
Legal Ethics in the Era of Law Firm Mergers and Vereins: Fee-Splitting, Referral, Conflicts and Other Ethical Issues

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I. Overview of recent merger activity

2018 was one of the busiest years for law firm mergers *ever*, including record or near-record numbers of mergers for:

- Regional U.S. firms expanding in the U.S.;
- National and regional U.S. firms expanding internationally; and
- National and regional U.S. firms combining with international firms.

What's driving law firm merger activity?

- Cost pressures
- Seeking economies of scale
- Competition from non-law firm providers
- Competition for legal talent
- Client needs and considerations

Is bigger better?

- Are these larger megafirms actually more profitable?
- Are these larger megafirms more capable of competing with encroaching non-law firm competitors?
- Are these larger megafirms competently handling the legal ethics issues that arise?

II. Verein association structure

What is a *verrein* structure for law firms?

- From the German for “association”
- Swiss organizational structure defined in its civil code
- Consists of associated independent entities with shared or coordinated management

For example...

Consider a Swiss verein structure for a law firm named

- ***Global Megafirm***
- Consisting of a holding company;
- with a single board of directors;
- managing a unified global brand

that includes multiple independent legal entities, like:

- ***Global Megafirm US, LLP***
- ***Global Megafirm Australia***
- ***Global Megafirm Canada***
- ***Global Megafirm International***
- each its own independent separate organizational structure, governance, and compensation systems.

Actual management of vereins varies depending on the law firm along a spectrum:

- Some firms use relatively strong central management;
- Other firms function more like a referral network.
- **But** verein member entities are *financially independent*, which can mean less risk for taking on liabilities of unknown businesses,
- **and** make it easier to unwind if things go wrong.

Some practical limitations of the verein structure

- The verein structure does not remove regulatory complexity for law firms; on the contrary, within national or regional jurisdictions, there are still complex rules to navigate.
- For example, the 50 different sets of rules of professional responsibility in the United States.

More practical limitations of the verein structure

- The verein structure does not *remove* barriers based on business culture or other local variations, customs, and practices.
- For example, the status of lawyers among various member entities may differ widely, as well as relative lawyer compensation, productivity expectations, client development protocols, and business sharing habits.

Verein members are independent entities and may not cooperate in practice

- What happens when verein member entities compete?
- What happens when verein member entities align with competitors?
- What is the value of a unified global brand under these circumstances?
- What if the performance of verein members differs substantially?
 - Market perception?
 - Prestige?

Benefits of the verein structure

- A unified global brand
- Management coordination
- Economies of scale and cost-sharing
- Profits and incentives according to local policies and practices
- Knowledge and expertise sharing

What alternatives are there to vereins?

- Single large firm
- Affiliations and referral networks
- Alternative structures

Questions regarding vereins

- Is the verein a *single* law firm...
- for conflicts purposes?
- for fee and profit sharing purposes?
- for advertising and solicitation purposes?
- for referrals between its members?

More questions regarding vereins

- Are clients better off because of vereins?
- Are vereins (more) profitable?
- Are members better off because of vereins?

III. Law firm mergers, vereins and the RPCs

ABA Model Rules of Professional Conduct

- Every state has its version of the RPCs –
 - While all states and most U.S. jurisdictions have adopted the ABA Model RPCs in some form since 1983, there are state- and jurisdiction-specific variations
 - You can find complex charts published by the Center for Professional Responsibility Policy Implementations Committee outlining the status of each jurisdiction's review of rule changes
 - https://www.americanbar.org/groups/professional_responsibility/policy/

Rule 1.17: Sale of Law Practice

- Conditions
- Notice requirements
- Fee arrangements –
 - “(d) The fees charged clients shall not be increased by reason of the sale.”

Fees

- Rule 1.15: Safekeeping Property
 - Jurisdiction-specific Trust Accounting Requirements
 - Business and trust accounts
 - Commingling of funds
 - Conversion
- Rule 1.5: Fees
 - Jurisdiction-specific fee arrangements
 - Contingency fees
 - Sharing fees with lawyers not of the same firm
 - Sharing fees with non-lawyers
- Rule 5.4: Professional Independence of a Lawyer

Conflicts

- Rule 1.7: Current Clients
- Rule 1.9: Former Clients
- Rule 1.10: Imputation of Conflicts of Interest: General Rule
- Limitations of Conflict Check Systems
 - Initial conflict checks
 - Conflicts that arise during representation
 - Conflict Committees

Confidentiality

- Rule 1.6: Confidentiality of Information
 - Enforcing obligation to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client
 - Jurisdiction-specific recordkeeping requirements
 - Electronically-stored information

Supervision

- Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer
 - Conformance to RPCs
- Rule 5.3: Responsibilities Regarding Nonlawyer Assistance
- Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law
- Rule 5.6: Restrictions on Rights to Practice
- Rule 5.7: Responsibilities Regarding Law-related Services

Advertising and Public Communication

- Rule 3.6: Trial Publicity
- Rule 7.1, 7.2: Communications Concerning a Lawyer's Services
- Rule 7.3 Solicitation of Clients
 - “(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.”

Discipline

- Rule 8.5: Disciplinary Authority; Choice of Law
 - “(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.”

Questions regarding the RPCs

- Is it really one mega law firm?
- Is there a difference between sharing fees and sharing of costs?
- Are traditional conflict of interest rules applicable?
- Are the existing RPCs insufficient to deal with mega law firm issues and vereins?

Thank You

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