ETHICS AND PROFESSIONALISM
AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION

AMERICAN BAR ASSOCIATION
Young Lawyers Division

Committee Newsletter | Fall 2017, Vol. 3 No. 1

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Proposed amendment to the Model Rules of Professional Conduct aims to change the way law firms and entities do business.

By: Charlie Coffee

ABA Model Rule of Professional Conduct 5.6(b) prohibits "…an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[1] This has been interpreted to mean that an agreement by an attorney to not represent other clients against a settling defendant, in future actions, is prohibited.[2] Attorneys Anthony E. Davis and Noah Fiedler of Hinshaw Culbertson, LLP believe, however, that this rule needs to be expanded to protect attorneys and law firms from unfair burdens placed on them by their corporate clients, especially in the area of conflicts of interest.[3] Davis and Fiedler's primary focus is on outside counsel guidelines (hereinafter, "OCGs")[4], which contain processes and procedures, requirements, and policies that "in-house" corporate legal departments expect outside counsel to follow.[5] Davis and Fielder argue that, due to the increased bargaining power corporate clients gained following the 2008 economic downturn, lawyers have been forced to give up some of their autonomy when it comes to the lawyer/client relationship; in fact, they view the current market for corporate legal work as a battle, and state that:

> The most destructive weapons in this battle are OCGs that redefine conflicts of interest so broadly that they significantly impair lawyers' ability to make decisions (both legal and business-related) as to what clients they may represent and matters they may work on, and to act as trusted and independent counselors on behalf of those self-same clients.[6]

Davis and Fielder argue that OCGs redefine what creates a conflict of interest in three ways: (1) they expand the definition of who is the client; (2) they limit the universe of other clients from whom law firms are permitted to accept work; and (3) they redefine conflicts. First, the definition of who the client is expands when entities mandate that, for conflicts purposes, the "client" is both a parent entity and all of its subsidiaries. Therefore, it is argued, what should be an objective, fact-specific inquiry, based on upon a specific situation, is replaced by a homogenous definition of "client." Davis and Fielder believe that this "…enormously narrows the universe of other possible clients whom the lawyer could represent."

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[1] MODEL RULES OF PROF'L CONDUCT R. 5.6 (AM. BAR ASS'N 2017).
[2] Samson Habte, *Law Firms Take Aim at Outside Counsel Guidelines, Irking Clients*, AM. BAR ASS'N MANUAL ON PROF. CONDUCT (June 14, 2017), https://www.bna.com/law-firms-aim-n73014453461/.
[3] Davis & Fiedler, *The New Battle Over Conflicts of Interest: Should Professional Regulators – or Clients – Decide What is a Conflict?*, 24 PROF'L LAWYER 2 ((last visited Oct. 13, 2017), https://www.americanbar.org/publications/professional_lawyer/2016/volume-24-number-2/the_new_battle_over_conflicts_interest_should.html.
[4] Carla Del Bove, *Practical Tips for Using Outside Counsel Guidelines*, LEXISNEXIS BUS. OF L. BLOG (Feb. 11, 2016), http://businessoflawblog.com/2016/02/outside-counsel-guidelines/.
[5] These agreements address items like rates, invoicing guidelines, staffing and status reporting.
[6] Davis & Fiedler, *supra* note 3.

Second, OCGs often prevent entire law firms from representing more than one entity in a given field. This differs from the past, where law firms often represented several corporations who provided the same product or service because that law firm was seen as "specializing" in that area. Davis and Fielder argue that, by including such provisions in OCGs, corporate clients are only hurting themselves because such a provision "…limits the ability of lawyers to understand industry-wide issues from multiple perspectives, and ultimately makes it more difficult for lawyers to provide the best possible, and most informed, service to the client."

Third, OCGs often redefine conflicts by requiring that a law firm not represent a client or in any way take a position that *could be contrary* to a position a corporate client is taking or may take in the future. If a law firm takes such a position, it is often required to withdraw from representing that other client on whose behalf it took said position. Davis and Fielder note that, "[w]hen retained under these terms, lawyers must decide whether to breach the engagement agreement with the client imposing the guidelines, or breach their ethical and fiduciary duties to other clients."[7]

Davis presented his proposal this past summer at the 43rd ABA National Conference on Professional Responsibility in St. Louis, Missouri.[8] He implored conference attendees to "collectively push back" against the burden of OCGs by urging regulatory organizations to adopt his proposed change to the model rule (the change is underlined below), which he believes addresses the aforementioned issues stemming from OCGs:

> Rule 5.6 Restrictions On Right To Practice
>
> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right 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 <u>the terms of engagement of a lawyer by a client or of</u> the settlement of a client controversy.

However, not everyone agrees with Davis and Fielder. Amar Sarwal, Vice President and Chief Legal Strategist for the Association of Corporate Counsel, noted businesses would not be pleased to see the law firms they use pushing for, what he believes is, a restraint on trade by restricting a business' freedom of contract. He further noted that OCGs are the result of "arms length" transactions between sophisticated consumers (usually between corporate legal departments and the attorneys they are looking to hire). Sarwal believes that regulators should be focusing on the tremendous need for legal services for individuals, not focusing on protecting law firms from their own clients. He says, "[i]t

[7] *Id*.
[8] Habte, *supra* note 2.

makes no sense…You should target your regulatory dollars and resources towards those who most need the protection."

Davis and Fielder are not the only ones to recognize the potential issues with OCGs. In 2014, information management Company Iron Mountain put together an Emerging Trends Task Force to explore OCGs and make recommendations for how firms can negotiate and manage such agreements. It notes that many firms have or are considering implementing their own internal audit departments to ensure compliance with provisions in various OCGs. This often requires increased staffing and technology, which can come at quite a high price. In a 2014 survey done by the aforementioned task force, only 18% of firms surveyed had such internal audit procedures in place; however, 41% of the firms surveyed were developing such procedures.[9]

At the time this article was written, this author was not able to find that a formal proposal had been made for the adoption of the above-mentioned amendment to Model Rule of Professional Conduct 5.6. Given the competition in today's legal market, however, this author does not see OCGs disappearing any time soon, nor is it likely, without some intervention by regulatory authorities, that the bargaining power of law firms will increase enough to eliminate the potential issues that Davis and Fielder have identified. Thus, for right of for wrong, it appears that law firms and attorneys must take whatever steps are necessary to protect themselves, perhaps at the cost of a potential client.

[9] LAW FIRM INFO. GOVERNANCE SYMPOSIUM, EMERGING TRENDS TASK FORCE REPORT (IRON MOUNTAIN ed., July 2014), file:///C:/Users/kd/Downloads/Emerging%20Trends%20Task%20Force%20Report.pdf.

Nebraska Ethics Advisory Opinion on Payment of Cryptocurrency for Legal Services is First in the Nation

By: Bryce M. Addison

Tech-savvy law firms and solo practitioners have been accepting digital currencies, such as Bitcoin, in exchange for legal services since as early as 2013. But despite the increasing spotlight on digital currency regulations, and concerns over its role in criminal activity, until recently, there have not been any state bar opinions providing guidance to lawyers on the propriety of accepting digital currencies as payment for legal services.

In September, the Nebraska Ethics Board became the first state bar entity to produce such an opinion. One of the three questions presented to the Nebraska Board was: May an attorney receive digital currencies such as Bitcoin as payment for legal services?

Answering that question in the affirmative, the Nebraska Board essentially aligned its digital currency policy with its policy on various other consideration items such as property,[10] stock, and foreign currency. That is, the Board advised that a Nebraska attorney is free to accept Bitcoin in exchange for legal services as long as the value accepted is "reasonable." However, the Nebraska Board advises that due to the volatility historically exhibited by digital currencies, attorneys accepting Bitcoin should take added precaution and action not applicable when other consideration items are at issue.

The Nebraska Board advises that law offices should "value or convert bitcoins and other digital currencies into U.S. dollars immediately upon receipt."[11] Further, law offices should (1) notify the client that the attorney will not retain the digital currency units but instead will convert them into U.S. dollars immediately upon receipt; (2) convert the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) credit the client's account accordingly at the time of payment. The goal of this procedure is "to mitigate or eliminate the risk of volatility" and to inform the client that "an increase in the value of their bitcoins will not additionally fund their outstanding account."[12]

Although the Nebraska Board's opinion has been generally well-received, digital currency users and critics of the opinion may argue that it failed to accommodate digital currencies within the relevant framework of current regulations and imposes more burdensome scrutiny on digital currencies than is recommended for other analogous types of consideration. These critics may argue the potential for volatility in digital currencies is no different than that in stock or other consideration types.

To illustrate, in Formal Opinion 00-418 (issued July 7, 2000), the ABA Standing Committee on Ethics and Professional Responsibility determined that a lawyer acquiring stock in exchange for legal services is deemed to be entering into a business transaction with the client and therefore must, in part, "take account of all information reasonably ascertainable at the time when the

[10] [10] MODEL RULES OF PROF'L CONDUCT r. 1.5, cmt. 4 (AM. BAR ASS'N 2017). Comment 4 provides, "[a] lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i)," and is adopted in the Nebraska Rules of Professional Conduct.
[11] Neb. Lawyers' Advisory Comm., Advisory Op. 17-03 (2017).
[12] *See id*.

agreement for stock acquisition is made." This, the Committee opines, "involves making the often difficult determination of the market value of the stock at the time of the transaction."[13] This ABA opinion does not require or provide guidance indicating that an attorney must immediately sell stock received in exchange for legal services. If an attorney accepting stock for legal services is not advised to immediately sell the shares received, why should an attorney accepting digital currencies be so advised? To a lesser degree, similar questions exist with regard to the acceptance of property and foreign currencies, which may also be subject to varying, albeit not as extreme, degrees of volatility.

The Nebraska ethics advisory opinion is a constructive first step in providing long overdue guidance to attorneys who accept digital currencies in exchange for legal services. Moving forward, additional state and national advisory committees should be moved to join the discussion and to promote consistency in ethical and professional guidelines with respect to accepting digital currencies for legal services.

NEWS AND ANNOUNCEMENTS

Ethics & Professionalism Committee Happenings

By: Emil Ali, Vice-Chair

This month I had the pleasure of joining a few hundred fellow young lawyers at the Fall ABA YLD conference. The scene was set in beautiful Denver, Colorado, where the weather cooperated, and the event was full of lively discussions and networking.

The Ethics & Professionalism Committee hosted a well-attended ethics CLE regarding best practices for Fee Agreements. I had the privilege of moderating a panel featuring April McMurrey, from the Colorado Supreme Court Office of Attorney Regulation Counsel, and Heather Kelly, from Gordon & Rees, who helped the audience spot issues that many young lawyers face in fee agreements. Reflecting on our discussion, I am struck by the need for more education in the greater legal community.

I am also delighted to inform you that our Committee's proposal for a Resolution to be presented to the YLD Assembly at the ABA Midyear Meeting in Vancouver, BC has been accepted. In the next few months, we will help craft a Resolution and report to support our idea of Improving Compliance with Ethical Obligations. Please reach out directly to me at emil.j.ali@gmail.com if you are interested in participating in this endeavor.

CALL FOR ETHICS & PROFESSIONALISM CONTENT

Want to get even more from your committee membership? Being published in one of our newsletters or on our website is a fantastic way to build your professional reputation. We are accepting articles on an on-going basis relating to legal ethics, malpractice avoidance, mental wellness, and any other topic which deals with the professionalism of attorneys. We are

[13] ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 00-418 (2000), at 4.

especially interested in publishing content from voices that properly reflect the diversity of our committee and young lawyers in general. Submissions should be made to Karuna Davé at kdave@deutschkerrigan.com and Whittney Dunn at wadunn@thebarplan.com.

We are also interested in your thoughts regarding our committee's programming. If you would like to be a named presenter for an ABA webinar or future ABA conference, please send us your proposals. Also, if there is a particular topic you would like to see covered in an upcoming presentation, webinar, or publication, please let us know. Submissions and programming suggestions should be made to Rick Anderson at randerson@rmwbhlaw.com and Whittney Dunn at wadunn@thebarplan.com.

Finally, even if you are not interested in contributing to our publications or programming, we would love to hear from you! Please let us know what we're doing well and also what we could be doing better. Committee feedback and comments should be sent to Whittney Dunn at wadunn@thebarplan.com.

Have a wonderful fall!

Sincerely,

Your ABA YLD Ethics & Professionalism Committee Leadership