THE NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2025-4: ETHICAL ISSUES ARISING WHEN ATTORNEYS CONTRACTUALLY LIMIT THEIR DISCRETION

TOPIC: Contractual Limitations on Attorney Discretion

DIGEST: Lawyers are sometimes asked to enter into agreements that by their terms would limit the discretion granted to them under the Rules of Professional Conduct (the "Rules"). However, lawyers must always comport themselves in accordance with the Rules, and the Rules may not be modified by contracts with clients or other parties. Therefore, lawyers retain the discretion to act or not to act that is granted to them under the Rules regardless of any contractual provisions to the contrary.

RULES: 1.1; 1.2; 1.3; 1.4; 1.5; 1.6; 1.7; 1.8; 1.13; 1.16; 2.1; 3.1; 3.2; 3.3; 3.4; 3.5; 3.6; 5.6; 6.1; 6.3; 6.4

QUESTION: What are the ethical implications when an attorney contractually agrees to limit discretion that attorneys otherwise have under the Rules?

Introduction

Professional independence and autonomy are hallmarks of the legal profession. While lawyers must generally act to accomplish the legitimate objectives of their clients,[1] several of the New York Rules of Professional Conduct (the "Rules") expressly give attorneys discretion to act or not to act in certain circumstances. Relatedly, other Rules expressly prohibit lawyers from taking actions that would limit such discretion as the Rules provide them. And while most Rules are silent, lawyers' overarching obligation to exercise independent professional judgement would be impaired if lawyers could ethically abdicate their discretion to act upon such independent professional judgment. By preserving and protecting attorney discretion, the Rules preserve lawyers' independence to use their professional judgment to protect not only their client, but also the lawyer, the legal profession and the legal system.

For example, Rule 1.2(a) requires that a lawyer "abide by a client's decisions" but then, in subparts (e) and (f), allows a lawyer to "exercise professional judgment" to waive or fail to assert a position of the client and to "refuse" to participate in conduct the attorney believes may be illegal even if there is some legal support for the conduct. Rule 1.6 requires lawyers to keep client confidences, but then provides for certain exceptions when a lawyer is permitted (even if not required) to make disclosure. Rule 1.16, in addition to requiring withdrawal under certain circumstances, permits lawyers to withdraw under other circumstances. Such Rules, in giving the

[1] For purposes of this Opinion, "clients" include organizations, like corporations and governments, that employ lawyers in-house. *See* Rule 1.13.

lawyer permission to act or not, place the ultimate decision within the lawyer's discretion: The lawyer—not the client—is the one entitled to make such decisions.

However, lawyers are at times asked by clients, employers and others to agree in advance to terms that could limit their ability to exercise their Rule-granted discretion. A contractual provision, an outside counsel guideline, or an employment policy may purport to require attorneys to forego in advance the ability to act on their independent professional judgments even if, during the course of the representation, they believe that certain actions should be taken or avoided to protect the client or employer, or the lawyer or the legal system. For example, some client agreements that lawyers are asked to sign may prohibit attorneys from withdrawing under any circumstances unless agreed to by the client (or a third party). Others may prohibit the disclosure of confidential information in *all* cases absent client consent. Others may prohibit or limit lawyers from exercising their discretion before tribunals or from participating in law reform activities and organizations. Such provisions, and others of similar intent, inherently impose a risk that lawyers who do not comply could be viewed as having breached a contract. That risk may undermine the discretion afforded them as licensed professionals under the Rules.[2]

However, for the reasons explained in this opinion, attorneys always retain the discretion given to them by the Rules even if they are parties to a contract that purports to allocate certain decisions to the client or otherwise curtail the attorney's discretion. Attorney and client may not alter the Rules by agreement. Therefore, an attorney may always act within the scope of the discretion granted to them by the Rules, even if the exercise of such discretion could be viewed as a breach of the lawyer's contractual obligations.[3] Furthermore, while it may not be unethical in all cases for lawyers to enter into contracts that purport to limit their discretion, this Opinion also discusses those instances when such contracts are expressly prohibited or might create ethical issues that a lawyer should avoid.

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[2] The Rules recognize a distinction between the objectives of a representation and the means to achieve those objectives. The client has the ultimate say as to the objectives of a legal representation. (Rule 1.2(a)). However, the *means* for achieving a client's objective are generally left to the discretion of counsel. Counsel's only obligation to the client, insofar as the means to the client's objectives are concerned, is to *consult* with the client (Rules 1.2(a), 1.4(a)(2)). In determining such means and in consulting with the client concerning them, the lawyer must still act competently (Rule 1.1), diligently (Rule 1.3), and with independence and candor (Rule 2.1). Comment [2] to Rule 1.2 notes, however, that where lawyer and client disagree on the means, "[b]ecause of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved." The comment further explains that the lawyer may have to resign or the client may fire the lawyer if agreement on the means cannot be reached.

[3] We recognize that New York courts have declined to enforce contracts or contractual terms that are against public policy. *See Denburg v. Parker Chapin*, 82 N.Y.2d 375 (1993) (finding a clause in a law firm partnership agreement unenforceable as against public policy), and *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1376 (Fed. Cir. 2001) ("Given the magnitude of the public policy interest here, it is not surprising that contracts barring the reporting of crimes are held to be unenforceable."). Nevertheless, we only address here whether an attorney, having agreed to a provision limiting the attorney's discretion given by the Rules (enforceable or not), retains such discretion under the Rules despite such a provision.

I. Rules that specifically give attorneys discretion are fundamental to the practice of law

Those Rules that specifically give lawyers discretion are fundamental to the practice of law. They form a key component of the societal compact that gives lawyers the exclusive right to practice law in New York. Those Rules ensure that lawyers maintain their independence in representing a client, explicitly allowing an attorney to avoid engaging in certain conduct with which the attorney disagrees and to speak out to prevent an impending crime, death or bodily harm.[4]

Lawyers' independence is at the heart of Rule 1.16(c), defining when lawyers may withdraw from a representation. Among the reasons for which a lawyer may resign from representing a client include to avoid becoming complicit in their clients' possible crimes or frauds, or because the client insists on presenting claims or defenses that the lawyer believes, in the exercise of independent judgment, cannot be legally justified or are prohibited under the Rules, or because the lawyer's mental or physical condition render it difficult for the lawyer effectively to continue the representation. Rule 1.16(c)(2), (3), (6), (9), (13). For those Rules to be effective, the lawyer must have the discretion to make an independent professional judgment to terminate a relationship.

Similarly, lawyers need not be silent witnesses to criminal or lethal conduct. While the Rules governing client confidences do not permit a lawyer to disclose, absent a client's consent, the client's confidential information, the Rules specifically permit a lawyer to disclose such information "to the extent that the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm [and] to prevent the client from committing a crime." Rule 1.6(b)(1), (2). Thus, as an ethical matter, a lawyer representing a corporate client can warn the appropriate authorities that the client has "accidentally discharged toxic waste into a town's water supply." Rule 1.6, cmt [6B]. Again, the attorney is granted the discretion needed to determine if such disclosures are permitted and warranted in the circumstances.

Other Rules grant lawyers certain rights of association that serve broader societal purposes, and those rights, like other discretionary rights in the Rules, are not, as an ethical matter, limited by contract with a client. For example, Rule 6.1 "strongly encourage[s] lawyers to provide pro bono legal services to benefit poor persons," Rule 6.3 provides that "[a] lawyer may serve as a director, officer or member of a not-for-profit legal services organization," and Rule 6.4 provides that "[a] lawyer may serve as a director, officer or member of an organization involved in the reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer."[5]

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[4] *Cf. Jenner & Block LLP v. U.S. Department of Justice*, Civ. No. 25-916(JDB), 2025 WL 1482021, at *8 (D.D.C. May 23, 2025) ("Our society has entrusted lawyers with something of a monopoly on the exercise of this foundational right—on translating real-world harm into courtroom argument. Sometimes they live up to that trust; sometimes they don't. But in all events, their independence is essential . . . .").

[5] Comment [1] makes it clear that such law reform organizations include bar associations.

II. Agreements that purport to limit attorney discretion do not prohibit an attorney from ethically exercising discretion specifically given to the lawyer by the Rules

Of course, a lawyer's discretion must always conform to any applicable overarching professional obligations. The Rules are replete with "shall" and "shall not" provisions and those *must* be observed even when a lawyer *may* exercise discretion. Foremost among them, Rule 2.1 mandates that "[i]n representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice." (Emphasis added). A lawyer *may* have the discretion in how to exercise professional judgment, but *must* do so independently, as Rule 2.1 demands. This juxtaposition of discretion and mandate is not uncommon in the Rules.

There are other commands in the Rules that provide overarching obligations that go to the very core of the legal profession. Lawyers "shall not" take on work they know they are not competent to handle, or intentionally mishandle it (Rule 1.1); they "shall" act diligently and "shall not" neglect client matters (Rule 1.3); they "shall" communicate with clients and keep them informed about their matters (Rule 1.4); and so on through most of the Rules. Therefore, even in those situations where a Rule expressly grants lawyers discretion, as discussed above, that discretion must usually serve a larger imperative. For example, Rule 1.2(e) gives a lawyer discretion to exercise professional judgment to waive or not assert a right or position when the client is not prejudiced, and Rule 1.2(f) to refuse to aid or participate in conduct that "the lawyer believes" to be unlawful, "even if there is some support for an argument that the conduct is legal." Although lawyers may exercise discretion in such cases, both those situations are governed by the overarching obligation imposed by Rule 2.1 that the lawyer "shall exercise independent professional judgment."[6]

Thus, lawyers cannot ignore the ethical mandate to exercise independent professional judgment in representing a client. However, independent professional judgment can be rendered meaningless if the lawyer is, by contract, stripped of the discretion to act upon that judgment.[7]

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[6] Among those overarching responsibilities is a lawyer's obligation to obey the law. In that regard, we are mindful that clients may be legally required to impose certain limitations on their lawyers. For example, some foreign jurisdictions may require provisions in engagement letters that may not be consistent with certain of the Rules. Even domestically, there may be instances when State agencies funding not-for-profit legal providers may by law be required to assert oversight of client files and data in ways that may not be consistent with Rules governing confidentiality. This Opinion does not address such legally imposed mandates, but only the voluntary relinquishing of discretion by lawyers acquiescing in the demands of clients.

[7] Rules that grant lawyers permission to act at their discretion have long been analyzed in the context of lawyers' duty to exercise independent professional judgment. *See, e.g.,* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct,* 91 MINN. L. REV. 265, 282 (2006) ("Although the rules give lawyers choices, lawyers are required to exercise 'professional judgment' in selecting among those choices."). Because lawyers must always exercise professional judgment, some scholars have argued that lawyers may not be put into positions where they cannot do so, especially when society at large is at risk. *See, e.g.,* Susan B. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something In Between?*, 30 HOFSTRA L. REV. 783, 808 (Spring 2002)("Any discretion given a lawyer by the ethics rules for the purpose of protecting the courts, third parties, or society as a whole should not be available as an asset for the lawyer to trade away for her own pecuniary benefit or that of her client."); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 55 (Nov. 2005) ("In situations in which the rules expect the lawyer to exercise discretion in a professionally appropriate way, it would be wrong—that is, an abuse of discretion—for a lawyer to refuse to make a considered decision.").

Even if attorneys sometimes enter into agreements that contractually limit their discretion, they must still exercise independent professional judgment where required and, as an ethical matter, they remain free to act upon such judgment where the Rules specifically give them such discretion.[8]

For example, assume a lawyer agrees with a client not to disclose any confidential information except with the client's written consent or if required by law. During the representation, the attorney learns from the client that the client is planning to commit a heinous crime. In this situation the attorney may, consistent with the discretion specifically given lawyers in the Rules, decide to report such confidential information to law enforcement if the attorney reasonably believes such disclosure is necessary to prevent the commission of the crime. Because the attorney's disclosure is permitted by the Rules, the attorney remains free under the Rules to make that disclosure even though the attorney agreed to a contract that could be read to prohibit it.

In Formal Opinion 2025-1, we concluded that directives or instructions given by a client or an employer, including the government, cannot excuse an attorney from following the Rules.[9] In Formal Opinion 2025-2, we concluded that lawyers may not counsel or assist a client in illegal or fraudulent conduct even if the client or the lawyer is immune from criminal or civil sanctions for such conduct.[10] In this Opinion, we address whether a contractual agreement can ethically constrain a lawyer's discretion to act despite Rules that grant the lawyer such discretion. The logic of our prior Opinions also applies here. A lawyer has the ethical duty to comply with the Rules despite a client's contrary wishes, and it does not matter if such wishes are expressed in *ad hoc* demands or in a formal contract.[11] In none of these instances is the lawyer's duty to comply with the Rules affected. Similarly here, discretion granted by the Rules to lawyers is not impaired by contractual provisions.

III. Except for the specific Rules that prohibit attorneys from entering into certain agreements, agreeing to limit discretion is not itself an ethical violation

There are instances under the Rules where lawyers are expressly prohibited from entering into agreements that limit attorney discretion.

Most explicitly, Rule 5.6 forbids lawyers from offering or making agreements "in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy." Rule 5.6(a)(2). Under this rule, lawyers are directly forbidden from entering contracts that limit their

[8] This discussion applies equally to all contracts that purport to limit a lawyer's discretion in the practice of law, including, without limitation, client engagement letters, outside counsel guidelines, oral agreements with clients and third parties, employment agreements and policies, agreements with third-party funders, and agreements to resolve actual or threatened disputes or legal actions.

[9] N.Y. City Bar Ass'n, Formal Op. 2025-1, *Ethical Obligations of Lawyers Representing Government Officers and Agencies* (Apr. 4, 2025).

[10] N.Y. City Bar Ass'n, Formal Op. 2025-2, *Ethical Responsibilities of Lawyers Who Have, or Who Advise or Assist Clients Who Have, Legal Immunity* (June 11, 2025).

[11] Likewise, lawyer and client may not agree that the lawyer may take action that the Rules forbid, such as filing a frivolous claim. *See* Rule 3.1(a).

right to practice. This necessarily includes attorneys' right to represent such clients, absent conflicts of interest, as they in their discretion may choose.[12]

However, there is no Rule that specifically addresses limiting the discretion explicitly afforded by the Rules. Likewise, this Committee is not aware of any court decisions or statutes that have addressed whether lawyers violate the Rules by contractually agreeing to limit discretion explicitly granted to them by the Rules.[13]

Indeed, lawyers who enter into contracts or agreements that purport to limit the lawyers' discretion to, for example, not resign or not disclose client confidences may well do so because they do not foresee that there is any likelihood that they will need to exercise that discretion in the future and want to assure the client of this. Further, if an event transpired requiring the attorney to exercise discretion, the attorney may have reasoned that the contractual limitation is no more than a requirement to have a discussion with the client before the lawyer takes discretionary action because the lawyer fully expects that the client would agree with how the attorney plans to exercise the attorney's discretion. An attorney entering into a contract or agreement under such circumstances would not necessarily violate any of the Rules. There may be other circumstances, however, when entering into such a contract or agreement *would* raise issues. [14]

For example, lawyers should be mindful of the potential for a personal conflict of interest that may arise if their compliance with ethical obligations could be viewed as a breach of a contract that forbids them to do so. Rule 1.7 prohibits lawyers from representing a client if it is reasonable to conclude that "there is a *significant risk* that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests" (emphasis added). While Rule 1.7(b) does not preclude every representation where there is the prospect of a personal interest conflict, lawyers should be mindful that a contract that purports to limit discretion in ways that a lawyer could not honor without violating the Rules potentially imposes on the lawyer a Hobson's choice, the dilemma of complying with the Rules and facing potential litigation or disregarding the Rules to buy personal safety. Where, at the outset of the representation, it is evident to the lawyer that the risk of facing that choice is significant, the lawyer should not take on the representation without discussing the conflict with the client. In

[12] The Rules also forbid lawyers from entering certain agreements that might, by their nature, create conflicts that could encourage lawyers not to use their discretion appropriately or could affect their exercise of independent professional judgment. *See, e.g.* Rule 1.8(d) (prohibiting agreements giving attorneys literary or media rights relating to representation); Rule 1.8(f) (prohibiting compensation from someone other than the client absent certain safeguards); Rule 1.8(h) (prohibiting attorneys from acquiring a proprietary interest in the cause of action); Rule 1.5 (prohibiting contingency agreements in criminal and certain domestic relations matters). *See also* N.Y. City Bar Ass'n, Formal Op. 2025-3, *Permissibility of Financial Disincentives Associated with a Lawyer's Departure from a Law Firm* (concluding a law firm may not provide for financial disincentives that have the effect, either by their express terms or in practice, of discouraging or deterring competition with the law firm).

[13] *But see supra*, note 7.

[14] Given the lack of guidance noted above, it would be particularly inappropriate to conclude that a lawyer who entered into an agreement to limit the lawyer's discretion has violated the Rules, except in the narrow circumstances set forth in the balance of this opinion.

general, lawyers should be careful before potentially putting themselves in such conflicted positions.[15]

Similarly, while it may not be an ethical violation to enter into such an agreement (or not to perform such an agreement at a later date), a lawyer also should be mindful not to mislead a client by entering into agreements that the lawyer knows the lawyer will not perform. Under Rule 1.4(a)(5), a lawyer must "consult with the client about any relevant limitations on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by these Rules or other law" (emphasis added). A lawyer may acquire the requisite knowledge at any time during a representation, including, in some cases, in connection with entering into agreements at the outset of the representation.[16]

These issues suggest that lawyers consider whether to make clear to the client that the lawyer's obligations to comply with the Rules supersedes any contract provision that purports to limit such compliance, and in particular that notwithstanding any such contract the lawyer will retain the discretion given to the lawyer by the Rules. [17] This may avoid potential confusion by the client.

Conclusion

Lawyer independence is the hallmark of our profession, and the Rules are designed to assure that independence. Lawyer and client (or any other party) may not alter the Rules by agreement. Thus, lawyers always retain the discretion specifically given to them under the Rules, regardless of any contractual terms that could be read to deny a lawyer that discretion. Further, lawyers should be aware of the risks of entering into agreements that they may not be ethically able to honor. We recommend that lawyers, where appropriate, clarify in agreements that they should not be read to limit an attorney's ability to act in a manner otherwise consistent with the Rules.

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[15] In particular, lawyers are officers of the court, and as such they have special obligations not to abuse legal procedure, or bring the administration of justice into disrepute, or undermine the integrity of the adjudicative process. To that end, Rules 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6 impose specific affirmative obligations on counsel who appear before tribunals. In such circumstances, lawyers must be free to conduct themselves ethically before the court or other tribunal and must be able to ignore client demands that might lead to conduct that violates the Rules. *See, e.g.,* N.Y. City Bar Ass'n, Formal Op. 2025-1, *Ethical Obligations of Lawyers Representing Government Officers and Agencies* (Apr. 4, 2025) ("A lawyer who engages in such prohibited conduct under the Rules is subject to disciplinary action under all circumstances and no matter what the client wanted or who the client is.").

[16] *See* N.Y. City Bar Ass'n, Formal Op. 2019-4, *Representing Multiple Individuals in the Context of a Governmental or Internal Investigation* (May 15, 2019) (Rule 1.4 may require disclosures to prospective clients about "risks and advantages" in the representation relating to a lawyer's obligations to other clients).

[17] For example, a lawyer may want to include in the contract a sentence along the following lines: "For the avoidance of doubt, nothing in this contract should be interpreted as limiting the lawyer's obligations, independence or discretion given to the lawyer under the applicable ethical rules, including the obligation to exercise independent professional judgment and the discretion to act thereon as appropriate."