

# Don't Let Client Demands Erode Law Firm Autonomy

By **Deborah Winokur** (April 6, 2023)

Embracing social change has not typically been the provenance of law firms, but the intensity of the culture wars has pushed BigLaw into the fray.

A January Bloomberg Law article chronicled the participation of major law firms — including Morgan Lewis & Bockius LLP, Greenberg Traurig LLP, Morrison Foerster LLP, Ropes & Gray LLP, and Sheppard Mullin Richter & Hampton LLP — in taking public stands on abortion policy, police brutality and racial justice.[1]



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BigLaw culture is changing as law firms must evolve to reflect the culture of both their clients and their employees.

When clients make demands that directly target the hiring practices and criteria used, a law firm's culture can be shaken.

As a self-regulating profession, the practice of law is unique in that lawyers have duties to clients and third parties under the American Bar Association's Model Rules of Professional Conduct.

The twin obligations of Model Rule 5.4 on the professional independence of a lawyer, and Rule 5.6 prohibiting noncompete agreements, are unique hallmarks of the legal profession underscoring the need for lawyers to retain their professional independence against encumbrance by nonlawyers and lawyers alike.

As explained in Comment 2 to Rule 5.4, the prohibition on sharing legal fees with nonlawyers prevents nonlawyers from encroaching on a lawyer's professional judgment.[2]

Likewise, the purpose of Rule 5.6 — banning noncompetes — is to prohibit a firm from limiting a lawyer's professional autonomy and denying clients freedom to select their own lawyers.[3]

These rules must be considered when responding to client demands relating to attorney and law firm autonomy, along with broader issues of attorney development, culture and firm integrity.

## **Diversity, Equity and Inclusion Initiatives**

Industry clients have had a significant role in moving the needle on diversity in large law firm settings.

Compared to other industries, law firms lag on diversity measures related to women, racial and ethnic minorities, and other groups.[4]

Clients are often pushing for diversity initiatives given a desire for their hired firms to reflect their diverse workforces and customer bases. Over the past 10 years, major corporations have been a driving force behind diversity initiatives implemented by their outside law firms.[5]

Some of these initiatives can be potentially invasive and risk jeopardizing attorney privacy.

If a client's policy requires that the firm provide detailed demographic information about all billing attorneys, including race, ethnicity, sexual orientation, gender identity, participation in the military, disability status, etc., the firm's human resources department must confirm with the attorneys that they are agreeable to the sharing of this personal information.

In addition, in order to protect their lawyers, law firms should perform due diligence about how this private personnel information will be used and stored.

Client metrics must also be examined. When fulfilling clients' diversity-related staffing requirements, law firms should be transparent with their lawyers about how their participation on a matter will be credited, especially if the new assignment is outside of the lawyer's desired practice group.

DEI initiatives that are being imposed upon a law firm by outside forces may result in a formulaic application that does not advance the goals of equity and inclusion nor expand the breadth of thought or experience.

On the other hand, if the law firm itself is incorporating these types of programs into its own policies and procedures, the combined effort should enhance firm culture.

Certainly, in order to provide diversity of thought and experience, firms must have clear policies that meaningfully involve and remunerate lawyers who are assigned to matters as part of a DEI policy.

In addition, as part of their duties to clients, law firms should be sensitive to their staffing needs in light of a client's DEI policies.

Before accepting matters requiring specific diversity benchmarks, law firms must ensure that they have the attorney capacity to comply with their ethical duties of competence, diligence and communication.

This must be true for situations for an incoming client with a DEI policy and existing clients who may be currently employing the services of attorneys from diverse backgrounds.

This is especially true if there are limited lawyers available for a particular, specialized matter. Employing lawyers from diverse backgrounds is critical for firms seeking to comply with outside DEI policies as well as implementing their own.

Ultimately, a law firm is bound by the Rules of Professional Conduct, so it cannot rely on a client's demand as an excuse for improper staffing of a matter.

## **Seconding Lawyers**

Another area where client demands relating to, and potentially infringing upon, a law firm's autonomy is in the area of attorney secondment.

Requests by in-house counsel for attorney secondment, whether as a direct hire or a temporary assignment, have been on the rise due to cuts in corporate departments and the perception that integration of seconded attorneys is easier to accomplish in the remote environment.[6]

When faced with a client's demand to hand over a developing associate, the firm needs to consider a number of factors, both ethical and holistic, in terms of an attorney's development.

From an ethical standpoint, the firm needs to consider the impact on other clients and whether the firm will be able to adequately staff matters without the associate's ability to contribute.

Furthermore, the seconded attorney must be particularly mindful of the duties of competence and confidentiality.

The seconded attorney may not have the same access to mentors and legal research as the attorney working within the firm. It is therefore essential that the seconded attorney be trained ahead of time and aware of resources for support.

In addition, the seconded attorney and the other attorneys at the firm must both be aware of the broad duties of confidentiality. It is possible that the seconded attorney may work on matters adverse to other clients of the firm. For example, the company may be performing in-house research about suing a different client of the law firm.

The seconded attorney may not share that information with the firm, and may need to be screened from participation in the matters relating to that firm client upon return to the firm.

Furthermore, the law firm and the associate should consider the secondment in light of the potential impact on that young professional's trajectory.

In some cases, having the opportunity to develop unique industry experience by working directly inside a company can accelerate a lawyer's development, but there are also risks to the lawyer by way of limiting broad exposure to a variety of practice areas and other attorneys inside the firm. The attorney may also be limited in the opportunity to develop new business.

Ultimately, a law firm cannot abdicate or allow a client to substitute its own decision making for the firm's.

## **Conclusion**

While I imagine all law firms wish to successfully fulfill their clients' legal needs and have them walk away happy, they are not, and should not be, made to compromise their professional and ethical duties in order to do so.

When a law firm is effectively forced to make hiring and retention decisions based on requirements established by clients, the law firm's integrity, ethics and independence are seriously jeopardized.

Corporations are not governed by the same rules nor held to the same standards as law firms, and may not take into account a law firm's professional duties to all of its clients.

Recognizing these duties in the face of rapid and intense social change, firms need to build and promote awareness of their core values and firm culture in order to meaningfully respond to these changes.

To ensure success and growth for generations to come, law firms must work collaboratively with clients while maintaining their independence on decisions relating to their lawyers' employment.

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[1] <https://news.bloomberglaw.com/business-and-practice/culture-wars-catch-big-law-firms-balancing-client-staff-demands?context=search&index=0>.

[2] [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_4\\_professional\\_independence\\_of\\_a\\_lawyer/comment\\_on\\_rule\\_5\\_4/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer/comment_on_rule_5_4/).

[3] [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_6\\_restrictions\\_on\\_rights\\_to\\_practice/comment\\_on\\_rule\\_5\\_6/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_6_restrictions_on_rights_to_practice/comment_on_rule_5_6/).

[4] <https://www.law360.com/articles/1164440/the-2019-law360-glass-ceiling-report>; <https://www.law360.com/articles/1177089/the-2019-law360-diversity-snapshot>.

[5] [https://www.americanbar.org/groups/litigation/publications/litigation\\_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/](https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/).

[6] <https://www.law.com/corpcounsel/2021/07/19/corporate-counsels-secondment-requests-are-on-the-rise/>.