lawyers *and prospective clients*” (emphasis added). As for “issue” conflicts, the same commenters noted that Comment [13] to Rule 1.7 is limited to current cases and cases in which an inconsistency between the positions taken for different clients would “seriously weaken the position being taken on behalf of the other client.” This is a delicate balance, the academics’ comment added, that as a matter of policy should not be variable solely as a matter of negotiation between lawyer and client.

### **b. Comments from Law Firms**

Another 2019 comment, submitted by law firms, described three problematic conflicts provisions that often are requested by clients:

- Provisions that expand the definition of “client” to include, e.g., far-flung affiliates and even *future* affiliates. The current D.C. Rules allow this but in doing so, according to these firms, they “unduly limit other representations by the law firm, particularly in transactional matters, that do not threaten harm or unfairness to the entity being represented or its family of affiliates.” The comment stated that if nothing else, the “sheer difficulty” of compliance is a strike against allowing such arrangements. More importantly, the commenters questioned whether this serves any legitimate purpose under the Rules.

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<sup>29</sup> Peters Report, at 23.

- Provisions that limit representation of a client’s competitors. This, said the commenters, is a restriction on a lawyer’s right to practice and on “the right of future clients to retain the counsel of their choice.” If it requires disclosure of information about other clients, such a provision also raises confidentiality concerns under Rule 1.6. Here, too, the commenters questioned whether this type of restriction serves any purpose other than “to prevent other prospective clients from engaging competent counsel of their choice.”
- Provisions that redefine “issue” and “positional” conflicts and/or empower the client to decide unilaterally what constitutes a conflict. OCGs may expand the issue conflict restriction “dramatically to include the representation of another party in any matter in which the lawyer advocates—*or may at some future time advocate*—positions on policy or legal principles that are—*or may at some future time be*—adverse to the client’s interests (emphasis in original).”

A separate comment from a single law firm quoted an OCG clause that directed outside counsel to identify the client’s affiliates “from a review of our 10-K and related corporate disclosures.”<sup>30</sup>

### c. Comments from a Legal Malpractice Insurer

A comment from a major American legal malpractice insurer in response to the 2019 request for comment observed that the Rules of Professional Conduct seek to establish “the appropriate balance between lawyers’ duties to their clients, the legal system, and society at large. To achieve that balance, the insurer stated, lawyers must maintain their professional independence.” This includes not agreeing to limit their professional autonomy or to be precluded from representing future clients. OCGs that expand the definition of “client,” impose blanket prohibitions on representing competitors, and expand the definition of a conflict “considerably diminish a lawyer’s professional independence and limit the freedom of other legal service consumers to hire counsel of their own choosing”—“not out of concern for ethical representation but in furtherance of commercial interests.” The insurer noted further that in addition to the policy problems raised by overbroad definitions, the practical difficulties of keeping up with all of a client company’s affiliates can be overwhelming and a trap for the unwary.

The insurer’s comment added that OCG restrictions often treat business-competitive concerns as conflicts of interest even though they far exceed the *legal* concerns contemplated by the conflicts

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<sup>30</sup> Each public company must file Form 10-K annually with the Securities and Exchange Commission. “The annual report on Form 10-K provides a comprehensive overview of the company’s business and financial condition and includes audited financial statements.” U.S. Securities and Exchange Commission, Fast Answers (downloaded from <https://www.sec.gov/fast-answers/answers-form10k.htm>) (last visited May 9, 2021).

aspects of the D.C. Rules. This limits the field of available counsel, “and businesses that have the most legal work and spread it broadly among the most firms gain the most competitive advantage.” Such restrictions can “effectively prohibit smaller, less-established businesses from obtaining the advice and counsel of the lawyers who have the industry-specific knowledge and experience most relevant to [such prospective clients’] interests.”

Limiting the scope of permissible definitions of who is the client or of what will constitute a conflict of interest will not leave clients without a remedy, for “[a] client has a right to discharge a lawyer at any time, with or without cause.”<sup>31</sup> Perforce this includes the right to fire a lawyer for taking a position—even one permitted by the conflicts rules—that is adverse to an affiliate of the client. The proposal set out below would not detract from this right.

The same insurer commented in February 2021 in support of the Committee’s proposal to amend Rules 1.7 and 5.6.

### **3. Committee’s Recommendations to Amend Rule 5.6 and Comment [25] to Rule 1.7**

Based on its consideration of the public comments received, 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. As provided by D.C. Rule 1.7, the identity of the “client,” for conflicts purposes, would be no more inclusive than the entities that the lawyer is actually representing, plus any affiliates that function as the alter ego of such entities<sup>32</sup> 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.”<sup>33</sup> The existing restriction on adverse representations that are “likely ultimately to have a material adverse effect on the financial condition of the organizational client” also would remain in effect.<sup>34</sup> Conflicts expressly set forth in such other rules as Rules 1.8, 1.9 and 1.10 similarly would set the maximum permissible scope of restrictions relating to those provisions.

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<sup>31</sup> D.C. Rule 1.16, cmt. ¶ 4.

<sup>32</sup> *See* D.C. Rule 1.7, cmt. ¶ 23.

<sup>33</sup> *See id.* cmt. ¶ 22.

<sup>34</sup> *See id.* cmt. ¶ 24.

The Committee's November 2020 request for comment expressly solicited suggestions as to other, possibly less far-reaching, approaches that would appropriately limit the currently unlimited ability of lawyers and clients to set the limits of what constitutes a conflict of interest. No such suggestions were received, and the Committee has not altered its November 2020 proposal on this issue.

These restrictions would not override limitations established by other law—for example, federal conflict of interest statutes that restrict private practitioners' contacts with agencies by which they formerly were employed. Moreover, they would not impose strict liability, in the sense that outside counsel's objectively reasonable conclusion that her 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.

## **B. Confidentiality**

Closely related to the conflict of interest issues discussed above are client demands that law firms advise the client, or obtain the client's consent, before accepting a representation of a competitor of the client in an unrelated matter—or even, where the *issue* involved might be of interest to the client—a representation of a prospective client that is *not* a competitor. Such a requirement, of course, frequently will compels the outside lawyer to choose between breaching the duty of confidentiality imposed by D.C. Rules 1.6 and 1.18, and, as discussed above, declining a new representation that would be (1) unrelated to the representation of the existing client, and (2) not materially adverse to the legal interests of the existing client.

Because this issue appears to be covered by the existing D.C. Rules, it is being considered by the D.C. Bar's Legal Ethics Committee. Accordingly, the Committee is not proposing any Rules amendments relating to the issue at this time.

## **C. Indemnification**

### **1. Background**

Some OCG terms require lawyers to indemnify: (1) clients for matters not resulting from the lawyer's 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. Some commenters observed that additional liability assumed by the lawyer by contract likely will not be covered by malpractice insurance, thus potentially disadvantaging the lawyer, the requesting client, and the lawyer's other clients.



The D.C. Rules go to considerable lengths to ensure that a client may hold its lawyer responsible for injuries to the client caused by the lawyer’s intentional or negligent acts or omissions. For example, a lawyer may not prospectively secure a waiver or limit her liability for “malpractice” that injures a client.<sup>35</sup> The rationale for this restriction is that such agreements “are likely to undermine competent and diligent representation.”<sup>36</sup> Moreover, even where a lawyer seeks to settle a claim for *past* malpractice, “the lawyer must first advise [the client or former client] in writing of the appropriateness of independent representation in connection with such a settlement” and accord that person “a reasonable opportunity to find and consult independent counsel.”<sup>37</sup>

Here, as with the conflicts and confidentiality rules discussed above, the Committee knows of no serious dispute about the propriety of the existing restrictions and is not proposing to alter any of them. But increasingly in recent times, clients have required as a condition of engagement that their outside counsel agree to accept liability—*without fault* on the part of the lawyer—for losses suffered by the client in connection with the matter for which the lawyer has been engaged.<sup>38</sup> Indeed, some clients have required that outside counsel accept such liability even where the injury is caused by a third party and even where the injury is not to the client but to another third party such as an officer or director of the client.<sup>39</sup>

Provisions such as these hold lawyers responsible for errors and omissions for which neither statutes nor the common law impose liability—errors and omissions that lawyers’ malpractice insurance does not cover.<sup>40</sup> Such provisions effectively shift the business risk of clients’ operation

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<sup>35</sup> D.C. Rule 1.8(g)(1).

<sup>36</sup> D.C. Rule 1.8 cmt. ¶ 13.

<sup>37</sup> D.C. Rule 1.8 cmt. ¶ 14.

<sup>38</sup> See, e.g., Anthony E. Davis & Noah Fiedler, *Indemnity Provisions in Outside Counsel Guidelines: A Tale of Unintended Consequences*, 23 PROF. L., No. 4, at 1 (2016) (“*Indemnity Provisions*”); CLAIRE COE & STEVEN VAUGHN, *INDEPENDENCE, REPRESENTATION AND RISK: AN EMPIRICAL EXPLORATION OF THE MANAGEMENT OF CLIENT RELATIONSHIPS BY LARGE LAW FIRMS* 72 (2015) (noting that a majority of the 53 law firms surveyed stated that indemnification requests are becoming commonplace, particularly from U.S. financial institution clients) (downloaded from <https://www.sra.org.uk/globalassets/documents/sra/research/independence-report.pdf?version=4a1ab7>) (last visited May 9, 2021).

<sup>39</sup> See *Indemnity Provisions*, at 4-5, 14-19 (setting forth numerous examples of indemnification clauses to which law firms have been asked to agree).

<sup>40</sup> See *Indemnity Provisions*, at 6-8.

to their outside lawyers, and likely will have the effect (presumably unintended) of making such lawyers more hesitant and cautious in their advice to clients, depriving clients of the benefit of thinking that would aid the client in deciding whether a particular risk is worth taking. Moreover, commenters note, such provisions create a host of potential conflicts (e.g., among the corporate client, its corporate officer who is entitled to indemnification from the lawyer but whose interests may be adverse to those of the corporation, and the lawyer)—conflicts that might not be waivable.

In 2010, the Maryland State Bar Association’s Ethics Committee concluded that a broad indemnification provision of the sort outlined above<sup>41</sup> created a potential conflict under Maryland’s version of Rule 1.7, “as an attorney’s interest in avoiding personal liability or cost under the indemnification may affect the attorney’s independence of judgment to an extent that would be prohibited by the Rule,” as well as possibly violating Maryland Rule 1.8’s restrictions on providing financial assistance to clients and acquiring proprietary interests in clients’ causes of action.<sup>42</sup> The Maryland committee declined to opine whether the indemnification provision constituted a contract of insurance or violated the state’s public policy because such issues were beyond its purview.<sup>43</sup>

## 2. Comments Received by the Committee

Two insurance industry commenters in the 2019 round confirmed that insurers do not offer, and are unlikely to begin offering, insurance for lawyers beyond the liabilities for malpractice established by statute and common law. These commenters also noted that situations where indemnification is sought but no fault on the part of the lawyer is alleged will be covered neither

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<sup>41</sup> The provision in question stated:

In consideration of your engagement for professional services, your firm shall defend (with counsel satisfactory to BANK), indemnify and hold harmless BANK and BANK affiliates and their respective directors, officers, employees, successors and assigns, against and from all suits, claims, proceedings, actions, losses, liabilities, damages, interest, fines, penalties, judgments, settlements (as pre-approved in writing by BANK), costs and expenses (including reasonable fees, expenses and disbursements of attorneys, accountants and other experts and professionals, and costs, fees, and expenses of investigation) arising out of, in connection with, resulting from or based on allegations of, the performance or breach of any obligations under the [BANK’s] Procedures, including without limitation, delays or errors in performance of the Procedures or compliance with the [Protecting Tenants at Foreclosure] Act.

Maryland State Bar Ass’n, Ethics Docket No. 2010-03.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

by the insurer's duty to indemnify the lawyer for an adverse judgment (or settlement) nor by the insurer's duty to defend against the lawsuit.

A law firm comment, also part of the 2019 round, noted that to the extent that indemnification clauses go beyond the outside lawyer's malpractice coverage, they:

[W]ould raise the cost of legal representation for all clients and tax the attorney-client relationship with a specter of sizable payouts depending on the fault of others over whom the firm has no choice and no control. Such a burden to the attorney-client relationship would infringe upon the professional independence and judgment of the lawyer to offer novel theories or would deter lawyers from undertaking any but the most conservative of representations.

Yet another law firm comment suggested that overbroad indemnification clauses may lead lawyers to "limit their legal advice to clients to only the most conservative of recommendations, even if the client is seeking a wider range of options along with an explanation of levels of legal risk. This dynamic arguably constitutes a conflict of interest under Rule 1.7(b)(4)" and perhaps a non-waivable conflict at that. Another comment pointed out that in some instances—federal procurement, for example—outside counsel liability beyond normal limits may be required by law.

The insurer that commented in response to the November 2020 solicitation endorsed the Committee's proposal on this issue.

### **3. Committee's Recommendation to Amend D.C. Rule 1.8(g)**

The Committee accordingly recommends that D.C. Rule 1.8(g) 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 other law (e.g., certain government procurement contracts).

#### **D. Client Ownership of, and Control Over, the Lawyer's Work Product; Lawyer's Future Use of Information Gained During a Representation**

##### **1. Background**

Some OCGs purport to vest in the client all ownership and intellectual property rights of the lawyer's work product. That in turn, according to commenters, empowers the client to direct the lawyer not to make any use of the work product and even to refrain from keeping a copy. Other OCGs expressly would forbid outside counsel from making use of any information—even

information that is generally known or is not specific to the client—gained in connection with the representation. Still others require that when the representation ends, outside counsel turn the entire file over to the client without retaining copies of even counsel’s own work product. Read literally, such provisions would prevent or greatly limit practitioners from developing expertise in particular areas of the law to the extent such expertise is based upon previous representations.

As pointed out by a consolidated comment from twenty-six large law firms, “it is . . . standard practice for lawyers to retain a copy of the 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).” The comment goes on to state that to prevent lawyers from retaining and using such material, which a copyright owner can do, would upset a structure that has served well for centuries and—most important—“would represent a serious curtailment of lawyer independence.”

The D.C. Rules contain broad protections for client information. Specifically, they prohibit revealing client “confidences or secrets”—a broad concept that covers all “information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.”<sup>44</sup> The Rules also prohibit a lawyer from *using* such information to the client’s detriment, for the lawyer’s benefit, or for the benefit of a third party.<sup>45</sup> These restrictions remain in force even after the conclusion of the representation.<sup>46</sup> Moreover, with narrow exceptions for attorney work product that has not been paid for<sup>47</sup> or is the product of client misrepresentation,<sup>48</sup> the D.C. Rules entitle a client to its entire file.<sup>49</sup> The Committee is not proposing to alter any of these protections.

The Rules contain certain narrow exceptions to these restrictions. A lawyer may, for example, reveal or use client confidences or secrets to prevent specified categories of injury to third parties,<sup>50</sup> to prevent undermining of the administration of justice (e.g., bribery of jurors or court personnel),<sup>51</sup>

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<sup>44</sup> D.C. Rule 1.6(a)(1), (b).

<sup>45</sup> D.C. Rule 1.6(a)(1)-(2).

<sup>46</sup> D.C. Rule 1.6(g).

<sup>47</sup> D.C. Rules 1.16(d), 1.8(i).

<sup>48</sup> D.C. Bar Legal Ethics Op. 350 (2009).

<sup>49</sup> D.C. Rule 1.16(d); D.C. Bar Legal Ethics Op. 333 (2005) (noting D.C. use of the “entire file” approach).

<sup>50</sup> D.C. Rule 1.6(c)(1).

to rectify client crime or fraud that has been facilitated using the lawyer’s services,<sup>52</sup> when required by law,<sup>53</sup> to defend against client charges of lawyer misconduct,<sup>54</sup> to sue for unpaid fees,<sup>55</sup> and to seek legal advice about the lawyer’s own compliance with the law.<sup>56</sup> Such information also may be revealed or used when authorized by the client.<sup>57</sup> Further, the confidentiality rules “do[] not preclude the lawyer from using generally known information about [a] former client when later representing another client.”<sup>58</sup>

These prohibitions and exceptions aside, the Rules themselves do not address expressly whether a lawyer has the right to retain and use copies of her work product, nor do they address whether a lawyer may make future use of information, including legal theories, that is not client specific. The former issue is addressed—but only by implication—by the exceptions that allow disclosure of client confidences and secrets where necessary to defend against client charges of lawyer misconduct or seek a judgment for the lawyer’s fees. It also is addressed in two D.C. ethics opinions. Legal Ethics Opinion 273 states that:

[i]t would not be unethical for the lawyer terminating the representation to retain copies of documents from the client’s file, although these (like any documents of a former client that contain confidential or secret information under Rule 1.6) would need to continue to be accorded the status and protection due them.<sup>59</sup>

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<sup>51</sup> D.C. Rules 1.6(c)(2).

<sup>52</sup> D.C. Rule 1.6(d).

<sup>53</sup> D.C. Rule 1.6(e)(2).

<sup>54</sup> D.C. Rule 1.6(e)(3).

<sup>55</sup> D.C. Rule 1.6(e)(5).

<sup>56</sup> D.C. Rule 1.6(e)(6).

<sup>57</sup> D.C. Rule 1.6(e)(1), (e)(4).

<sup>58</sup> D.C. Rule 1.6 cmt. ¶ 10; *accord* ABA Model Rule 1.9(c)(1); N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.0, Rule 1.6(a) (2019). The ABA’s Standing Committee on Ethics and Professional Responsibility has explained that “generally known” means “widely recognized by members of the public in the relevant geographic area or . . . widely recognized in the former client’s industry, profession, or trade” and not merely, say, mentioned in open court, a public record, or a document available in a public library. ABA Formal Ethics Op. 479 (2017). The Model Rules, like the D.C. Rules, prohibit the *disclosure* of former client information regardless of whether it has become generally known. ABA Model Rule 1.9(c)(1).

<sup>59</sup> D.C. Bar Legal Ethics Op. 273 (1997).

And, a footnote to D.C. Legal Ethics Opinion 250 approves the practice by implication: “If a lawyer wishes to keep copies of files sent to a former client, the lawyer must bear the cost of making such copies.”<sup>60</sup>

The latter issue arguably is addressed in D.C. Rule 3.4(f), which prohibits a lawyer from asking someone other than her client to withhold information from a third party,<sup>61</sup> as well as in the Rules’ requirements that a lawyer’s representation be competent,<sup>62</sup> zealous,<sup>63</sup> and diligent.<sup>64</sup> The issue is addressed expressly in several D.C. ethics opinions and in New York State’s version of Rule 1.6.

D.C. Legal Ethics Opinion 175 concludes that a legal theory developed in the course of a representation is not “information” and hence not a protected “client secret.”<sup>65</sup> Accordingly, such a theory not only can be used freely by the lawyer but even can be used adversely to the former client.<sup>66</sup> Importantly, the opinion offers the following rationale for its position:

A lawyer is useful to his clients because of his knowledge of the law and how it can be applied to different factual situations. Such knowledge is not gained through formal legal training and post-graduate courses alone, but also from the everyday practice of the law while representing clients. The Code . . . would surely place an unbearable burden upon every legal practitioner if it prohibited the use of such knowledge except for the benefit of the client whom he happened to represent when he acquired it. Legal expertise consists of layer upon layer of knowledge and

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<sup>60</sup> D.C. Bar Legal Ethics Op. 250 n. 2 (1994)

<sup>61</sup> D.C. Rule 3.4(f). The ABA’s Annotated Model Rules of Professional Conduct confirms this reading of the rule. ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 571 (9<sup>th</sup> ed. 2019) (commenting on identical Model Rule 3.4(f)).

<sup>62</sup> D.C. Rule 1.1.

<sup>63</sup> D.C. Rule 1.3(a).

<sup>64</sup> *Id.*

<sup>65</sup> D.C. Bar Legal Ethics Op. 175 (1986). Opinion 175 was decided under the former D.C. Code of Professional Responsibility but the confidentiality rule that it addressed, Disciplinary Rule 4-101, was not materially different from current D.C. Rule 1.6(b).

<sup>66</sup> *Id.*

experience gained gradually through the representation of many clients in many situations. It is not something that can be parsed and sold exclusively to any one client. The usual attorney-client relationship does not include such expectations.

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Furthermore, it is an underlying policy of the Code that attorneys should become increasingly knowledgeable about the law and use their growing expertise to represent clients to the best of their ability. Thus, the inquirer was ethically obligated to use his evolving expertise for the benefit of the first client while he represented that client, and he is, likewise, obligated to use his expertise for the benefit of all of his subsequent clients.<sup>67</sup>

D.C. Legal Ethics Opinion 275 contains a similar sentiment:

[W]hat a lawyer learns about the law in general, about how a particular industry operates, or about how legal principles may apply to certain kinds of cases in the course of doing professional work for a client may be used by the lawyer in representing another client. *See* our Opinion No. 175 (1986).<sup>68</sup>

New York’s version of Rule 1.6 provides that “[c]onfidential information’ does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.”<sup>69</sup>

Lawyers learn from their experience, and one would expect them to employ their growing knowledge of the law on behalf of each successive client.<sup>70</sup> This policy is important to lawyers *and* clients (especially future clients), and it merits express protection. That means, at a minimum, that lawyers should be permitted to retain copies of their client files (including work product) and that clients should *not* be allowed to prevent their lawyers from applying the expertise gained in representing them to those lawyers’ subsequent work on behalf of other clients.

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<sup>67</sup> *Id.* (footnotes omitted).

<sup>68</sup> D.C. Bar Legal Ethics Op. 275 (1997).

<sup>69</sup> N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.0, Rule 1.6(a) (2019).

<sup>70</sup> *See generally* D.C. Rule 1.1 cmt. ¶¶ 1, 2, 6 (noting importance of experience and need for lawyers to “keep abreast of changes in the law”).

## **2. Committee's Recommendations to Amend Rule 1.16 and Comment [41] to Rule 1.6**

D.C. Rules 1.1, 1.3(a), and 3.4(f), along with the two D.C. ethics opinions discussed above, are helpful on the issue of information usage but the important principles for which they stand could be enunciated more clearly and authoritatively. The Committee accordingly recommends that Rule 1.16 be amended to state expressly that a lawyer may retain copies of a former client's file and that the comment to Rule 1.6 be amended to set out expressly the expectation that a lawyer will use her growing knowledge of the law on behalf of each successive client.

### **E. Client's Right to Amend Conditions of Engagement Unilaterally**

Some OCGs reserve to the client the right to alter the conditions of engagement unilaterally. The Committee accordingly recommends that D.C. Rule 1.16 be amended to make clear that where a lawyer has agreed, or a client asserts that a lawyer has agreed, that the client may change the terms of representation unilaterally, the lawyer may withdraw from a representation if the change is material and the lawyer is unwilling to accept it. This would supplement the existing withdrawal rules, which require withdrawal if, *inter alia*, "the representation will result in violation of the Rules of Professional Conduct or other law" and permit withdrawal for several reasons, including that "obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult."<sup>71</sup> A proposed new comment would make clear that withdrawal is discretionary on the part of the lawyer and would note the possibility of client and lawyer deciding that the proposed change should be withdrawn, modified, or held for consideration at a later time.

### **F. Other OCG Issues**

Two additional OCG issues raised by the 2019 comments are client-imposed requirements that outside counsel comply with the client's internal code of conduct<sup>72</sup> and client requests to audit lawyers' internal files. The Committee is not recommending any Rules changes at this time regarding those issues. With respect to the former, the Committee urges 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. The Committee plans to continue monitoring this

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<sup>71</sup> D.C. Rule 1.16.

<sup>72</sup> Some OCGs require the outside lawyers to adhere to the client's internal code of conduct, making no distinction between provisions of such a code that make or do not make sense to apply to non-client personnel. Moreover, given that many law firms have their own internal codes of conduct, such a requirement may give rise to inconsistent and competing conduct requirements.



issue. With respect to the latter, the Committee cautions lawyers and clients that any such provisions must exhibit due regard for the confidentiality requirements of the Rules and notes that the issue is being considered by the D.C. Bar’s Legal Ethics Committee.

### **G. Choice of Law**

The insurer-commenter notes that the changes being proposed—

will place restrictions on D.C. lawyers that might not apply to lawyers in other jurisdictions, even if they are working on an engagement with a D.C. lawyer. When a D.C. lawyer represents a client in a nonlitigation engagement together with lawyers in other jurisdictions and that engagement is governed by OCGs that contravene the proposed [D.C.] amendments, typical choice of law considerations would permit the D.C. lawyer to ethically operate under those OCGs when the predominant effect of the lawyer’s conduct is in the other jurisdiction. *See* ABA Model Rule 8.5(b)(2). D.C. Rule 8.5, however, might make this difficult in many circumstances.

Comment at 4.

Although there is some basis for this concern, there also would be potential choice of law issues if D.C. adopted the current Model Rule. Model Rule 8.5(b)(2) applies the “predominant effect” criterion regardless of whether the lawyer in question is admitted to practice in the “other” jurisdiction. We understand that this is now the applicable rule in many U.S. jurisdictions.

By contrast, under D.C. Rule 8.5(b)(2), which tracks the pre-2002 version of the Model Rule,<sup>73</sup> the predominant effect exception comes into play *only* if the D.C. lawyer is *admitted to practice* in the “other” jurisdiction. To see how this might work in the OCG context, consider the following hypothetical:

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<sup>73</sup> The D.C. BAR RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE’S PROPOSED AMENDMENTS TO THE DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT: FINAL REPORT AND RECOMMENDATIONS (JUNE 2005, REV. OCT 6 2005) (THE WORTHAM REPORT), issued by the Committee in 2005 and subsequently approved by the Board of Governors and the D.C. Court of Appeals, did not recommend adoption of the 2002 amendment to Model Rule 8.5(b)(2). The rationale was that the revised rule “would subject lawyers to substantial burden [*sic*] in trying to determine (a) where the predominant effect of the lawyer’s conduct occurs and (b) whether and how that jurisdiction’s ethics rules differ from the D.C. Rules of Professional Conduct, and that any countervailing benefits do not outweigh this burden.” THE WORTHAM REPORT at 210; *accord id.* at 10. The Committee recently reconsidered the issue and decided—over a dissent from two members—not to recommend adoption of Model Rule 8.5(b)(2).

A D.C. lawyer is to be engaged for a federal non-litigation matter by a client located in a jurisdiction where the lawyer is not admitted to practice.<sup>74</sup> The would-be client insists upon OCGs that violate the D.C. OCG limitations.

If the D.C. lawyer in this hypothetical cannot convince the client to bring its OCGs into conformity with the D.C. Rules, the lawyer must either accept the client's OCGs (and thus violate the D.C. Rules) or forgo the representation. Under the Model Rule, though, a reasonable case can be made—and a safe harbor thus created<sup>75</sup>—for the proposition that the predominant effect of the lawyer's acceptance of the client's OCGs occurs in the client's jurisdiction rather than in D.C.

Significantly, there are potential circumstances where it would not be clear under either current D.C. Rule 8.5 *or* Model Rule 8.5 whether the D.C. Rules or the rules of another jurisdiction would apply to proposed OCGs. For example, under either version of Rule 8.5(b)(2), determining whether the “predominant effect” of conduct relating to OCGs in a non-litigation matter occurs in another jurisdiction may be difficult, especially in the context of representation of entities with locations and activities in multiple jurisdictions.

There also are potential choice of law issues in connection with litigation matters. Both D.C. Rule 8.5(b)(1) and Model Rule 8.5(b)(1) provide that “for conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.” Although application of that provision is often more clear-cut than Rule 8.5(b)(2), it governs only “conduct in connection with a matter pending before a tribunal.” Accordingly, paragraph (b)(1) does not apply to prelitigation conduct; even in the case of impending litigation, there may be questions whether particular conduct relating to OCGs is sufficiently “connect[ed]” to the litigation for this provision to apply.

In any event, whether to revise D.C. Rule 8.5 is beyond the scope of this report. Further, these sorts of uncertainties are inherent in many choice of law rules and should not stand in the way of making appropriate changes to the rules respecting OCGs. In addition, the potential consequences of making a choice of law determination that is ultimately adjudicated to be incorrect will be mitigated to some extent by the safe harbor provision we propose to include in Rule 5.6.

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<sup>74</sup> This presumably isn't the unauthorized practice of law in the other jurisdiction because the matter involves the federal government. *See* 5 U.S.C. § 500(b) (2018) (authorizing appearance before federal agencies of any lawyer admitted in a U.S. jurisdiction); *Sperry v. Florida*, 373 U.S. 379 (1963) (federally registered patent agent needn't be a bar member in his state of residence).

<sup>75</sup> “A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.” Model Rule 8.5(b)(2).

The Committee's view is that the changes being proposed in this report are important and that there necessarily will be choice of law issues for whichever jurisdiction acts first to address the problems outlined above. (We understand that several other jurisdictions, including New York, are considering action with respect to OCGs and are waiting to see what D.C. does.)

### **III. Recommended Amendments to the D.C. Rules**

The Committee recommends Rules amendments addressing the four issues discussed above that appear most acute and most susceptible to correction by rules changes. These are the: (1) definition of conflicts of interest; (2) overbroad indemnification requests; (3) the lawyer's future use of information gained, and work product created, in the course of a representation; and (4) the right of a lawyer to withdraw if the lawyer is unwilling to agree to a client's unilateral material change in the terms of the representation.<sup>76</sup> The remaining issues also are of concern, however, and the Committee will continue to monitor them with an eye toward future action if needed.

The Committee further recommends that if the Court of Appeals decides to adopt some or all of the proposed amendments, that (1) there be a delayed effective date of at least several months to allow the Bar to educate members and to update resources such as published versions of the D.C. Rules and (2) the amendments apply only to engagement arrangements, and amendments to such arrangements, made on or after the effective date.

#### **A. Conflicts of Interest: Rule 5.6 and Comment [25] to Rule 1.7**

D.C. Rule 5.6, the comment to that rule, and Comment [25] to D.C. Rule 1.7 would be revised to provide that the restrictions on a lawyer's right to practice that are expressly set out in the D.C. Rules, as explained by the comments thereto, establish the maximum permissible scope of such restrictions.

##### **1. Rule 5.6**

D.C. Rule 5.6 would be amended as follows (additions in bold face type and underscored; deletion struck through):

A lawyer shall not participate in offering or making:

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<sup>76</sup> As noted above, the D.C. Bar's Legal Ethics Committee is addressing the confidentiality issue.

- (a) A partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; ~~or~~
- (b) An agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between parties; or
- (c) An engagement agreement or other agreement addressing terms of a representation in which a restriction on the lawyer’s right to practice is broader in scope than required by the conflict of interest elements of these rules or by other law.

A lawyer will not be subject to discipline for reasonably concluding that the terms of the lawyer’s engagement do not violate paragraph (c).

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The clean version of the proposed amended Rule 5.6 would read:

A lawyer shall not participate in offering or making:

- (a) A partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;
- (b) An agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between parties; or
- (c) An engagement agreement or other agreement addressing terms of a representation in which a restriction on the lawyer’s right to practice is broader in scope than expressly required by the conflict of interest elements of these rules or by other law.

A lawyer will not be subject to discipline for reasonably concluding that the terms of the lawyer’s engagement do not violate paragraph (c).

**2. New Comment [4] to Rule 5.6**

A new Comment [4] would be added to D.C. Rule 5.6 as follows, and existing Comment [4] would be renumbered Comment [5]. Note that the phrase “as explained by the comments thereto” would make clear that, as indicated by existing Comments [22] through [24] to Rule 1.7, the permitted

scope of disqualification includes any alter ego of a represented entity, any affiliate whose confidential information has been provided to the lawyer under the reasonable understanding that the lawyer is representing that affiliate, and situations where a representation adverse to a client's affiliate would have a material adverse effect on the financial condition of the represented client.

**[4] In light of the strong policy in favor of providing a free choice of counsel, see *Jacobson Holman PLLC v. Gentner*, 244 A.3d 690, 700-03 (D.C. 2021); *In re Hager*, 812 A.2d 904, 918 (D.C. 2002); *Neuman v. Akman*, 715 A.2d 127, 130-33 (D.C. 1998), paragraph (c) prohibits a lawyer from agreeing, or requesting that another lawyer agree, to disqualification provisions that are broader in scope than expressly required by the conflict of interest elements of these rules (e.g., Rules 1.7 through 1.13, Rule 1.18), as explained by the comments thereto, or by other law (e.g., federal conflict of interest statutes).**

Renumber existing paragraph [4] as paragraph [5].

### 3. Comment [25] to Rule 1.7

Comment [25] to D.C. Rule 1.7 would be amended as follows (deletions struck through; additions in bold face type and underscored):

**[25] In light of the strong policy in favor of providing a free choice of counsel, see *Jacobson Holman PLLC v. Gentner*, 244 A.3d 690, 700-03 (D.C. 2021); *In re Hager*, 812 A.2d 904, 918 (D.C. 2002); *Neuman v. Akman*, 715 A.2d 127, 130-33 (D.C. 1998), the express provisions of this rule, as explained by the comment thereto (particularly paragraphs [20] through [24]), other of these rules relating to conflicts (e.g., Rules 1.8 through 1.13 and 1.18), and Rule 5.6(c) establish the maximum scope of conflicts in the context of a lawyer's representation of an organization client. In particular, a lawyer may not request or agree to an arrangement that defines the client for conflicts purposes more broadly than is expressly required by the provisions of this rule, by other of these rules relating to conflicts of interest, or by other law (e.g., federal conflict of interest law). See ABA Formal Opinion 94-381 (1994); Ass'n of the Bar of the City of N.Y. Formal Op. 2007-3 (2007). Moreover, the engagement agreement or other agreement regarding the terms of representation should identify by name all entities that the lawyer is actually representing, as well as any affiliates that function as the alter ego of such entities (as defined in paragraph [23] of this comment).** ~~[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(e) can be met.~~

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The clean version of the proposed amended Comment [25] would read:

[25] In light of the strong policy in favor of providing a free choice of counsel, see *Jacobson Holman PLLC v. Gentner*, 244 A.3d 690, 700-03 (D.C. 2021); *In re Hager*, 812 A.2d 904, 918 (D.C. 2002); *Neuman v. Akman*, 715 A.2d 127, 130-33 (D.C. 1998), the express provisions of this rule, as explained by the comment thereto (particularly paragraphs [20] through [24]), other of these rules relating to conflicts (e.g., Rules 1.8 through 1.13 and 1.18), and Rule 5.6(c) establish the maximum scope of conflicts in the context of a lawyer's representation of an organization client. In particular, a lawyer may not request or agree to an arrangement that defines the client for conflicts purposes more broadly than is expressly required by the provisions of this rule, by other of these rules relating to conflicts of interest, or by other law (e.g., federal conflict of interest law). See ABA Formal Opinion 94-381 (1994); Ass'n of the Bar of the City of N.Y. Formal Op. 2007-3 (2007). Moreover, the engagement agreement or other agreement regarding the terms of representation should identify by name all entities that the lawyer is actually representing, as well as any affiliates that function as the alter ego of such entities (as defined in paragraph [23] of this comment).

## **B. Indemnification**

D.C. Rule 1.8(g) would be amended as follows (deletions struck through; additions in bold face type and underscored):

- (g) A lawyer shall not:
- (1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice; ~~or~~
  - (2) Settle a claim or potential claim for malpractice arising out of the lawyer's past conduct with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable opportunity to do so in connection therewith; or

- (3) **Except where required by law, agree to, or request that another lawyer agree to, a condition of engagement or other term of representation that renders a lawyer responsible for errors or omissions for which neither statutes nor common law impose liability on the lawyer.**

\*\*\*\*\*

The clean version of the proposed amended Rule 1.8(g) would read:

- (g) A lawyer shall not:
- (1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice;
  - (2) Settle a claim or potential claim for malpractice arising out of the lawyer's past conduct with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable opportunity to do so in connection therewith; or
  - (3) Except where required by law, agree to, or request that another lawyer agree to, a condition of engagement or other term of representation that renders a lawyer responsible for errors or omissions for which neither statutes nor common law impose liability on the lawyer.

### C. **Future Use of Information and Work Product**

Rule 1.16, along with the comment to that rule and the comment to Rule 1.6, would be amended to address the future use of information, including work product, gained by a lawyer while representing a client.

#### 1. **Rule 1.16**

The following sentence would be added at the end of D.C. Rule 1.16(d):

**The lawyer also may retain copies of documents relating to the client.**

The following new Comment [12] would be added to D.C. Rule 1.16:

**[12] Information contained in client documents retained by the lawyer following the conclusion of a representation may not be revealed or used where such revelation or usage is prohibited by Rule 1.6 or other of these Rules (e.g., Rules 1.9, 1.18, 3.3).**

## 2. Comment to Rule 1.6

The following new catchline and new Comment [41] would be added to D.C. Rule 1.6:

### Use of General Knowledge Gained in the Course of a Representation

**[41] This rule protects information of and about the client, as opposed to information about the law in general, how a particular industry operates, or how legal principles may apply to specific types of cases. As noted in D.C. Legal Ethics Opinion 175, it is an underlying expectation of these rules that lawyers should become increasingly knowledgeable about the law and employ their growing expertise to represent clients to the best of their ability. Thus, a lawyer is expected to use her evolving expertise for the benefit of each successive client, and lawyers may neither request nor agree to conditions restricting such use. D.C. Legal Ethics Opinion 175 (1986); accord D.C. Legal Ethics Opinion 275 (1997); see Rules 1.1 (requiring that representation be competent) and 1.3(a) (requiring that representation be zealous and diligent).**

### D. Optional Withdrawal Following Client's Unilateral Change in Terms of Representation

Rule 1.16 would be amended by (1) renumbering paragraph (b)(5) as (b)(6) and inserting a new paragraph (b)(5), and (2) adding a new comment [9] and renumbering existing comments [9] through [11] as [10] through [12], as follows (additions in bold face type and underscored):

- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

\* \* \*

- (5) **a lawyer has agreed, or a client contends that a lawyer has agreed, that the client may make unilateral changes in the conditions of engagement or other terms of the representation, and the client unilaterally makes a material change to which the lawyer is unwilling to assent;**



- (6) the lawyer believes in good faith, in a proceeding before a tribunal, that the tribunal will find the existence of good cause for withdrawal.

**[9] Paragraph (b)(5) permits a lawyer to withdraw where (i) the lawyer has agreed that the client may make unilateral changes in the conditions of engagement or other terms of the representation, and (ii) the client unilaterally proffers a material change to which the lawyer is unwilling to assent. Sometimes there may a dispute whether the lawyer has agreed that the client may make unilateral changes in the conditions of engagement or other terms of the representation. Where the client contends, and the lawyer disputes, that the client has such a right and seeks to impose a material change to which the lawyer is unwilling to assent, the lawyer may also withdraw. Like the other subparagraphs of paragraph (b), paragraph (b)(5) permits but does not require the lawyer to withdraw. Short of withdrawal, of course, the lawyer and the client may agree that the change requested by the client will be modified or withdrawn, or that the representation will continue and the proposed change will be considered later.**

Renumber existing comments [9] through [11] as [10] through [12].