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HONORING CHOICE BY CONSENTING ADULTS: PROSPECTIVE CONFLICT WAIVERS AS A MATURE SOLUTION TO ETHICAL GAMESMANSHIP—A RESPONSE TO MR. FOX

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I. INTRODUCTION

In a recent article entitled *All's OK Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*,¹ published in Volume 29 of this Law Review (the "Article"), author Lawrence J. Fox assails the increasing utilization of prospective conflict waivers by law firms with even the most sophisticated corporate clients.² The central thesis of the Article is that a prospective conflicts waiver agreement between a law firm and a highly sophisticated client, even one advised on the implications of the waiver by independent counsel, at the inception of the attorney-client relationship when both are able to make

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1. Lawrence J. Fox, *All's OK Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701 (2001).

2. See generally *id.*

a mutually agreeable and rational determination concerning the types of future conflicts that will prevent the law firm from accepting an engagement adverse to the client, is a blight on the legal profession.³ Given this premise, it is hardly surprising that Mr. Fox also condemns recent initiatives by the American Bar Association (“ABA”) to modernize the guidelines to facilitate the use of prospective conflict waivers as a scourge that should be halted forthwith.⁴

In proclaiming that the sky is about to fall, at least on the legal profession, Mr. Fox advocates the prohibition of prospective conflict waivers with a fervor that was once reserved for pool halls in River City or “Demon Rum.” Although cloaked in high-minded language, this prohibitionist position, which is an antiquated and myopic one, would ride roughshod over one of the most sacrosanct client rights—the right to select counsel of choice.⁵ In his zeal to encourage clients who would—absent an effective conflicts waiver—invoke the most tenuous “conflicts” by lawyers with whom they may have little, if any, real relationship, under the rubric of undivided loyalty, Mr. Fox overlooks the important rights of the client on the receiving end of the tactical use of conflicts, who is likely to be deprived of counsel of choice—usually counsel with whom this client has a long-standing relationship.⁶ Viewed in this context, the possibility that a client may succeed in welching on

3. *See id.* at 715-28.

4. *See id.* at 708-15.

5. The right of clients to retain the counsel of their choice is so fundamental that the New York Court of Appeals has decisively established that it is “absolute”; even where two adverse clients select the same lawyer to represent them both to prepare a separation agreement. For example, in *Levine v. Levine*, 436 N.E.2d 476 (N.Y. 1982), the court stated:

While the potential conflict of interests inherent in such joint representation suggests that the husband and wife should retain separate counsel, the parties have an absolute right to be represented by the same attorney provided “there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement.”

Id. at 479 (quoting *Christian v. Christian*, 365 N.E.2d 849, 855 (N.Y. 1977)); *see also* *Cerqueira v. Clivilles*, 623 N.Y.S.2d 580, 580 (App. Div. 1995) (“A civil litigant has a fundamental right to the legal counsel of choice and we are not unmindful that disqualification motions . . . are frequently used as a litigation tactic.”); *Glashow v. Linden Towers Coop. #4*, N.Y. L.J., Jan. 31, 2001, at 25 (N.Y. Sup. Ct. Jan. 30, 2001) (“Disqualification of counsel, however, conflicts with the general policy favoring a party’s right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter.”), available at <http://www6.law.com/ny/com> (last visited Oct. 10, 2001).

6. Of course, this is a zero-sum game and every client who successfully raises a “conflict” deprives another client of their lawyer or counsel of choice. The “payoff” to the objecting client engaged in this ethical gamesmanship is enhanced where the lawyer-client relationship that is disrupted is a significant and long-standing one that will exacerbate the harm to the other client to whom the objecting client is opposed.

an agreement not to interfere with another client's long-standing relationship with counsel whenever it becomes expedient to do so, should not be a cause for great comfort for Mr. Fox as it can only fortify the negative public perception that lawyers are ethically challenged.

To be sure, prospective conflict waivers may not be suited to every client and there are clients that would not be expected, absent independent representation, to comprehend or appreciate the potential consequences of an advance consent. At the other end of the spectrum, however, it is extremely hard to argue that highly sophisticated corporate and individual clients, who are well advised by inside or outside counsel—often both—are incapable of understanding the implications of waiving future conflicts. After all, these clients regularly allocate risks in agreements with full appreciation of the implications. Indeed, every time a client executes a general release, unknown potential risks and ramifications are accepted. They do not vitiate the legal effect of these agreements any more than they should abrogate prospective conflict waivers.

A. *The Context for Evaluating Prospective Conflict Waivers:
The Overly Rigid Application—Undivided Loyalty*

Just how extreme this prohibitionist position and its deleterious consequences for client loyalty really are can only be fully appreciated in the context of the overly-broad swath that the duty of undivided loyalty already cuts into the right of clients to select their counsel of choice. This is the problem that a prospective conflicts waiver is designed to manage. Since the Court of Appeals for the Second Circuit decided *Cinema 5, Ltd. v. Cinerama, Inc.*⁷ more than twenty-five years ago, it has become axiomatic that a law firm's representation of a client in a matter adverse to another current client of the firm is almost always improper, even though the two matters are entirely unrelated.⁸ In the ensuing quarter century, the practice of law has evolved dramatically. Clients that once utilized the legal services of a single law firm for all their needs, especially large multinational corporations, now frequently engage numerous firms to handle discrete and highly specialized legal problems,⁹ and the size of law firms has increased exponentially.¹⁰

7. 528 F.2d 1384 (2d Cir. 1976).

8. *See id.* at 1386-87 (holding that two matters need not have a "substantial relationship" in order for Canon 5 to apply).

9. *See generally* Ted Schneyer, *Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law*, 16 REV. LITIG. 537, 542-43 & n.15 (1997).

10. *See generally id.*

In this context, the application of a broad inflexible rule prohibiting all concurrent adverse representation, which is premised on the duty of undivided loyalty to one current client embodied in Canon 5 of the *New York Code of Professional Responsibility* ("Canon 5") and Rule 1.7 of the *ABA Model Rules of Professional Conduct* ("Model Rule 1.7"), may unnecessarily prevent other clients from exercising their important right to select counsel of choice and can also deprive the other clients of the law firm's loyalty—the very attribute the rule is supposed to protect. As applied, this extremely rigid prohibition on all adverse concurrent representation can preclude a client that has relied on a law firm for many years from continuing to utilize its services if the law firm happens to represent the client's adversary in another matter,¹¹ even though the other engagement is entirely unrelated to the controversy and there is no conceivable risk that any diminution of loyalty to, or zealotry in representing, the other client would occur.¹² As a result, Canon 5 and Model Rule 1.7 have become a tactical weapon of choice to attempt to disqualify the adversary's lawyer,¹³ especially by clients

11. Some courts treat all members of a corporate family as a single "client" for conflicts purposes, see *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 792 (S.D.N.Y. 1991); *Hartford Accident & Indem. Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534, 540 (S.D.N.Y. 1989); *Glueck v. Jonathan Logan, Inc.*, 512 F. Supp. 223, 227 (S.D.N.Y.), *aff'd*, 653 F.2d 746 (2d Cir. 1981), thereby extending the prohibition on adverse representation to subsidiaries and affiliates. In a formal opinion, the American Bar Association has, however, concluded that, absent a contrary understanding with the client, corporate entities should be treated as distinct entities for conflicts purposes and it is not unethical to simultaneously represent a client in a matter adverse to a subsidiary or affiliate while concurrently representing the parent. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 390 (1995).

12. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1298-1301 (1981).

13. For example, in *Sports Medicine Service of Gramercy Park v. Perez*, 657 N.Y.S.2d 314 (Civ. Ct. 1997), the court stated:

Disqualification motions have become a cottage industry. All too frequently attorneys bring such motions as a litigation tactic. Even where the situation presented seems to implicate a disciplinary rule if read literally, the court must be wary to prevent its misuse, particularly when it is unnecessarily detrimental to the adverse party's rights.

Disqualification should not be ordered lightly, particularly where the disqualification would not advance the very purposes that the disciplinary rule seeks to promote. DR 5-105(C) is intended to protect clients from an attorney who is incapable of zealously representing the potentially competing interests of each client. Mechanical, uncritical application of the disciplinary rule in this case would not only result in injustice, but would not protect the defendants, who are members of the class that the Rule is intended to protect. Disqualification here would be purposeless and contrary to public policy.

Id. at 315-16 (citations omitted). In *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981), the Court of Appeals for the Second Circuit recognized the "proliferation of disqualification motions and the use of such motions for purely tactical reasons." *Id.* at 437. While the court was unable to determine the precise increase in such

whose relationship with a law firm it is seeking to disqualify is extremely limited, but which still qualifies for protection under Canon 5.¹⁴

B. *The Problem*

An increasingly common fact pattern illustrates the problem:

For many years, a corporation has relied on one outside law firm to provide antitrust advice, including creating and monitoring of its antitrust compliance program and representing it in litigation. Although the legal representation has been costly, the corporation has benefited from the development of a well-trained group of lawyers who are intimately familiar with the corporation's business. Equally important, a relationship of mutual trust and confidence has developed over the years between senior management of the corporation and the law firm.

Under these circumstances, it is only natural that when the corporation finds itself named as a defendant in an antitrust suit brought by a potential entrant alleging monopolization and seeking an astronomical judgment, the general counsel turns to the corporation's long-time counsel, whose senior antitrust partner is asked to rush over to review the pleading and to counsel, as well as console, the general counsel and the chief executive officer on this bet-your-company case. Upon reading the caption of the complaint at the meeting, the lawyer gasps, turns to the two corporate officers and says: "I do not know how to tell you this, but the plaintiff has recently become a small client of our California office, which is negotiating a small lease for a division of the plaintiff. We had no idea this company was going to become a competitor of yours or we would never have taken them on."

The Chief Executive Officer responds: "Come on, Joe, we know you and your firm and we are confident that you will fight tooth and nail for us. We are not worried about who is doing what in a small real estate matter in your California office. We do not believe for a moment that you would ever 'roll over' after what we have been through together. We trust you totally. So, do not worry, we are not concerned; let us focus on the merits." The lawyer, seeing her major client slip through

motions, it believed the use of disqualification motions had substantially increased. *See id.*; *see also infra* note 38 and cases discussed therein.

14. Even a dormant relationship has been held to be sufficient to preclude simultaneous adverse representation, *see Kennecott Copper Corp. v. Curtiss-Wright Corp.*, No. 78 Civ. 1295, slip. op. at 5 n.2 (S.D.N.Y. Apr. 11, 1978), as has a relationship that ended more than a year before if there is any possibility that additional issues may arise. *See Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188, 192-96 (D.N.J. 1989).

her fingers, reluctantly responds: “I am afraid you do not understand how the lawyers’ conflicts rules work in situations like this. Because the plaintiff currently is a client of our law firm, we cannot oppose it in any matter, especially in litigation. So we cannot take the case without the plaintiff’s consent. I cannot even discuss the merits with you because it would be considered disloyal.”

The chief executive explodes: “But that is crazy—I cannot believe what I am hearing. The plaintiff is not affected at all. The lease transaction is between the plaintiff and a landlord 3,000 miles away and plaintiff’s representation by your firm could not possibly be harmed by your defense of our company in this case. It does not help my company for your firm to be less than enthusiastic in the negotiations in California. We have been paying your firm an annual retainer for years to have you available for a critical situation like this—what about loyalty to us? What kind of so-called ethics rule would require you to be disloyal to my company?”

The answer to this rhetorical question is: an inflexible ethical regime that deprives a client from continuing to utilize the services of counsel—no matter how long the relationship—because an adversary of the client happens also to be utilizing its same law firm in a matter that has no relationship whatsoever to the matter in dispute and which could not be expected to be affected in any manner, much less adversely, by the lawyer’s other representation. Of course, the draconian impact on the lawyer’s loyalty to the long-standing client in the foregoing scenario, stemming from the rigid application of Canon 5, could have been prevented if the law firm had obtained a prospective conflicts waiver. Not surprisingly, the same vocal group of prohibitionists that bemoans the use of prospective conflict waivers as a vehicle to manage this unnecessary intrusion on client choice, is equally vehement in its insistence on maintaining the underlying rigid rules.¹⁵

We examine in Part II the origin and adverse impact on client rights of the broad, inflexible rule precluding all engagements adverse to a current client and review some of the efforts to ameliorate its harsh effects. In Part III, we discuss conflict waivers and review the ABA’s

15. Even Mr. Fox is forced to acknowledge the regrettable impact that comes from depriving a client of a long-standing attorney-client relationship. *See* Fox, *supra* note 1, at 719. In the Article, he notes that a client with a long-standing relationship might not be able to switch lawyers because [t]he client may be engaged in a short deadline transaction . . . [M]ay have invested thousands, tens of thousands of dollars, in getting the law firm up to speed and may not want to switch law firms . . . [And,] [t]he lawyer and the client may have developed a rapport, even a sense of trust.

Id.

proposed rule (the “Proposed Rule”) that would apply to prospective conflict waivers and facilitate the use of advance waivers as a method to managing the problems of the overly rigid rule. In Part IV, we address Mr. Fox’s criticism of this proposal.

II. THE GENESIS OF THE BROAD RULE PROHIBITING ALL ENGAGEMENT ADVERSE TO CURRENT CLIENT CONFLICTS

A. *Cinema 5 and the Origin of the Prima Facie Rule Against Simultaneous Adverse Representation*

The source of the problem can be traced to the Second Circuit’s decision in *Cinema 5, Ltd. v. Cinerama, Inc.*¹⁶ In *Cinema 5*, the Second Circuit concluded that the “substantial relationship” test, while appropriate “where the representation of a former client has been terminated,” does not apply where the relationship is a continuing one.¹⁷ In the concurrent client situation, “[w]here the relationship is a continuing one, adverse representation is prima facie improper.”¹⁸ The court expressly left open, however, the possibility that this presumption of diminished vigor could be overcome. “[T]he attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation.”¹⁹

B. *Subsequent Application of Cinema 5*

The Second Circuit’s invitation to analyze the *impact* of the conflicting representation on the affected client has been ignored by subsequent cases in favor of a mechanical test that both begins and ends with a determination that there is simultaneous representation by the law firm and that the requisite adversity exists. As a result, the prima facie rule adopted in *Cinema 5* has become a per se rule.

The Third Circuit’s decision in *IBM Corp. v. Levin*²⁰ (“*Levin*”) exemplifies the inflexible application of the rule. *Levin* involved an

16. 528 F.2d 1384 (2d Cir. 1976).

17. *Id.* at 1387.

18. *Id.* Although the court’s rejection of the substantial relationship test has been embraced by the vast majority of subsequent cases and ethics rules, the wisdom of this conclusion is certainly subject to debate.

19. *Id.*

20. 579 F.2d 271 (3d Cir. 1978).

antitrust action by Howard S. Levin, and the Levin Computer Corp. (“Levin”), an upstart computer company, against IBM that had proceeded for six years.²¹ While the case was pending, Levin’s law firm, Carpenter, Bennett & Morrissey (“CBM”), accepted engagements for IBM in labor matters that were entirely unrelated to the antitrust action.²² Claiming that it “discovered” the conflict six years into the case,²³ rather than curing the dual representation by simply terminating the firm as its labor counsel, IBM attempted to exploit the situation to its advantage. It sought to cripple Levin’s antitrust case by stripping Levin of its lawyers by moving to disqualify CBM based on the unrelated simultaneous representation in the labor matter.²⁴

Although Levin’s counsel argued that no adverse effect on IBM could or would result from these two completely unrelated representations, the District Court granted IBM’s disqualification motion, and the Third Circuit affirmed, applying the *prima facie* rule from *Cinema 5* as a *per se* rule of disqualification.²⁵ In doing so, the court ignored the *Cinema 5* rebuttable presumption that the presumed impropriety could be overcome through proof “that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation.”²⁶ The Third Circuit ruled that the conduct must be measured against the duty of undivided loyalty that an attorney owes to each of his clients, not the similarities in litigation.²⁷

Not surprisingly, the court offered no explanation of how Levin’s interest could be furthered by the rendering of bad labor advice by CBM

21. *See id.* at 274-75.

22. *See id.* at 276.

23. *See id.* at 277.

24. *See id.*

25. *See id.* at 279-80.

26. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976).

27. *See Levin*, 579 F.2d at 280 (citing *Cinema 5*, 528 F.2d at 1386). The court also relied on Canon 9, the need to avoid the “appearance of impropriety,” for the “maintenance of public confidence in the propriety of the conduct of those associated with the administration of justice,” *id.* at 283, a ground which generally has been abandoned as a basis for disqualification. *See, e.g.*, *Armstrong v. McAlpin*, 625 F.2d 433, 445 (2d Cir. 1980) (en banc) (“[T]he possible ‘appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . . particularly . . . where . . . the appearance of impropriety is not very clear.’”) (alterations in original) (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979)), *vacated on other grounds*, 449 U.S. 1106 (1981); *Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc.*, 53 F. Supp. 2d 338, 345 (E.D.N.Y. 1999) (Weinstein, J.) (“[T]he appearance of impropriety is usually insufficient, in and of itself, to support disqualification.”); *Commercial Union Ins. Co. v. Marco Int’l Corp.*, 75 F. Supp. 2d 108, 113 (S.D.N.Y. 1999) (finding that the interests of fairness and efficiency outweigh the minimal risk of appearance of impropriety); *Hartford Accident & Indem. Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534, 538 (S.D.N.Y. 1989) (stating that in the Second Circuit, “courts are reluctant to rest disqualification of counsel solely upon Canon 9”).

to IBM or how the law firm's representation of Levin in its antitrust case against IBM could lead to any "diminution in the vigor" of its unrelated labor representation of IBM.²⁸ Indeed, the failure of IBM's general counsel to "discover" the simultaneous labor representation until some six years into the antitrust action leads to the ineluctable conclusion that IBM believed that CBM's labor advice had been perfectly satisfactory. And if IBM was genuinely concerned, it could have, and should have, terminated the law firm's representation and told it to permanently cross IBM off its client list.²⁹

But the objective in this case, like most other disqualification motions, had little, if any, basis in high-minded concerns over loyalty and everything to do with litigation strategy. Even a cursory analysis of the *Levin* facts, which typify disqualification motions rooted in *Cinema 5*, shows that Levin—not IBM—had a right to be concerned about loyalty.³⁰ In *Levin*, a small client faced the prospect that the loyalty of its

28. The client in the non-adverse matter, here IBM, faces few risks, if any, especially compared with the client in the adverse matter, here Levin. In *Levin*, the law firm represented IBM in a matter that did not implicate or involve Levin's interests. See *Levin*, 579 F.2d at 280. As a result, the incentive for the law firm to breach its duty to the client in the non-adverse matter is almost nonexistent. See *Developments in the Law*, *supra* note 12, at 1299-1300. Despite this analysis, the inflexible *Cinema 5* rule, as applied in cases like *Levin*, proscribes dual representation *at the behest of the unaffected client*. Because the other client's interests—Levin's—were not implicated in the non-adverse matter, Levin had no reason to encourage CBM to betray IBM in the non-adverse matter. This factor reduced the danger that CBM will be exposed to and succumb to pressure to act disloyally. CBM had no incentive or reason to "soft pedal" or "pull its punches" in representing IBM because CBM was not antagonizing Levin in any way by being as zealous as possible for IBM in its labor negotiations. Levin was interested exclusively in the adverse matter, in which CBM did not represent IBM. Thus, in the non-adverse matter, the law firm has little incentive to commit acts of "spontaneous" disloyalty.

29. See Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, 113-14 (1996). Professor Green suggests allowing the federal courts to develop disqualification standards through a case-by-case balancing process that takes full account of the costs disqualification imposes on the courts and on innocent clients, but treats disqualification solely as a remedy to redress or avert breaches of confidentiality or other tangible harm, not as a pure sanction to enforce ethics compliance. See *id.* at 73-74. Applying this approach, Professor Green sharply criticizes the Third Circuit's decision in *Levin* because, *inter alia*, the disqualification motion came five years into the litigation and IBM made no showing that it had been harmed or was likely to be harmed by the offending representation. See *id.* at 84-85.

30. Because the law firm's representation of Levin was in the matter where Levin's interests were adverse to IBM's interests, CBM's simultaneous representation of IBM in the non-adverse matter may create a substantial danger of dilution of its loyalty to Levin in the adverse matter. See *Developments in the Law*, *supra* note 12, at 1298. CBM's representation of IBM in the non-adverse matter creates two basic risks for Levin in the adverse matter. One risk is the danger that IBM may be perceived as a potentially important client to CBM and will be able to take advantage of this favored status to procure CBM's betrayal of Levin in the adverse matter. The second risk is that the law firm, on its own initiative, may represent Levin less vigorously to avoid antagonizing IBM, whom CBM represents in the non-adverse matter. Given the real danger that the law firm's divided

lawyer was being “purchased” by a huge conglomerate’s legal business. But Levin had no problem with its law firm’s zeal—it was no doubt this very zeal which prompted IBM to attempt to remove CBM. In the name of client loyalty, the mechanical application of *Cinema 5* ironically deprived Levin of the loyalty of its counsel when it was needed the most.

A similar result was reached in *Foster Wheeler Corp. v. Edelman*.³¹ In that case, Foster Wheeler’s long-time takeover counsel, Wachtell, Lipton, Rosen & Katz (“Wachtell”), was disqualified in an action arising from a contested takeover of Foster Wheeler by Asher Edelman.³² Wachtell was disqualified because one of the defendants in the *Foster Wheeler* action, Howard Alper, was a partner of Edelman, and also a partner in an entity called J&J Investors, which was a member of a group of more than eighty limited partners represented by Wachtell in a completely unrelated bankruptcy matter.³³ The court rejected Wachtell’s argument that no conceivable impact on Alper, a partner in an entity that was a “tag along” client in a large and unrelated class action, resulted from Wachtell’s representation of Foster Wheeler.³⁴ The court applied the per se rule of disqualification mechanically without analyzing the impact of the alleged conflict.³⁵ The court did not explain how Edelman could be prejudiced in the unrelated bankruptcy matter by Wachtell’s representation of Foster Wheeler in the contested takeover. Of course, Wachtell’s disqualification vindicated no real ethical objective, but it did serve a very real strategic goal of stripping an adversary of counsel in the midst of a fast-moving takeover battle.³⁶

loyalties may prevent its faithful representation of Levin, the client represented in the adverse matter, the *Cinema 5* proscription of simultaneous representation would be sensible here without the consent of Levin. Ironically, in *Levin*, Levin faced these potential theoretical dangers of divided loyalty, but it chose to continue with its counsel of choice, because its counsel was doing a zealous and, no doubt, effective job. IBM did not face any of the dangers that Levin did, but sought to disqualify the law firm because it was doing a zealous and effective job for Levin.

31. No. Civ. 87-4346, slip op. at 2 (D.N.J. Mar. 24, 1988).

32. *See id.* at 2, 4.

33. *See id.* at 3.

34. *See id.* at 3-4.

35. *See id.*

36. In sharp contrast to the mechanical approach applied in cases like *Levin* and *Foster Wheeler*, the district judge in *Chem-Nuclear Sys., Inc. v. Waste Mgmt., Inc.*, No. C82-812C, Transcript of Hearing (W.D. Wash. July 9, 1982), refused to order the disqualification of counsel based on an alleged violation of Canon 5 in a takeover. There, a law firm was representing the target of an unsolicited tender offer in litigation against a bidder. Unbeknownst to the law firm, it had been simultaneously representing a subsidiary of the bidder in a dormant litigation that remained pending in the Delaware Chancery Court, which was not revealed in a conflicts check because it had been recently acquired by the bidder. The bidder moved to disqualify the law firm based on the conflict

C. *The Ethical Costs of An Overly Broad Application of Canon 5—
Undue Influence on Client Choice of Counsel and
Mandated Disloyalty*

The sweeping preclusion on all adverse concurrent representation frequently is justified by those who, like Mr. Fox, espouse the importance of demanding a lawyer's undivided loyalty to all clients no matter how narrow the relationship. But this rationale overlooks the steep ethical price that must be paid by the other client. An overly broad application of Canon 5, which goes beyond what is necessary to protect the client in the non-adverse relationship, needlessly deprives other clients of the extremely important right to select their counsel of choice,³⁷ can mandate disloyalty to a law firm's client—the very value

and the law firm sought to cure the conflict by withdrawing from the Delaware litigation, which it did with permission of the Chancery Court. The district court refused to disqualify the law firm from representing the target in the fast-moving takeover litigation because, *inter alia*, the prejudice to the target outweighed other considerations. The court stated that “discovery in preparation for the [preliminary injunction] motion is proceeding at a feverish pace. To require Chem-Nuclear to change counsel at this juncture would do them a grave disservice The motion for disqualification is therefore denied.” *Id.* at 32.

37. Justice Brennan recognized the importance of this right in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (Brennan, J., concurring). “A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings.” *Id.* at 441. The Second Circuit has a general aversion to attorney disqualification. “This reluctance [to disqualify] probably derives from the fact that disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons.” *Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc.*, 53 F. Supp. 2d 338, 346 (E.D.N.Y. 1999) (Weinstein, J.) (alteration in original) (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979), *vacated on other grounds*, 449 U.S. 1106 (1981)); *see, e.g., Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791-92 (2d Cir. 1983); *Sumitomo Corp. v. J.P. Morgan & Co.*, Nos. 99 Civ. 8780, 4004 (JSM), 2000 WL 145747, at *3 (S.D.N.Y. Feb. 8, 2000); *Rosewood Apts. Corp. v. Perpignano*, No. 99 Civ. 4226 (NRB) (MHD), 2000 WL 145982, at *3 (S.D.N.Y. Feb. 7, 2000); *Aetna Cas. & Sur. Co. v. Manshul Constr. Corp.*, No. 95 Civ. 3994 (LMM), 1997 WL 214946, at *12 (S.D.N.Y. Apr. 29, 1997). The Sixth Amendment guarantees a criminal defendant the right “to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. It is well-settled that a component of this right is the protection of a defendant's opportunity to obtain the counsel of choice. *See Powell v. Alabama*, 287 U.S. 45, 53 (1932). Although no constitutional counterpart exists for civil cases, the ethics rules, reflecting strong public policy, specifically recognize the importance of a client's right to select counsel of choice by prohibiting certain restrictions on an attorney's right to practice. *See N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-108(B)* (1999); *MODEL RULES OF PROF'L CONDUCT R. 5.6* (1990). “The type of restriction that violates DR 2-108(B) is one that *completely prohibits* the lawyer from representing clients and thus offends ‘the right of members of the public to select and repose confidence in lawyers of their choice without restriction by providing full availability of legal counsel.’” *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 416 n.2 (N.Y. 1989) (Hancock, J., dissenting) (emphasis added) (quoting *Cohen v. Lord, Day & Lord*, 534 N.Y.S.2d 161, 163 (App. Div. 1988). Model Rule 5.6(b) bars settlement agreements restricting the right of the plaintiff's

supposedly advanced by Canon 5—inflicts needless prejudice on blameless clients, does not serve the purpose of the conflict rules, and invites the kind of gamesmanship that the courts have condemned.³⁸

Preventing a client from engaging counsel of choice where there is, and can be, no adverse impact on the lawyer's loyalty to the other client in the unrelated matter is antithetical to the client's right to counsel of choice. And, where the client wishes to engage counsel with whom the client already has had a long-standing relationship, an unnecessarily broad application of *Cinema 5* actually *mandates disloyalty* to a client of the firm. While the "prima facie" rule originally described by *Cinema 5* may have enabled the courts or ethics committees to strike an appropriate balance, this mechanical application completely ignores these competing concerns.

D. Legislative Solution—The Texas Example

The cleanest solution to this problem would be to simply change the rule. To be sure, neither the ABA nor most academics have shown much inclination to do so.³⁹ However, at least one state has done so. Texas adopted the "substantial relationship" test to measure conflicts of

lawyer to represent future claimants in actions against the defendant. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 371 (1993).

38. See, e.g., *Kassis v. Teacher's Ins. & Annuity Assoc.*, 678 N.Y.S.2d 32, 34 (App. Div. 1998) (noting that "[m]otions to disqualify are frequently used as an offensive tactic" and "may be used frivolously as a litigation tactic" (quoting *Solow v. W.R. Grace & Co.*, 632 N.E.2d 437, 440 (N.Y. 1994) (alterations in original))), *rev'd*, 717 N.E.2d 674 (1999); *Bongiasca v. Bongiasca*, 679 N.Y.S.2d 132, 133 (App. Div. 1998) (accepting the lower court's finding that "given the long-term participation of both parties' attorneys in the parties' affairs . . . that defendant made the disqualification motion as a delaying tactic"); *McDade v. McDade*, 659 N.Y.S.2d 530, 531 (App. Div. 1997) (rejecting disqualification motion when "plaintiff was aware of the facts which formed the basis for the claim of conflict of interest" two and a half years before seeking disqualification and thus it appeared "that the motion was 'little more than a tactic clearly designed to stall and prolong a divorce action'"); *Drury v. Tucker*, 621 N.Y.S.2d 822, 823 (App. Div. 1994) (noting that "disqualification motion[s] must be 'carefully scrutinized' because it 'denies a party's right to representation by the attorney of [his] choice'" and denying the disqualification motion because it was "made to gain a 'strategic advantage' over plaintiff" (alteration in original) (citations omitted) (quoting *S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 508 N.E.2d 647, 650 (N.Y. 1987))); *Glashow v. Linden Towers Coop. # 4*, N.Y. L.J., Jan. 31, 2001, at 25 (N.Y. Sup. Ct. Jan. 30, 2001) (noting that "a disqualification motion must be 'carefully scrutinized' because it 'denies a party's right to representation by the attorney of [his] choice'" and denying the disqualification motion because it was "made to gain a 'strategic advantage' over plaintiff") (alterations in original) (citations omitted), available at <http://www6.law.com/ny/com> (last visited Oct. 10, 2001); see also Ellsworth A. Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View*, N.Y. L.J., July 20, 1977, at 1 (stating that disqualification motions have become "common tools of the litigation process, being used . . . for purely strategic purposes" (footnote omitted)).

39. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (1987).

a current client. Rule 1.06 of the *Texas Disciplinary Rules of Professional Conduct* allows concurrent representation except where the two representations involve a “substantially related matter,”⁴⁰ or the attorney’s representation of one party “reasonably appears to be or become[s] adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.”⁴¹

Applying Texas Rule 1.06, a Texas intermediate appellate court in *Conoco, Inc. v. Baskin*⁴² affirmed the denial of a motion to disqualify a plaintiff’s law firm, which was simultaneously representing the defendant in unrelated matters.⁴³ In reaching this conclusion, the court considered the nature and status of the concurrent representation of plaintiff and defendant in the unrelated matters and found there was no evidence of any exposure by the law firm to any confidences in the other litigation that would enhance plaintiff’s posture in its suit against defendant, or undermine defendant’s position in the same suit.⁴⁴ It seems extremely unlikely, however, that New York or many other states will follow Texas’ lead anytime soon.⁴⁵

40. TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.06(b)(1) (1990).

41. *Id.* Within the meaning of the Texas Disciplinary Rule, matters of different clients are “substantially related” when “a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar.” *Id.* case note 4. In addition, the representation of one client is

“directly adverse” to the representation of another client if the lawyer’s independent judgment on behalf of a client or the lawyer’s ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer’s representation of, or responsibilities to, the other client.

Id. cmt. 6. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. *See id.*

42. 803 S.W.2d 416 (Tex. App. 1991).

43. *See id.* at 422.

44. *See id.* at 421-22. In *In re Dresser Indus., Inc.*, 972 F.2d 540 (5th Cir. 1992), the Court of Appeals for the Fifth Circuit limited the application of the Texas Disciplinary Rules in the federal courts. Reversing the district court, which had applied the Texas Rules and had accordingly denied the disqualification motion due to lack of a substantial relationship, the Fifth Circuit held:

The district court clearly erred in holding that its local rules, and thus the Texas rules, which it adopted, are the “sole” authority governing a motion to disqualify. Motions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law.

....

... [W]e consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants’ rights.

Id. at 543 (citations omitted).

45. A recent decision, *Sumitomo Corp. v. J.P. Morgan & Co.*, Nos. 99 Civ. 8780, 4004 (JSM), 2000 WL 145747, at *1 (S.D.N.Y. Feb. 8, 2000), may provide hope, however, that a more analytical and flexible approach to the application of Canon 5 to current client conflicts may be on the horizon. *See discussion infra* notes 50-71 and accompanying text.

E. The "Trial Taint" Test

The Second Circuit has sought to soften the litigation impact of the rule and eliminate at least some of the gamesmanship through adoption of the "trial taint" test, which is designed to preclude disqualification unless the trial will be tainted.⁴⁶ But, a rule that eliminates disqualification as a sanction is vastly different from giving ethical approval to the underlying conduct and does not obviate the ethical breach in representing one current client against another. This was a conclusion recently reinforced in *Universal City Studios, Inc. v. Reimerdes*,⁴⁷ where the court declined to disqualify counsel based on the absence of "trial taint," although the judge determined the firm's simultaneous representation to be violative of Canon 5.⁴⁸ Whenever the law firm chosen by a client has a current client relationship with the putative client's adversary, no matter how attenuated it is to the matter in controversy, acceptance of the proposed engagement still would be

46. See, e.g., *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748-49 (2d Cir. 1981). In *Glueck*, the Second Circuit declined to extend the flat prohibition of Canon 5 to certain nontraditional clients, such as trade associations, opting for a more lenient "substantial relationship" test to assess a lawyer's concurrent representation of a trade association and another client adverse to a member of the trade association. See *id.* at 749-50.

47. 98 F. Supp. 2d 449 (S.D.N.Y. 2000).

48. See *id.* at 455-56. In *Universal City Studios*, Judge Lewis Kaplan denied Time Warner's motion to disqualify defendant's counsel even though the attorneys currently represented Time Warner in another case. See *id.* The court found that when the law firm agreed to represent Time Warner and another plaintiff in an unrelated case, it "surrendered the right to represent another client in litigation against any of them." *Id.* at 453. Even though the court concluded that the firm was acting improperly in seeking to represent defendants while representing Time Warner in the other case, the court concluded that it did not necessarily follow that the firm should be disqualified. See *id.* at 455. Judge Kaplan noted that "[d]isqualification motions are subject to abuse for tactical purposes," and that "disqualification . . . deprives a client of counsel of its choice," and may require complex satellite litigation extraneous to the case before the court. *Id.* He emphasized that professional disciplinary bodies, including the Grievance Committee of the district court, "are available to police the behavior of counsel." *Id.* Disqualification is only appropriate, in the Second Circuit, if a violation of the Code of Professional Responsibility gives rise to significant risk of "trial taint," see *Glueck*, 653 F.2d at 748, which is a significant risk that the conflict will affect the attorney's ability to represent the client with vigor (in violation of Canons 5 and 9), or if the attorney is in a position to use privileged information acquired by representation in another matter (in violation of Canons 4 and 9). See *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979), *vacated on other grounds*, 449 U.S. 1106 (1981).

Judge Kaplan did not find a real risk of tainting the trial or any risk of prejudicing Time Warner. The motion was tactically motivated. See *Universal City Studios*, 98 F. Supp. 2d at 455-56. Disqualification at this stage would prejudice the defendants by forcing them "to find and educate new counsel for an important trial that now is less than two months away or seek an adjournment and thus perhaps prolong the duration of the preliminary injunction." *Id.* at 456. The court believed that "Time Warner sat on its hands for too long to have substantial claims on the Court's exercise of its discretion." *Id.* The court, however, found the firm did have a breach of ethics, and in other circumstances, it could be subject to disqualification. See *id.* at 455.

ethically impermissible and the law firm is unlikely to accept it. As a result, if counsel has been retained, the “trial taint” test may spare the client the draconian problems stemming from disqualification, but it will do little, if anything, to assist the client in securing its law firm of choice in the first place.

F. *Sumitomo Corp. v. J.P. Morgan—An Analytical Approach to Current Client Conflicts*

Absent a rule change, any departure from the inflexible approach to correct client conflicts will have to be developed by courts and bar associations. Former Chief Judge Kaufman said, “[w]hen dealing with ethical principles . . . we cannot paint with broad strokes . . . and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.”⁴⁹ Nowhere is this admonition against overly broad ethics rules more apt than in application to Canon 5.

Recently, in *Sumitomo Corp. v. J.P. Morgan & Co.*,⁵⁰ Judge Martin adopted a thoughtful and analytical approach to the application of Canon 5. In denying a motion to disqualify Paul, Weiss, Rifkind, Wharton & Garrison (“Paul Weiss”), the court examined the impact of the alleged conflict and whether it would actually “diminish the vigor” of the law firm. Relying on the Second Circuit’s decision in *Board of Education v. Nyquist*,⁵¹ Judge Martin held disqualification is appropriate under Canon 5 only where the attorney’s conflict undermines a court’s confidence in the vigor of the attorney’s representation of the client.⁵² Unlike the sweeping per se disqualification often applied to concurrent adverse representation, the “diminished vigor” test applied by the court in *Sumitomo Corp.* would limit Canon 5 to situations where its purpose is served. To be sure, the procedural context in *Sumitomo Corp.* differed from the typical adverse representation fact pattern in a way that arguably diminished the “direct adversity” between Paul Weiss and its client. But, the requisite adversity to warrant disqualification was present and Judge Martin’s analysis would seem to be equally valid in all Canon 5 cases.

49. *United States v. Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955).

50. Nos. 99 Civ. 8780, 4004 (JSM), 2000 WL 145747, at *1 (S.D.N.Y. Feb. 8, 2000).

51. 590 F.2d 1241, 1246 (2d Cir. 1979), *vacated on other grounds*, 449 U.S. 1106 (1981)).

52. *See id.* at *4 (citing *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979), *vacated on other grounds*, 449 U.S. 1106 (1981)).

Sumitomo Corp. involved two separate but virtually identical actions brought by the Sumitomo Corporation (“Sumitomo”) arising from Sumitomo’s \$2.2 billion loss from copper-trading transactions.⁵³ After sustaining these enormous losses, Sumitomo retained Paul Weiss to conduct an investigation into the copper-trading transactions and to represent Sumitomo in all proceedings or litigation arising from them.⁵⁴ As a result of its investigation, Paul Weiss discovered that certain of its clients in unrelated matters, including Chase Manhattan Bank (“Chase”), which it represented in the litigation, were among Sumitomo’s potential targets.⁵⁵ Paul Weiss advised Sumitomo that it could not evaluate, much less assert, potential claims against those current clients, including Chase, and suggested Sumitomo obtain other counsel for those actions.⁵⁶ At Sumitomo’s request, Paul Weiss sought a waiver from Chase that would permit Paul Weiss at least to evaluate Sumitomo’s potential claims against Chase.⁵⁷ This request was refused,⁵⁸ and thereafter Sumitomo retained the law firm Kronish, Lieb, Weiner & Hellman (“Kronish Lieb”) to represent it against Chase.⁵⁹ Sumitomo, represented by Kronish Lieb, sued Chase, and shortly thereafter, represented by Paul Weiss, sued J.P. Morgan.⁶⁰

Chase moved to consolidate the two cases.⁶¹ Although the similarities of the alleged cases were hotly debated, with Chase arguing that they were “extremely similar” and J.P. Morgan emphasizing the differences, it was not disputed that certain factual issues were identical.⁶² Suffice it to say, the court found sufficient overlap to warrant consolidation. Chase argued that upon consolidation, Paul Weiss should be disqualified because it would be representing one current client who was suing another current client in a consolidated action.⁶³ Even without

53. *See id.* at *1.

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.* at *2.

58. As a practical matter, Paul Weiss’ willingness even to request the consent from Chase suggests the relationship was a relatively limited one. Most law firms would be unwilling to risk antagonizing a large corporate client that utilizes a broad range of services.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.* at *2 n.2.

63. Along with the motion to disqualify Paul Weiss, Chase also moved to consolidate the two actions for pretrial purposes pursuant to Rules 24(a) and 42(a) of the Federal Rules of Civil Procedure. The court interpreted this as a motion to consolidate these cases for pretrial purposes. Rule 42(a) empowers a trial judge to consolidate actions for trial when there are common questions of law or fact to avoid unnecessary costs or delay. *See* FED. R. CIV. P. 42(a).

consolidation, Chase argued, disqualification was mandated because Paul Weiss' representation of Sumitomo would adversely affect Chase.⁶⁴

Judge Martin declined to apply Canon 5 mechanically:

No decision, however, has found that the Code's prohibition against simultaneous representation extends to the situation before the Court. Here, Paul Weiss is not representing Sumitomo against Chase in this litigation in violation of DR 5-105. Instead, Paul Weiss is representing Sumitomo against Morgan, a non-client, while Kronish Lieb is representing Sumitomo against Chase, Paul Weiss' current client in an unrelated matter. Thus, the per se rule against simultaneous representation articulated in *Cinema 5* and other decisions does not require the Court to disqualify Paul Weiss.⁶⁵

The court analyzed the nature and extent of Paul Weiss' representation of both Chase and Sumitomo. Significantly, Judge Martin recognized that he was "not dealing with an individual client who [had] placed his trust in an individual lawyer for a substantial period of time."⁶⁶ He emphasized that Chase is "a huge financial institution" and Paul Weiss was only one of many law firms that represent Chase.⁶⁷ Judge Martin also considered the amount of business in relation to the size of the client (Chase) and the law firm (Paul Weiss), which he found not substantial in relation to their respective sizes.⁶⁸

Based on this analysis, the court found no reason to suspect that Paul Weiss would fail to represent Sumitomo, the nonmoving party client, vigorously as a result of a desire to please the moving party client, Chase.⁶⁹ Judge Martin added that the fact that Chase made the motion to disqualify, demonstrated that Chase did not believe that Paul Weiss would not vigorously represent Sumitomo.⁷⁰

Most significantly, Judge Martin did not foresee any danger from Paul Weiss' participation in the case that would adversely impact its representation of Chase in the other concurrent matter:

There is no danger that Paul Weiss' participation in this case will adversely impact its representation of Chase in the other matters. The issues involved in this action are totally unrelated to the issues in the matters in which Paul Weiss represents Chase. While one can

64. *See Sumitomo Corp.*, 2000 WL 14574, at *4.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.*

69. *See id.* at *4-5.

70. *See id.* at *4.

understand that Chase's in-house counsel might be unhappy that a law firm which represents it in some matters was taking a position in litigation involving another client that, if adopted, would prejudice an argument that Chase was advancing in a separate case, that does not mean that the law firm is violating a confidence of its client or engaging in unethical conduct.

Because there is no indication that Paul Weiss' conflict between Sumitomo and Chase will undermine the Court's confidence in the vigor of Paul Weiss' representation of either Sumitomo in the Morgan action or Chase in any unrelated matter, there was no reason [to] disqualify Paul Weiss.⁷¹

Judge Martin's opinion in *Sumitomo Corp.* provides an insightful and analytical approach to the application of Canon 5. If applied to all cases involving current client conflicts, it would eliminate many of the difficulties imposed on clients by the mechanical, inflexible approach that has become *de rigeur*, and is far more consistent with the purpose of the conflicts rules. The approach followed by Judge Martin vindicates the purpose of Canon 5, while also safeguarding a client's extremely important right of counsel of choice. Judge Martin's approach would also avoid the mandated disloyalty imposed by the mechanical approach, the absurd results in cases like *Levin* and *Foster Wheeler*, and would go a long way to prevent abusive disqualification motions filed for tactical purposes.

III. ENFORCEABLE PROSPECTIVE CONFLICT WAIVERS ARE THE BEST WAY FOR SOPHISTICATED CLIENTS AND THEIR LAWYERS TO MANAGE THE PROBLEM OF THE OVERLY RIGID PER SE RULE

Given the current state of the conflicts law, the best—and many times the only—method to avoid the deleterious effects of tactical disqualification motions designed to disrupt an attorney-client relationship is to permit consenting clients, especially sophisticated ones, and their lawyers to create their own “default” position through the enforcement of prospective conflict waivers. In the Article, Mr. Fox creates the impression that, until recently, prospective conflict waivers were rarely encountered and infrequently countenanced.⁷² In fact, while

71. *Id.* at *4-5.

72. See Fox, *supra* note 1, at 705-07 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 372 (1993) [hereinafter ABA Formal Opinion 372] and five cases to suggest that

the decisions are by no means uniform, prospective conflict waivers have been enforced,⁷³ and many scholars have welcomed their use.⁷⁴

In 1993, a formal ABA opinion cautiously blessed prospective conflict waivers.⁷⁵ Significantly, the ABA recognized that the growth in size and sophistication of law firms and their clients necessitated effective waivers:

The impetus for seeking prospective waivers has grown as the nature of both law firms and clients has changed. In an era when law firms operated in just one location, when there were few mega-conglomerate clients and when clients typically hired only a single firm to undertake all of their legal business, the thought of seeking prospective waivers rarely arose. However, when corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm's New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation *strikes some as placing unreasonable limitations*

prospective conflict waivers have been met with uniform hostility). *See infra* note 73 for a discussion of the five cases.

73. *See, e.g.*, *Fisons Corp. v. Atochem N. Am., Inc.*, No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284, at *15-16 (S.D.N.Y. Nov. 14, 1990) (stating that the prospective conflicts waiver should be enforced when adequate disclosure was made to a sophisticated client and noting that the disclosure does not need to include the exact nature of the future disputes); *Interstate Props. v. Pyramid Co. of Utica*, 547 F. Supp. 178, 181-82 (S.D.N.Y. 1982) (holding that Canon 5 was not violated because the attorney received consent and the challenged action would not impair the attorney's ability to represent his client adequately); *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, No. 78 Civ. 1295, slip op. at 6-7 (S.D.N.Y. Apr. 11, 1978) (holding that because the client's officers knew that the company's "aggressiveness and Skadden Arps' specialized practice might some day lead to a collision," the agreement left the law firm "free to represent any client, past, present, or future, in any takeover attempt with no risk of disqualification, even though [the client] happened to be the unfriendly corporate suitor or otherwise in an adversarial position"); *Zador Corp. v. Kwan*, 37 Cal. Rptr. 2d 754, 762-63 (Ct. App. 1995) (enforcing waiver where client was given the opportunity to obtain legal counsel and signed waiver agreeing not to seek to disqualify counsel "notwithstanding any adversity that may develop" (alteration in original)); *Elliot v. McFarland Unified Sch. Dist.*, 211 Cal. Rptr. 802, 809 (Ct. App. 1985) (holding that "[b]y signing [a] joint powers agreement" the plaintiff "waived its right to disqualify [the law firm] from representing other signatories to that agreement"); *see also, e.g.*, New York County Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 724 (1998) [hereinafter New York County 724], available at 1998 WL 39561, at *1 (1998); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 390 (1995).

74. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.2.4, at 347 (1986); Susan R. Martyn, *Are We Moving in the Right Dimension? Sadducees, Two Kingdoms, Lawyers, and the Revised Model Rules of Professional Conduct*, 34 VAL. U. L. REV. 121, 152-53 (1999); Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 327 (2000). For additional discussion of Professor Painter's views on prospective waivers, see *infra* notes 104-06 and accompanying text.

75. *See* ABA Formal Opinion 372, *supra* note 72.

*on the opportunities of both clients and lawyers. While the Model Rules quite correctly treat such a situation as presenting a conflict, the conflict is also clearly one that can be waived.*⁷⁶

The Opinion states: “Consistent with the mandate of Model Rule 1.7, a lawyer may ask for, and a client may give, a waiver of objection to a possible future representation presenting a conflict of interest that in the absence of the waiver the lawyer would be disqualified from undertaking.”⁷⁷ To be sure, the Opinion does caution that under the current law, and under certain circumstances, a prospective conflicts waiver may not be binding and the attorney may have to secure a second waiver when an actual controversy arises.⁷⁸ But these caveats are unexceptional propositions, and even an ardent proponent of advance waivers (the Author pleads guilty) would have to admit that they cannot be invoked mindlessly and that occasions certainly may arise—depending on the specific terms of the waiver, the nature of the conflict, and the identity of the client—where the waiver might not be enforced. This, however, is a far cry from suggesting that prospective conflict waivers are always invalid or that a second waiver would be needed as a rule, rather than a narrow exception, especially where highly sophisticated clients are involved. In this respect, Mr. Fox’s interpretation of the ABA Formal Opinion 372 appears to be wishful thinking.⁷⁹

76. *Id.* (emphasis added).

77. *Id.*

78. *See id.* The ABA, in 1993, stated:

[N]o lawyer can rely with ethical certainty on a prospective waiver of objection to future adverse representations simply because the client has executed a written document to that effect. No lawyer should assume that without more, the “coast is clear” for undertaking any and all future conflicting engagements that come within the general terms of the waiver document. Even though one might think that the very purpose of a prospective waiver is to eliminate the need to return to the client to secure a “present” second waiver when what was once an inchoate matter ripens into an immediate conflict, there is no doubt that in many cases that is what will be ethically required.

Id.

79. *See* Fox, *supra* note 1, at 705-07. In the Article, Mr. Fox asserts that ABA Formal Opinion 372 almost always requires a second waiver, stating that the “opinion concluded that almost certainly, a look back will be required at the time the prospective waiver is dusted off, an essential ethical limitation that is affirmatively eschewed by the [Business Law Section] Proposal.” *Id.* at 713. In fact, ABA Formal Opinion 372 merely speculates that “there is no doubt that in many cases that is what will be ethically required.” ABA Formal Opinion 372, *supra* note 72. Of course, there is a vast difference between “virtual certainty,” and “many cases,” and the frequency will depend on the client’s ability to understand the “legal implications” and effects of future adverse representation. This will no doubt depend on the sophistication of the client and the disclosures made to the client when the waiver is executed. *See* discussion *infra* notes 95-105 and accompanying text.

Indeed, the ABA Formal Opinion 372 must be read in light of the more recent Formal Opinion 724 issued by New York County Lawyer's Association Committee on Professional Ethics ("New York County 724"), discussion of which is conspicuously absent from the Article,⁸⁰ stating that under the *New York Code of Professional Responsibility*, prospective clients may "waive their right to a conflict-free relationship with their lawyer if they so choose and to consent to their lawyer's representation of another party or parties with interests adverse or differing from their own."⁸¹ As correctly noted by the New York County 724, "[i]n an advance waiver situation, there is no actual conflict for a lawyer to examine."⁸² The lawyer, however, can still discuss with the prospective client the types of anticipated representations and the lawyer and client can make a "reasonable analysis of the probabilities of whether or not this type of representation is likely to give rise to a conflict that is non-consentable."⁸³

The collection of cases that Mr. Fox has unearthed also should provide little, if any, comfort to the prohibitionists. These cases do not reflect any structural or overarching infirmity to the use of prospective conflict waivers, but simply involve *sui generis* cases in which lawyers failed to explain adequately the significance of these potential conflicts. Significantly, none of these cases involved situations where the client was advised by independent counsel in connection with the decision to consent—a prescription that should be fatal to the prohibitionist position in virtually every case. If the attorneys in those cases had obtained written waivers and had demonstrated informed client consent, and the client had been represented by independent counsel, in all likelihood, the waivers would have been enforced.⁸⁴

80. Although only two Bar Association opinions provide significant treatment of the subject matter of the Article, the most recent one, New York County 724, is relegated to a parenthetical reference in a footnote and seems only to have been referenced to at all because it was cited by a case on which the Article relies. See Fox, *supra* note 1, at 708 n.34.

81. New York County 724, *supra* note 73, at *1 ("[I]n recognition of the very important right of a client to retain counsel of his or her choice, and perhaps in recognition of the realities of modern legal practice, the Code provides that such conflicts can be waived with full disclosure and client consent.").

82. *Id.* at *2.

83. *Id.*; see also *id.* (citing ABA Formal Opinion 372 and stating "[a]t the very least, the client or prospective client should be advised of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients or matters that may present such conflicts").

84. In *Schwartz v. Indus. Valley Title Ins. Co.*, No. CIV.A. 96-5677, 1997 WL 330366, at *1 (E.D. Pa. June 5, 1997), the court held that a prospective conflicts waiver given in 1993 in a related but separate action was not effective to waive the conflict in connection with an action commenced in 1996 because the attorney did not *inform* the client that there could be subsequent adverse litigation. See *id.* at *6. The court noted in dicta, however, that the waiver would have been effective

A. *Ethics 2000*

In the summer of 1997, the ABA appointed a commission, popularly known as “Ethics 2000,” to comprehensively evaluate the Model Rules (the “Commission”).⁸⁵ Before embarking on its comprehensive review of the Model Rules, the Commission sought comments from an ad hoc committee of the Business Law Section of the ABA (the “Business Law Committee”).⁸⁶

if the attorney had “consult[ed] with [his] clients about potential conflicts of interest, and . . . disclose[d] the facts and circumstances surrounding the conflicts to such an extent that the clients appreciate[d] the significance of the conflict.” *Id.* (quoting Int’l Longshoremen’s Ass’n Local 1332 v. Int’l Longshoremen’s Ass’n, 909 F. Supp. 287, 292 (E.D. Pa. 1995)). Similarly, the Eastern District of Louisiana would have enforced the waiver at issue if the client had been truly informed, as required by the Proposed Rule. *See In re Suard Barge Servs., Inc.*, No. 96-3185, 1997 U.S. Dist. LEXIS 12364, at *15-16 (E.D. La. Aug. 14, 1997) (holding that a valid waiver must “disclose the nature of the actual or potential conflict” and that no waiver existed because the client “believed at that time that no conflict existed, so [the lawyer] did not explain the conflict in the requisite detail”); *see also Fla. Ins. Guar. Ass’n v. Carey Can., Inc.*, 749 F. Supp. 255, 260 (S.D. Fla. 1990) (holding that a client’s lack of objection did not constitute the requisite “informed consent after consultation” because the letter was ambiguous and was not addressed to the client’s counsel).

The rationale in *Florida Insurance Guarantee Ass’n* was the basis of Mr. Fox’s next case, *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356, 1359-60 (N.D. Ga. 1998). The *Worldspan* court’s ruling, however, was based on the fact that the six-year-old “standard engagement letter” was too ambiguous to satisfy the informed consent requirement. *See id.* at 1359-60. In dicta, the court also noted that the evidence did not suggest that the letter was the byproduct of any consultation with the client—and certainly there was no consultation with the client’s in-house attorney. *See id.* In fact, there was evidence from the law firm that suggested “that there was no response thereto . . . and the representation was thereupon commenced and continued without demur” and from the plaintiff-client that they had objected to the retainer letter. *Id.* The *Worldspan* court also commented in dicta that the lawyer-client relationship was one of “trust” and thus, “any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties.” *Id.* at 1360. This rationale, however, does not take into consideration the fact that before the lawyer is retained, the relationship is essentially contractual, and that under the proposed rules the lawyer must consider the sophistication of the client and whether or not the client was represented by independent counsel. Finally, with regard to *In re Granite Partners, L.P.*, 219 B.R. 22 (Bankr. S.D.N.Y. 1998), Mr. Fox acknowledges that the court vitiated the waiver at issue because it was merely “boilerplate” and that the waiver would probably have been effectuated if it had comported with the ABA’s requirements. *See Fox, supra* note 1, at 708 n.34.

85. *See, e.g.*, Chief Justice Norman Veasey, Professional Responsibility and the Corporate Lawyer, Address Before the Kutak Symposium (2000), in 13 GEO. J. LEGAL ETHICS 331, 332 (2000). For an excellent background on Ethics 2000, see Center for Professional Responsibility, *Ethics 2000 Commission*, at <http://www.abanet.org/cpr/ethics2k.html> (last visited Oct. 2, 2001).

86. Letter from Larry P. Scriggins, Chair, Ad Hoc Committee on Ethics 2000, to ABA Commission on the Evaluation of the Rules of Prof’l Conduct 1 (Sept. 15, 1999) (on file with the *Hofstra Law Review*) [hereinafter Sept. 15, 1999 letter].

1. The Business Law Committee's Proposal

The Business Law Committee specifically addressed prospective conflict waivers and proposed that if the client were sophisticated and/or had independent representation, the prospective conflicts waiver should be binding.⁸⁷ The Business Law Committee's proposal focuses upon the importance of a client's right to select counsel of choice and proposes that where a client had independent representation in the waiver decision, the lawyer and client would be permitted "to enter into a *binding agreement* that neither could abrogate under a 'second look' concept."⁸⁸

This proposal was designed to eliminate "uncertainty concerning the validity of prospective [conflict] waivers [that] can prejudice other clients of the lawyer, depriving them of legal services they expect to receive and their lawyer expects to be able to render."⁸⁹ This uncertainty requires a sophisticated client to make two calculations before it decides whether to retain a law firm that is likely to become conflicted: (i) the business risk that the conflict will be so harmful as to outweigh the benefits of retaining the law firm, and (ii) the legal risk that their waiver of the conflict will be invalidated or challenged in court by another party, all incurring additional costs for the client. This second

87. *See id.* at 2 (stating the proposal is designed to "recognize the principle that sophisticated clients are capable of giving informed general consents to future conflicts" and "that the same principle should apply where the client is not necessarily sophisticated in legal matters but is independently represented.").

88. *Id.* (emphasis added). According to the Business Law Committee:

A client that has not retained a lawyer for general representation may also agree to a waiver of future conflicts in other matters *that are not substantially related* to those matters for which the client has retained the lawyer. Whether a client who has given such a general waiver of future conflicts with respect to unrelated matters will be deemed to have given informed consent to a waiver of a specific type of conflict within the meaning of paragraph (b) will depend upon evaluation of such factors as the *business sophistication* of the client, the client's *familiarity with the nature of the lawyer's practice*, the degree of adversity involved (e.g., whether the waiver obtained referred to litigation in a case where the lawyer later seeks to represent another client in litigation with the client giving the waiver), and whether the client was represented by *independent counsel* (either the General Counsel, a member of the Law Department of the client, or outside counsel) when the waiver was granted. *Ordinarily, an advance waiver given by a client who is independently represented by counsel in connection with giving the waiver should be presumed to be an informed consent.*

Id. at 2-3 (emphasis added).

89. *Id.* at 1-2.

calculation is unnecessary and potentially costly to the sophisticated corporate client.⁹⁰

The importance of enforcing a prospective conflicts waiver based on the circumstances that exist at the time it is agreed on by the client and lawyer, not based on any “second look” after adversity arises, is easy to see. In reality, a games-playing client, bent on reeking ethical havoc on an opponent that happens to also be a client of the same lawyer, hardly can be expected to agree to any “second look” waiver. Once an attorney-client relationship has been established by such a mischievous client, the “conflict” will be used to another client’s disadvantage unless an enforceable conflicts waiver has been obtained. Thus, the Business Law Committee suggests

once a valid general waiver of future conflicts is obtained from a client, it may be relied on by the lawyer so long as the lawyer reasonably believes that [he] will be able to continue to provide competent and diligent representation to that client in those matters in which [he] is performing legal services for that client, notwithstanding the lawyer’s representation of another client covered by the conflict waiver. The client may revoke a waiver of future conflicts, *but the client may not withdraw its consent as to conflicts arising prior to the revocation*. In addition, the lawyer is entitled to treat the revocation as a termination of the lawyer-client relationship, with the effect that Rule 1.9 rather than Rule 1.7 would apply to conflicts arising thereafter.⁹¹

The Business Law Committee’s suggestion is a salutary one. Foreclosing a client from withdrawing its consent once potential adversity emerges will decrease the tactical use of disqualification motions and protect the “other client” from being stripped unnecessarily of their long-time outside counsel during the middle of a critical representation. Before a lawyer is retained (or retained for a new matter), the sophisticated client, who is represented by independent counsel, can negotiate at arm’s length with its outside counsel. The lawyer and the prospective client can discuss the types of conflicts that will likely arise and the client can make an informed and rational decision whether to form an attorney-client relationship—and the terms under which the client may object to the law firm’s representation of another client in an adverse matter. In this context, the client’s decision will be based on an assessment of whether, on balance, the desirability of being represented

90. See Audrey I. Benison, Note, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 733 (2000).

91. Sept. 15, 1999 letter, *supra* note 86, at 3 (emphasis added).

by the particular firm outweighs the inability to object to certain “conflicts.” After the representation has commenced, however, a client will be motivated primarily, if not exclusively, by strategic concerns based on the advantages to be gained by trying to strip an adversary of its trusted counsel.⁹²

To be sure, clients and attorneys can both negotiate with greater autonomy and fewer constraints before the representation commences and, thus, the prospective conflicts waiver optimally should be negotiated before the attorney is retained.⁹³ Prior to the formation of an attorney-client relationship, the attorney can better negotiate and determine what is in the law firm’s best interest and the best way to protect the relationship on which its other clients rely.⁹⁴ At this stage, the client has not invested any time or money in the lawyer and, more importantly, does not have an antagonistic relationship with any of the firm’s other clients. Accordingly, the lawyer and the client can reach a mutually agreeable “default” position rationally and on an even playing field.

2. Ethics 2000’s Proposed Rule

Given the sound theoretical underpinnings of the Business Law Committee’s Proposal, the extensive history of tactical use of attenuated “conflicts” and the cases approving prospective conflict waivers, the Proposed Rule is hardly as radical as prohibitionists like Mr. Fox profess. It simply clarifies the previous rule and emphasizes the sufficiency of the information conveyed to the consenting client over the timing of the disclosure. In particular, the Proposed Rule states:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

92. In *Levin*, for example, after CBM’s representation of Levin had commenced, it was extremely unlikely that IBM was truly concerned about the adequacy of the firm’s representation in its labor matters; its disqualification motion appears to have been based purely on strategic grounds. See *IBM Corp. v. Levin*, 579 F.2d 271, 275-77, 279-80 (3d Cir. 1978).

93. Although the optimal time for negotiating the terms of an advance conflicts waiver is at the inception of the attorney-client relationship, many of these same considerations may also apply to requests for a conflicts waiver where a law firm is requested to accept a new unrelated matter for an existing client. Indeed, many clients routinely use a variety of lawyers for different types of matters, and a law firm with an existing satisfactory client relationship is unlikely to forego the opportunity to expand the relationship by refusing to proceed if the client declines to provide the requested waiver.

94. See, e.g., *Kling v. Landry*, 686 N.E.2d 33, 39 (Ill. App. Ct. 1997) (noting that the fiduciary duty attaches after the attorney-client relationship is established); *C.K. Indus. Corp. v. C.M. Indus. Corp.*, 623 N.Y.S.2d 410, 411 (App. Div. 1995).

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.⁹⁵

3. Prospective Conflict Waivers

Specifically, the Commission's proposal would simply replace the words "consents after consultation" throughout the Model Rules with "gives informed consent" and would require the lawyer to memorialize the client's consent.⁹⁶ To assist lawyers in determining whether the informed consent was "reasonably adequate," the Commission's proposed comments (the "Proposed Comments") provide that a potentially conflicted lawyer should evaluate the prospective client's sophistication and, in some circumstances, whether the client was independently represented at the time the consent was obtained.⁹⁷

Proposed Comment 18 to the Proposed Rule clarifies "informed consent":

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including

95. MODEL RULES OF PROF'L CONDUCT R. 1.7 (Proposed Draft 2000), available at Center for Prof'l Responsibility, *Proposed Rule 1.7: Conflict of Interest: Current Clients*, <http://www.abanet.org/cpr/e2k-rule17.html> (last visited Oct. 2, 2001).

96. See *id.* cmt. 20; MODEL RULES OF PROF'L CONDUCT R. 1.4 (Proposed Draft 2000), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 322 (2001); see also Martyn, *supra* note 74, at 151-52 ("In addressing conflicts of interest, Ethics 2000 has taken two additional steps. First, we have tried to make clear that consents to conflicts of interests only validate a representation when they are legally allowed. In other words, some conflicts so affect the lawyer's judgment and role that courts have found them non-consentable. Second, we recommend that . . . it must be reduced to a writing.")

97. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 5 (Proposed Draft 2000), available at Center for Prof'l Responsibility, *Proposed Rule 1.7: Conflict of Interest: Current Clients*, <http://www.abanet.org/cpr/e2k-rule17.html> (last visited Oct. 2, 2001); see also *id.* cmt. 10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.⁹⁸

Under the Proposed Rule, the effectiveness of a prospective conflicts waiver will be determined by examining the extent to which the attorney is able to inform the client as to the material risks that the waiver entails. Proposed Comment 22 states: “The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.”⁹⁹

The degree of disclosure and the extent to which the client must be informed turns on the client’s sophistication and whether or not the client is represented by independent counsel. Proposed Comment 22 further indicates that “if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict.”¹⁰⁰ If the consent is “general and open-ended,” however, the effectiveness of the waiver will depend on the client’s sophistication.¹⁰¹ Open-ended consent, according to Proposed Comment 22, should be restricted to sophisticated clients and/or clients that are represented by independent counsel.¹⁰²

The Proposed Rule is in keeping with the previous decision from the ABA and the New York County Lawyer’s Association. In this vein, New York County 724 noted that

[t]he degree of disclosure that must be made in order for the client’s or prospective client’s consent to be “informed” will also depend on other factors. For example, when the lawyer is seeking an advanced waiver from a sophisticated client, such as a large corporation with in-house counsel, the adequacy of disclosure will be put to a less stringent test

98. *Id.* cmt. 18. (citations omitted).

99. *Id.* cmt. 22.

100. *Id.*

101. *Id.*

102. *See id.* (“[I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that an unforeseeable conflict may arise, such consent is more likely to be effective, particularly if the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.”). At the August 2001 ABA House of Delegates meeting, Mr. Fox failed to gain support for his motion to strike the sentence in Comment 22, which allows a lawyer to ask “‘experienced users’ of legal services for a prospective waiver of future conflicts of interest.” *Model Rules: ABA Stands Firm on Client Confidentiality, Rejects ‘Screening’ for Conflicts of Interest*, 17 *Laws. Man. on Prof. Conduct (ABA/BNA)* 492, 493 (Aug. 15, 2001).

than if the client were a small business, an individual unsophisticated with respect to legal matters, a child or an incapacitated person.¹⁰³

The progressive changes embodied in the Proposed Rule, which would contribute even more certainty to the use of prospective conflict waivers, have also received scholarly support. Professor Richard Painter has suggested that the client's sophistication and whether the client was independently represented are the two critical factors in determining the enforceability of a prospective conflict waiver.¹⁰⁴ He cogently argues that courts should uniformly enforce prospective conflict waivers "when the client is independently represented . . . by a lawyer, including in-house counsel, who is unaffiliated with the lawyer receiving the consent."¹⁰⁵ According to Professor Painter, the independent representation factor equalizes any potential asymmetry of information and/or bargaining power that might otherwise exist between a lawyer and her client and, therefore, should vitiate any prospective conflicts waiver.¹⁰⁶ No doubt many clients, especially large corporations, which can have the pick of the litter when it comes to selecting counsel, can certainly fend for themselves without an independent lawyer. On the other hand, Professor Painter is no doubt right that the presence of independent counsel is certainly sufficient to embrace a prospective conflicts waiver as long as counsel can provide adequate representation to both clients.

4. The Writing Requirement

The Proposed Rule would also require the attorney to memorialize her client's consent *in writing*.¹⁰⁷ Proposed Comment 20 indicates that the writing requirement may consist of "a document executed by the client or oral consent that the lawyer promptly records and transmits to the client."¹⁰⁸ If "it is not feasible to obtain or transmit the writing at the time the client gives informed consent," the waiver still will be effective if the lawyer obtains the writing within a "reasonable time thereafter."¹⁰⁹

103. New York County 724, *supra* note 73, at *3.

104. *See* Painter, *supra* note 74, at 327.

105. *Id.*

106. *See id.*

107. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (Proposed Draft 2000), available at Center for Prof'l Responsibility, *Proposed Rule 1.7: Conflict of Interest: Current Clients*, <http://www.abanet.org/cpr/e2k-rule17.html> (last visited Oct. 2, 2001).

108. *Id.* cmt. 20. The Proposed Comments do not require the writing to take any particular form but "it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as the client's agreement to the representation despite such risks." *Id.*

109. *Id.*

To be sure, the writing requirement is not intended to “supplant” the need for lawyers to talk with their clients and “to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.”¹¹⁰ “Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.”¹¹¹

At first blush, this requirement may seem innocuous. After all, prudence would dictate that there be some written confirmation—even if it is in the form of a note thanking the client for its consent. A writing also has the virtue of forcing the lawyer to articulate the nature of the conflict with a greater degree of specificity.¹¹² And, if a controversy ever develops between the lawyer and client over the fact or scope of a waiver, any lawyer seeking to enforce an oral waiver would have an uphill battle, to say the least.¹¹³

On the other hand, enacting a rule mandating written confirmations will have mischievous results, especially in practice areas such as corporate finance, mergers and acquisitions, and banking, where waivers are customarily implied, such as where a bank lawyer frequently represents corporate borrowers, while simultaneously representing the bank in unrelated deals—unless the bank objects.¹¹⁴ Despite the

110. *Id.*

111. *Id.*

112. *See* Martyn, *supra* note 74, at 155.

113. Mr. Fox states that it is ironic that the Commission proposes that potentially conflicted attorneys memorialize their client’s consent in a writing. *See* Fox, *supra* note 1, at 714-15. The “iron[y]” is that the Commission proposes taking “a giant step toward enhancing the safeguards” while at the same time “breach[ing]” the client’s protections. *Id.* On the one hand, the attorney is providing her clients with the additional protection of memorializing their agreements, while on the other, the lawyer is breaching the clients’ protection by “extract[ing]” a prospective conflicts waiver. *Id.* at 714. This is not ironic. Asking a sophisticated client to review a prospective conflicts waiver in the presence of its in-house counsel would not breach any client protections because the sophisticated client will be able to appreciate the business risk and its independent counsel will counter any potential asymmetry of bargaining power that could exist between the outside counsel and her client. Moreover, officers and directors of companies are entrusted regularly with important business decisions that affect their companies and their employees. The Proposed Rule is consistent with treating these sophisticated clients with the respect they deserve, while at the same time requiring outside counsel to inform their client fully and to memorialize the agreement.

114. In such a circumstance, the corporate borrower’s express written consent would be extremely important because it might be unaware of the law firm’s relationship to the lender, which could be extensive and would affect the zeal of the borrower’s lawyer. In contrast, the bank already would be familiar with all the matters in which it employs the lawyer and is also aware of the

unequivocal comment in the *Scope* preceding the *Model Rules*, establishing that they are not intended to create civil liability,¹¹⁵ they will undoubtedly become a pitfall for the unwary lawyer. In the ensuing malpractice case on any deal gone bad, where the lawyer's negligence will be attributed to the conflict, any claim of implied waiver can be expected to be met with a statute of frauds defense to any claims that an implied or oral waiver was given.¹¹⁶

IV. MR. FOX'S CRITICISM OF THE PROPOSED RULE

The central thesis of Mr. Fox's recent Article is that a highly sophisticated client, represented by the best counsel resources can secure, should be precluded from securing outside counsel of its choice, which is ready, willing and able to serve, if the law firm receives a prospective conflicts waiver of future unrelated conflicts that may protect its representation of its other clients if a conflict develops.¹¹⁷ The Article considers it "obscenity" for sophisticated and informed clients and their counsel of choice to establish their own "default position" for potential conflicts of interests, even when such conflicts will not adversely affect their representation.¹¹⁸ This view and the accompanying condemnation of Ethics 2000 devalues the sacrosanct right of the client to select its counsel of choice and ignores the unnecessary, and often draconian, adverse effects on the "other clients," who are deprived of their chosen counsel.

A. *The Criticism of Prospective Conflict Waivers Overlooks the Steep Ethical Price to the "Other Client"*

Stripped of the prolific pejoratives and *ad hominem* attacks on anyone and everyone who support prospective conflict waivers, Mr. Fox's condemnation of prospective conflict waivers evidently masks his even more extreme view that the duty of loyalty, which precludes every lawyer in a law firm—no matter how large—from accepting any

lawyer's appearance on the other side for the borrowers and its consent is implied by the lack of objection.

115. The *Model Rules* "are not designed to be the basis of civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons." MODEL RULES OF PROF'L CONDUCT pmb1. ¶ 18 (1999).

116. See Harry J. Haynsworth, *Business Lawyers Under Fire—Potential Ethical Sanctions and Liabilities*, in AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION (ALI-ABA) (Apr. 2, 1996).

117. See generally Fox, *supra* note 1.

118. See generally *id.*

engagement against a current client—no matter how small and unrelated—should continue to be applied rigidly and *without any exception*—even for client consent.¹¹⁹ At bottom, the prohibitionist position expressed by Mr. Fox is that a small group of sanctimonious lawyers know what is best for clients and, therefore, they should be empowered to impose a rigid, and some would argue anachronistic,¹²⁰ regime of undivided loyalty on even the most sophisticated clients to protect them from themselves and the avaricious lawyers who will prey on them. In advancing his general condemnation of prospective conflict waivers, Mr. Fox assiduously ignores the steep ethical price that this overly expansive duty of loyalty causes to the “other clients” who are unnecessarily deprived of their counsel of choice and the rampant ethical gamesmanship that has resulted from it.¹²¹ No wonder Mr. Fox states unequivocally that “[o]ther than adding to law firm wealth, one cannot conjure a single lawyer interest that justifies a device that is clearly designed to significantly compromise the loyalty interests of the client.”¹²²

119. In the Article, Mr. Fox asserts that any “negotiated” ethics rules, such as in the conflicts area, would lead to the negotiation of *all* ethics rules. *See* Fox, *supra* note 1, at 721-28. This argument overlooks completely the provisions in Model Rule 1.7 and in Model Code DR 5-105 which have always allowed consent to cure conflicts. Because these rules already allow a “negotiated” ethics rule or “default” without leading to the wholesale “negotiation” of other ethics rules, there is no reason to believe the Ethics 2000 proposal relating to prospective conflict waivers would have any such effect.

120. Almost a decade ago, the American Bar Association acknowledged that it was reasonable to believe that undivided loyalty, as applied, placed “*unreasonable limitations*” on both clients and lawyers, and that conflicts involving unrelated matters in commercial disputes “clearly” could be waived. ABA Formal Opinion 372 states, in salient part:

[W]hen corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm’s New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable *limitations on the opportunities of both clients and lawyers* . . . [T]he conflict is also *clearly* one that can be waived.”

ABA Formal Opinion 372, *supra* note 72 (emphasis added). Nevertheless, Mr. Fox seems outraged merely by the possibility that a large corporate client retaining the Hong Kong office of an international law firm for a discrete matter might encounter a lawyer from the firm’s New York office, who the client never met and the Hong Kong lawyer may never have spoken to, on the other side of a totally unrelated matter. *See* Fox, *supra* note 1, at 730. While heavy on criticism, Mr. Fox is extremely light on offering any justification, much less need, for any such overly expansive concept of loyalty. And, because the Article completely ignores the high ethical price that this causes to existing clients of a law firm who are needlessly deprived of their counsel of choice based on this overly broad concept of “loyalty,” which actually mandates ethical disloyalty, he fails to offer any justification for the results of the ethical gamesmanship that it encourages.

121. *See, e.g., supra* notes 38-39 and accompanying text.

122. Fox, *supra* note 1, at 721.

B. *The Proposed Rule Will Enhance Client Autonomy*

A sophisticated client, especially one with independent representation, will appreciate the risks associated with potential conflicts and will be in a position to determine whether retaining the lawyer with the prospective conflicts waiver is in its own best interest. And there are many reasons that the client will decide to sign a prospective conflicts waiver, fully aware that it may result in encountering that law firm as an adversary.¹²³ Of course, the client will also benefit from prospective conflict waivers signed by other clients, which will prevent them from stripping it of counsel when it needs the law firm the most.

In addition, a new client may also want to retain a specific law firm because the client believes it has the best qualifications for the job.¹²⁴ Absent the ability to obtain an enforceable prospective conflicts waiver, law firms, especially smaller law firms or those concentrating in specific areas of the law, may be unwilling to accept the new client if the firm fears that by doing so it could expose the firm's other clients to the loss of their counsel.¹²⁵ While many law firms today are sufficiently comfortable with the enforceability of prospective conflict waivers, if prohibitionists, like Mr. Fox, succeed in undermining prospective conflict waivers either by rolling back progressive proposals like the Ethics 2000 proposed changes or requiring "second waivers," client autonomy would suffer. Indeed, most commentators cite "client autonomy" as the reason to honor waivers and assert that informed consent strengthens client autonomy.¹²⁶

123. See Benison, *supra* note 90, at 734.

124. See, e.g., *Fisons Corp. v. Atochem N. Am., Inc.*, No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284, at *14 (S.D.N.Y. Nov. 14, 1990) (approving a client's consent to representation by a lawyer with a conflict because, in the client's judgment "it was far more important that it obtain the benefit of [the law firm's] familiarity with the ongoing trademark dispute than it was to avoid facing any adverse consequences due to its attorney's conflict of interest").

125. See *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, No. 78 Civ. 1295, slip op. at 6 (S.D.N.Y. Apr. 11, 1978) (holding that because the client's officers knew that the company's "aggressiveness and [the law firm's] practice might some day lead to a collision," the waiver left the law firm "free to represent any client, past or future, in any takeover attempt with no risk of disqualification" and recognizing that the reason the law firm had requested the waiver was because the "burgeoning law firm, was unwilling to close its doors to future clients by risking disqualification in its field of specialty merely because Curtiss-Wright might set its sights on some company which happened then to be a client of [the law firm]").

126. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202, reporter's note cmt. g(iv) (Proposed Final Draft No. 1, 1996) ("The preferred position, taken in the Comment, is that in most circumstances concern for client autonomy warrants respecting a client's informed consent."); WOLFRAM, *supra* note 74, § 7.2.2 ("Giving effect to a client's consent to a conflicting representation might rest either on the ground of contract freedom or on the related ground of

C. *The Ethics 2000 Proposal is Professional, Not “Unsavory”*

Putting aside the high-minded—and some would argue high handed—rhetoric, that implies proponents of prospective conflict waivers are unprofessional, or worse—politically incorrect—preferring base monetary concerns to the exclusion of professionalism,¹²⁷ it is clear that the ABA’s most recent proposal is a progressive and salutary one.¹²⁸

Contrary to Mr. Fox’s assertion, there is nothing “unsavory” in establishing a mutually agreeable “default position” as to which future conflicts will preclude the law firm from acting adversely to the same client. Does Mr. Fox really believe that all clients consider Texas lawyers to be “unsavory” because they are permitted to take on matters directly adverse to new or existing clients so long as they are not substantially related? There are many clients, especially large corporations, who are perfectly willing to retain a law firm in a discrete matter without the slightest apprehension about the firm’s desire not to allow this single “one-off” assignment to prevent the firm from representing its other long-time clients against it should a conflict develop. No one—certainly not Mr. Fox—would expect any law firm to accept such an engagement if it were already representing a client against the new client without requesting the consent of both the existing and new client, and it hardly follows that a request for a waiver is any less appropriate where there is no pending dispute. In this context, the assertion that a request by the law firm for an advance waiver to oppose the new client “diminishes” the lawyer is fatuous.

personal autonomy”); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 317 (1987) (arguing for an informed consent model that heightens the emphasis on client autonomy in the lawyer-client relationship).

127. In keeping with the sanctimonious, if not intolerant, attitude that questions the ethics of anyone daring to advocate the opposite view, the Article contains *ad hominem* attacks on those who disagree with Mr. Fox. Thus, rather than simply state that most interpretations of Rule 1.7 preclude engagements directly adverse to a current client, Mr. Fox insinuates that any lawyer with a different expectation must be unethical, saying he finds it “impossible to imagine that any ethical lawyer would have a legitimate ‘expectation’ that [the lawyer] would be free to represent one existing client against another.” Fox, *supra* note 1, at 710. In this same vein, he disparages the ethics of the members of the business law section: “[w]hatever can be said of the Ad Hoc Committee’s ethics” *Id.* at 711 n.48.

128. In terming requests for prospective waivers as “unsavory,” Mr. Fox advances the disingenuous argument that “the only reason to traverse this uncomfortable terrain is to enhance the economics of the law firm.” *Id.* at 717. In doing so, Mr. Fox ignores his own acknowledgments in the preceding paragraph that any client that “has used [a] firm for years” and is forced “to mov[e] his or her work to another firm would work its own hardship.” *Id.* at 716-17. These longstanding clients would be protected from exactly this hardship by the prospective conflicts waiver Mr. Fox attacks.

In keeping with prior ethics opinions, Ethics 2000 emphasizes the importance of “informed consent,” which turns on the sophistication of the particular client and the ability to exercise free will by comprehending the nature of the waiver. Those, including Mr. Fox, who continue to adhere to the “one size fits all” view—which they would impose on everyone—ignore the realities of the modern world, which the ABA has already embraced.¹²⁹ While Mr. Fox and the other prohibitionists no doubt hanker to rename the ABA project Ethics 1900, it is simply too late to roll back the clock. Ethics 2000 proposals, which are modest, are by no means “repulsive by reason of crass disregard of moral or ethical principles.”¹³⁰ They are a reflection of the needs of clients and the legal profession as perceived by experts in corporate law and professional ethics.¹³¹ The intent of Ethics 2000 is to enhance client autonomy and help ensure that the client’s interests remain “paramount,”¹³² and the prospective conflicts waiver provisions are a step in that direction.

D. The Article Bootstraps Claimed Disadvantages to Existing Clients Into Criticism of Prospective Conflict Waivers for New Clients

In attempting to justify his criticism, Mr. Fox tries to bootstrap the disadvantages that he sees to *existing* clients who are confronted with requests for a prospective conflicts waiver into an argument against the use of such waiver for *new* clients. In doing so, we find Mr. Fox in the anomalous position of professing concern about preexisting clients of the firm who will be sent packing if they do not sign prospective conflict waivers with regard to new matters.¹³³ Certainly, the irony of Mr. Fox’s epiphany about the proper level of concern for existing clients who will be deprived of counsel will not be lost. After all, these are the *very same clients* that are regularly victimized *in precisely the same way* by the rigid conflicts rules that Mr. Fox advocates so ardently!

In any event, Mr. Fox’s concern is hardly necessary. Existing clients, especially long-standing and loyal ones, who would be impacted

129. See ABA Formal Opinion 372, *supra* note 72.

130. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 802 (10th ed. 1996) (defining “obscene”).

131. See Veasey, *supra* note 85, at 332 (Honorable Norman Veasey, the Chair of Ethics 2000, noting that he brought thirty-four years of corporate law experience and his experience of serving as Chief Justice of the Delaware Supreme Court to Ethics 2000).

132. See *id.* at 334 (Chief Justice Veasey noting that he “think[s] the client’s interests must be paramount”).

133. See Fox, *supra* note 1, at 718.

the most if counsel were to decline a new matter, are the *least likely* to be turned away if they do not execute a waiver.¹³⁴ The law firm's extensive relationship—and, yes, economic interests—will weigh heavily against opposing such an important client—even with a waiver!¹³⁵ *A fortiori*, there is simply no reality to Mr. Fox's professed concern that law firms will refuse to accept new matters from longstanding and important clients simply to avoid the remote possibility that at some indeterminate point in the future another client of the firm might want it to be directly adverse to the client.¹³⁶ On the contrary, there

134. Prohibitionists, such as Mr. Fox, who profess concern that requests for advance waivers will undermine the client's "trust" of their lawyer, are simply donning sheep's clothing to conceal a wolfish objective. On its face, this argument can only apply by its terms to an existing attorney-client relationship where a trust relationship has been created. These clients will either have already been asked to sign a waiver at the inception of the relationship when they were "new" clients before any such "trust" existed or after they have become unlikely candidates to be asked for a prospective waiver if the relationship is as extensive as a reciprocal relationship of "trust" would imply. In contrast, a prospective new client does not yet have a relationship of trust with the lawyer. As a result, a new client will not have to "fire" the lawyer if she is offended by the waiver request; she can simply decline to retain the lawyer—there is no fuss or muss as there is no investment and no hardship.

An examination of Mr. Fox's argument exposes the inconsistencies in his position. Not all "conflicts" arise neatly at the inception of an engagement. On the contrary, conflicts are often created or prompted by subsequent events, many of which are unforeseeable, such as the merger of an adversary with a client of the firm, *see* Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 265 (D. Del. 1980), the unexpected emergence of a law firm's current client into a contest for corporate control, *see* Avacus Partners, L.P. v. Brian, No. CIV.A.11001, 1990 WL 6576, at *1 (Del. Ch. Jan. 23, 1990), *rev'd on other grounds sub nom., In re Infotechnology, Inc.*, 582 A.2d 215 (Del. 1990), or the discovery in the midst of litigation that a claim involves another client of the firm. Absent a prospective waiver, the newly involved client creating the conflict might be able to force the law firm to abandon its other client under circumstances that Mr. Fox acknowledges could cause great harm, would create the perception of disloyalty, and severely undermine the trust in the lawyer who is forced to abandon the client in midstream. *See* Fox, *supra* note 1, at 717-18.

135. An interesting issue concerning the use of prospective conflict waivers is whether once having obtained one, a lawyer is under any obligation to the existing client to *invoke* it if a conflict arises. Situations could be readily envisioned where the relationship develops with the waiving client where the law firm would prefer *not* to represent the *existing* client against the waiving client.

136. Mr. Fox's own cynicism about the way law firms resolve conflicts demolishes his contentions that existing clients will be "forced" to execute prospective waivers. According to the Article, given a choice, the law firm's economic interests dictate the outcome of any choice between clients:

Now the firm is presented with a conflicting representation that the prospective waiver can overcome. Instead of the firm deciding how to proceed based on considerations of professional responsibility and loyalty, the firm will now engage in a new analysis: Which representation offers the bigger bucks? Which client is likely to offer the most opportunity to cross-sell and generate more revenue in the future? Which client is likely to open more doors for the firm?

Fox, *supra* note 1, at 718. Applying Mr. Fox's own formula to the choice between substantial current clients and an improbable hypothetical future engagement of unknown importance leads to

is an *inverse* correlation between the significance of the clients existence and the possibly that this would occur.

E. Ethics 2000 Appropriately Distinguishes Between Sophisticated and Unsophisticated Clients

Although the Article purports to address waivers by “consenting adults,” Mr. Fox would treat all clients like children. In his zeal to impose the same standard—one appropriate for the least experienced and sophisticated client—on everyone, Mr. Fox rails against the distinction that the Ethics 2000 proposal makes between sophisticated and unsophisticated clients:

[T]he Ethics 2000 Commission actually proposes that a prospective waiver presented to an “experienced” client might be enforceable, not only as to totally unknown, unidentified, and unanticipated future conflicts of interest, but even as to a future representation that is substantially related to a representation the law firm has undertaken for the client from whom the prospective waiver was extracted!¹³⁷

As a threshold matter, it is highly unlikely that a prospective conflicts waiver ever will be “extracted” or “snatched” from a sophisticated client.¹³⁸ As any reader of the *American Lawyer* is aware, the legal profession is a highly competitive one and there is no shortage of competent lawyers. Any new client faced with a request who is unwilling to sign a prospective conflicts waiver can simply take their legal business elsewhere, especially large corporations seeking to retain a law firm in a single discrete matter. By insisting that the client sign a prospective conflicts waiver before the firm decides to establish an attorney-client relationship, the law firm is protecting its roster of existing clients from the prospect of unnecessarily losing their counsel.¹³⁹

In the same vein, Mr. Fox’s “least sophisticated person” argument, which would employ the lowest common denominator to render all

the ineluctable conclusion that any significant existing client could refuse to execute a prospective waiver with complete impunity.

137. *Id.* at 714 (footnote omitted).

138. In the Article, Mr. Fox envisions a world where law firms “extract” or “snatch” waivers from even the most powerful corporations. This unrealistic vision is a fictional one, and the prolific use of these pejorative terms adds no force to Mr. Fox’s arguments.

139. Of course, a law firm declining to accept a new client without a waiver is, in all likelihood, sacrificing the firm’s short-term business interests to protect its existing long-term client relationships. In doing so, not only is the firm abjuring the specific assignment that is declined, but it is also sacrificing the possibility of developing a broad range of additional future assignments from the prospective new client. This is especially true where there is no particular reason to believe that a conflict will develop between the prospective client and any existing client of the firm.

prospective conflict waivers unenforceable because some clients might not comprehend all the ramifications of an advance consent, is insensible. A sophisticated client, especially with the assistance of independent counsel, if needed, is perfectly capable of allocating a “conflicts” risk in selecting outside counsel the same way it allocates business risks in running its business.¹⁴⁰ The future “conflicts” will not be totally unknown, and a sophisticated client can readily appreciate the potential impact of agreeing to forego objections to lawyers from the same law firm from being directly adverse in *any unrelated* case. Certainly, counsel will be able to apprise the consenting client of the different type of future situations in which the client could encounter the law firm on “the other side.” Under these circumstances, a sophisticated client will be able to make an informed decision whether to retain the law firm. As New York County 724 correctly states:

[A] “blanket” waiver of future conflicts involving adverse parties may be informed and enforceable depending on the client’s sophistication, its familiarity with the law firm’s practice, and the reasonable expectations of the parties at the time consent is obtained. For example, a subsequent representation may be said to have been reasonably contemplated by a sophisticated client, advised by in-house counsel, who is familiar with a law firm’s multi-disciplinary practice and wide variety of clients. *In those circumstances, it may be foreseeable that one or more of such clients may in the future be adverse to the current client in an unrelated matter.*¹⁴¹

Indeed, any remaining concerns may be ameliorated by obtaining an agreement that if a conflict does occur, screening devices¹⁴² will be utilized. This would provide that different lawyers of the firm would be used for the “other” client and that no confidence or secrets of the client would be employed.

140. See WOLFRAM, *supra* note 74, § 7.2.4, at 347 (noting that sophisticated parties with extensive business experience who are used to dealing with lawyers are more capable of giving consent than more vulnerable clients).

141. New York County 724, *supra* note 73, at *3 (emphasis added).

142. See, e.g., Christopher J. Dunnigan, *The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 GEO. J. LEGAL ETHICS 291, 299-301 (1998) (discussing a variety of successful screening methods); Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 58 n.1 (1998) (defining and discussing screening methods).

1. Clairvoyance Is Not Required

While no lawyer or client is completely “clairvoyant”¹⁴³—except perhaps those that can claim to be able to predict the horrors that will ensue if the Proposed Rule is adopted—sophisticated clients can comprehend the conflicts presented and, with the assistance of both independent and outside counsel, can foresee the types of conflicts that may arise.¹⁴⁴ Significantly:

The Code does not require that the facts of each future adverse representation be known to the parties or described with precision in order for consent to be “informed.” If such were the rule, no advance waiver would ever be enforceable; by their nature, *such waivers include clients and claims that are not yet known.*¹⁴⁵

Fortunately, it is not the rule, and should not be the rule, no matter how hard the prohibitionists wish for it. New York County Opinion 724 cogently states: “If the subsequent conflict should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought, we see no reason why the lawyer should not be permitted to rely on such consent under DR 5-105(c).”¹⁴⁶ Even if a sophisticated client could not foresee every type of conflict that could arise, they have the business acumen to anticipate rationally the nature of the potential adversity and to weigh the potential risks against the benefits of a relationship with the potentially conflicted firm.¹⁴⁷

At bottom, the lawyer-client relationship is essentially a contractual one. According to Professor Gillers, “[t]he conventional image of the client-lawyer relationship posits two people who have agreed that one

143. Fox, *supra* note 1, at 716 (noting that because “sophisticated” clients are not “clairvoyan[t],” it makes no difference if they are sophisticated because “[they] do not know anything about this prospective waiver except that they are informed that they are not informed”).

144. See Benison, *supra* note 90, at 734 (“It would be aberrational at best for a sophisticated client to fail to comprehend the conflict presented, either because of its own shortcomings or the shortcomings of the explanation given to it.”).

145. New York County 724, note 73, at *3 (emphasis added).

146. *Id.*

147. See Benison, *supra* note 90, at 733 (commenting that sophisticated clients are equally able to assess the risks of accepting the conflicted representation and desirability of continuing under such circumstances); see also *In re Cendant Corp. Litig.*, No. 00-2520, 2001 U.S. App. LEXIS 19214, at *190 (3d Cir. Aug. 28, 2001). In *Cendant*, the Third Circuit noted:

Uncertainties are part of any *ex ante* negotiation and it should be presumed that the lead plaintiff and the lead counsel took the possibility of uncertainty into account in negotiating their agreement. Thus, only unusual and unforeseeable changes, i.e., those that could not have been adequately taken into account in the negotiations, could justify a court’s decision to find the presumption abrogated.

Id.

will provide a defined service to the other for a fee.”¹⁴⁸ In this contractual relationship, the lawyer serves as an agent for her client, and together the lawyer and client must define the scope of this agency.¹⁴⁹ When a sophisticated corporation retains a law firm, the retainer agreement often will detail the scope of the relationship; *i.e.*, define the specific matters of which the law firm will represent the client.

As with all contracts in New York, a sophisticated client may negotiate the terms and scope of the agency. Indeed, the New York Court of Appeals has held that when sophisticated parties negotiate contractual terms they may agree to allocate risks and in the absence of “extreme circumstances” the courts should honor this allocation.¹⁵⁰ A sophisticated client should be afforded the opportunity to decide the scope of its contractual relationship with its lawyer and determine what risks it wants to allocate, including the risk that its lawyer may represent a potential adversary in an unrelated matter.¹⁵¹

148. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 20 (5th ed. 1998); *see also* C.K. Indus. Corp. v. C.M. Indus. Corp., 623 N.Y.S.2d 410, 411-12 (App. Div. 1995) (noting that an attorney-client relationship arises when a contract is formed between an attorney and client for the performance of legal services or the rendition of legal advice).

149. *See* GILLERS, *supra* note 148, at 20; *see also* Debra A. Saunders & Richard S. Humphrey, *The Thickening Briar Patch of Legal Malpractice*, R.I. B.J., Apr. 1998, at 9, 9 (“As the attorney-client relationship is contractual in nature, it may be established by principles of contract and agency.” (footnote omitted)).

150. *See* Metro. Life Ins. Co. v. Noble Lowndes Int’l, Inc., 643 N.E.2d 504, 507 (N.Y. 1994). In *Metropolitan Life Insurance*, the Court of Appeals of New York held that “[a] limitation on liability provision in a contract represents the parties’ Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor.” *Id.* In reaching its conclusion, the court relied on Professor Corbin:

Parties sometimes make agreements and expressly provide that they shall not be enforceable at all, by any remedy legal or equitable. They may later regret their assumption of the risks of non-performance in this manner; but the courts let them lie on the bed they made. Where a contract provides that damages for breach shall not be recoverable beyond a specified sum, it is obvious that the risk of loss beyond that sum is being assumed by the promisee.

Id. (citing 5 CORBIN ON CONTRACTS § 1068, at 386 (1964)); *see also* Comprehensive Bldg. Contractors Inc. v. Pollard Excavating, Inc., 674 N.Y.S.2d 869, 871 (App. Div. 1998) (“[T]he purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances.” (citation omitted)). Sophisticated parties engaged in a lawyer-client relationship should be allowed to allocate unknown risks, *i.e.*, the potential adversities that may arise in the future as long as it does not materially affect the lawyer’s responsibility. This is also analogous to the Uniform Commercial Code, which allows sophisticated parties to allocate unknown risks as long as the allocation would not violate public policy. *See, e.g.*, N.Y. U.C.C. LAW § 2-719(3) (McKinney 1993); *id.* § 2-316.

151. To be sure, as with other contracts, it is impossible to conceive the precise contours of every possible future controversy; a sophisticated client will understand this, too. In short, the sophisticated client will understand that she is allocating the risk of what she does not know. By providing more certainty and decreasing frivolous disqualification motions, prospective conflict

F. *Sophisticated Clients With Independent Counsel are Neither Inept Nor Witless and Have Ample Bargaining Power*

In contending that sophisticated corporate clients need to be protected from themselves, Mr. Fox asserts *ipse dixit* that “all experienced or sophisticated clients are anything but powerful and knowledgeable.”¹⁵² According to Mr. Fox, there are “titans of industry who [are] vulnerable and without bargaining power in their relationship with counsel.”¹⁵³ The picture of hapless “corporate titans,” who cannot understand or appreciate the nature of the potential future conflict that they are being asked to waive or who cannot secure other counsel, bears no relation to reality. In the real world, clients are by no means shrinking violets. On the contrary, they are increasingly organized, militant about client service, and insistent on “fee caps” or fixed fee arrangements. In reality, general counsels of large corporations today are not tethered to a single law firm, tend to use many different law firms, and have a highly competitive legal market from which to select their counsel of choice. It is precisely because choice among competing law firms is so prevalent that the term “beauty contest” has been coined to describe the process by which clients select their counsel from among several possible choices.¹⁵⁴ At the inception of a new attorney-client relationship, any “corporate titan” or other “voracious” user of law firms can “just say no” to any prospective waiver and take its business elsewhere.¹⁵⁵ Even if “corporate titans” were as inept or vulnerable as Mr. Fox suggests, and they are not, almost all sophisticated corporate clients, especially large Fortune 100 companies, have in-house counsel, and any other sophisticated client

waivers will also afford attorneys the ability to focus their time and energy on the “rights” of their clients, rather than on “satellite litigation prompted by adversaries who are using the conflict rules for a tactical advantage,” because most of these conflict disputes arise between current clients whose matters are completely *unrelated*. Moreover, under the Proposed Rule, a lawyer may not represent two adverse clients if the matters are so similar such that the lawyer does not reasonably believe that she will be able to provide competent and diligent representation to each affected client. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7(b)(1) (Proposed Draft 2000), available at Center for Prof'l Responsibility, *Proposed Rule 1.7: Conflict of Interest: Current Clients*, <http://www.abanet.org/cpr/e2k-rule17.html> (last visited Oct. 2, 2001).

152. Fox, *supra* note 1, at 721.

153. *Id.*

154. See Dominic Bencivenga, *In-House Grip Tightens: Strict Criteria Urged for Selecting Outside Firms*, N.Y. L.J., July 24, 1997, at 5 (“For years, in-house counsel have winnowed their outside counsel to save money, improve case administration and communication.”); see also Ashby Jones, *Law Firms Join On-Line Beauty Contests*, N.Y. L.J., Feb. 6, 2001, at 5.

155. See Bencivenga, *supra* note 154, at 5 (discussing the ways in-house counsel have enhanced their control over outside legal work and noting that “[a]t no time during an engagement is the corporation’s bargaining position and ability to mold the legal services greater than at the moment the corporation is about to select outside counsel”).

readily can obtain independent legal advice on the advisability of executing an advance conflicts waiver, which should be fatal to Mr. Fox's argument. Recognizing that this appears to completely undermine his argument, Mr. Fox attempts to salvage his position that lawyers will be able to exploit their corporate clients by also denigrating the competence of in-house counsel at even the largest corporations. "[Y]et, so often, in-house counsel, even in-house counsel for Fortune 100 companies, are unsophisticated, young, and inexperienced."¹⁵⁶ On its face, the suggestion that the legal departments of the Fortune 100 companies are populated exclusively by counsel too inept to advise the company on the consequences of an advance conflicts waiver is surreal.¹⁵⁷

In the final analysis, the basic premise of Mr. Fox's argument, that sophisticated clients are dominated by their lawyers, is way off base. Contrary to Mr. Fox's argument, sophisticated clients have substantial bargaining power—often greater than the lawyer—and, aided by independent counsel, can negotiate the terms of the engagement, including the terms of the prospective conflicts waiver, at arm's-length.

G. The So-Called "Macroeconomic" Argument Exposes the Cracks in the Foundation of Undivided Loyalty

In the Article, Mr. Fox attempts to justify his criticism of prospective conflict waivers based on what he calls a "macroeconomic" argument that he asserts will lead the legal profession straight to Hell. In the Article, Mr. Fox argues that if more certainty were provided to the

156. Fox, *supra* note 1, at 722.

157. In fact, it appears that corporations are placing greater reliance on in-house counsel and that this reliance is well-deserved. See, e.g., Jeff Benjamin, *View the Bill from a Proper Perspective: Quality Must be the Focus*, N.Y. L.J., July 26, 1993, at S1 ("[In-house counsel] are better situated to identify potential liabilities and engage in preventive counseling. Also, in-house lawyers offer their company expertise, which might otherwise be lacking, in managing outside counsel and controlling the costs of their services."); Jeff Benjamin, *The Big Catch: What to Do Once You Land It: Top-Ten Tips for Handling the Major Corporate Client*, N.Y. L.J., Apr. 19, 1993, at S1 (noting that "in-house lawyers pride themselves on having the capability to provide all of the legal work regularly required by their client at a quality commensurate with the highest standards in the profession"); Colin Fergus & Jean Fergus, *Proper Interviewing Procedures Can Ensure an In-House Match*, N.Y. L.J., Mar. 9, 1992, at S2 (noting that "the role of in-house counsel has expanded greatly in the last decade. Once considered a mere paper-processing conduit to an outside law firm, today's in-house counsel is increasingly viewed as a trusted adviser and corporate strategist"); Sue C. Jacobs & Donna Ferrara, *Malpractice Liability Can Strike In-House: Various Activities, Solutions to Weigh*, N.Y. L.J., June 1, 1998, at S4 (noting that "[i]t is no longer unusual" for in-house lawyers "to close deals [or] litigate actively" and that "[i]n-house counsel are held to the same duty of care as an attorney in a law firm"); see also Bencivenga, *supra* note 154, at 5.

enforceability of prospective conflict waivers, their use would prove to be so wildly popular with both clients and lawyers that they will become so ubiquitous that all lawyers—including Mr. Fox and his prohibitionist friends—will be “forced” to abandon their high-minded principles and follow the crowd or perish economically. As the Article puts it:

[I]f some firms start using these prospective waivers wholesale, it will not be long before those firms find themselves doing much better financially. As the starting salaries, profits per partner, or revenues per lawyer of these firms start to soar, the traditional firms, wedded to old notions of loyalty, will look at these other firms, not so encumbered, and conclude that the only way for them to compete is also to launch a campaign of demanding prospective waivers. Thus, with no rules prohibiting these waivers, the profession will be treated to an inevitable and ugly race to the bottom as, one by one, these firms recognize that the only way to remain competitive is to join the crowd¹⁵⁸

As a threshold matter, in arguing that these horrors will occur “with no rules prohibiting these waivers,” the Article mischaracterizes in one fell swoop both the current legal status of prospective waivers and the nature of the Ethics 2000 proposal. At present, prospective conflict waivers are plainly *not* prohibited,¹⁵⁹ and the Ethics 2000 proposal would not remove any “prohibition” from prospective conflict waivers; it would enhance their *enforceability*. There is certainly no reason to believe that any correlation exists between the enhanced enforceability of prospective waivers and an increase in their use, and the Article offers none. More than ample authority already exists to support both their use, *and enforceability*, and if a conflict were to develop, a law firm and its existing clients are far better off at present having a prospective conflicts waiver even if a question remains about its enforceability under the specific circumstances.¹⁶⁰ While some law firms routinely require a prospective conflicts waiver from new clients, there is absolutely no empirical evidence to support Mr. Fox’s hypothesis that all law firms have been, or will be, compelled to follow suit.¹⁶¹

158. Fox, *supra* note 1, at 717.

159. See New York County 724, *supra* note 73 at *3; ABA Formal Opinion 372, *supra* note 72.

160. Most clients are as good as their word, and would be understandably reluctant to wench on an agreement even if they thought they could invalidate a prospective waiver based on a “policy” argument, which, notwithstanding the Article’s skewed reliance on a few *sui generis* decisions, see cases cited *supra* note 84, they probably could not. See cases cited *supra* note 73.

161. In this same vein, Mr. Fox contends that the parade of horrors that will be opened by the Ethics 2000 proposal will not stop at the border of prospective clients. See Fox, *supra* note 1,

Ironically, deconstruction of this very macroeconomic argument exposes the Achilles' heel in the prohibitionists' position which is that even they are forced to recognize that "duty of undivided loyalty"—the doctrinal foundation that they so stridently protect—is of *little real interest to clients*. Indeed, the very idea that prospective conflict waivers suddenly will become *de rigeur* depends on the willingness of clients to agree to them. If potential new clients, especially large and important ones, object to executing a prospective conflicts waiver because they consider undivided loyalty important, they can simply decline to engage the firm. The loss of this significant legal business by a firm demanding a prospective conflicts waiver as part of the price of admission will be of significant benefit to other law firms who do not insist on a prospective conflicts waiver. Indeed, if undivided loyalty were really as important to clients as Mr. Fox and his prohibitionist colleagues claim, any law firm would be far better off not joining the crowd that Mr. Fox envisions, and competing for all the clients who would be unwilling to relinquish undivided loyalty by emphasizing their "traditional values." In short, if Mr. Fox genuinely believed that the duty of loyalty had any significance to clients, he would consider his own "macroeconomic" argument to be voodoo economics.

V. THE REAL AGENDA

One need not delve too deeply into the arguments advanced in the Article to conclude that Mr. Fox is opposed not only to prospective conflict waivers, but that he really wants to eliminate consent to conflicts altogether—specific consents to current conflicts as well as prospective conflicts. In criticizing prospective consents, Mr. Fox argues that once a waiver is obtained, the decision whether to invoke them at the time a controversy arises between clients will lead to "unseemly discussions" centered on which client is better for the firm's economics and that "[j]ust contemplating these unseemly discussions" leads him to "a high level of discomfort and unease."¹⁶² Putting aside the pejorative

at 723-28. Whether this development would be as bad as Mr. Fox suggests is beside the point because there is no link between conflict waivers which are and always have been explicitly allowed and consent to the suspension of these other rules which regulate different types of conduct. According to Mr. Fox, Proposed Comment 22 is akin to Charon and will result in transporting the legal profession across the River Styx into the Underworld, see DONNA ROSENBERG & SORELLE BAKER, MYTHOLOGY AND YOU: CLASSICAL MYTHOLOGY AND ITS RELEVANCE TO TODAY'S WORLD 30-31 (1981), leading to client waivers of limitations on unreasonable attorneys' fees, malpractice liabilities, unauthorized conversations with represented clients, and the bar against initiating a sexual relationship with a current client. See Fox, *supra* note 1, at 723-28.

162. Fox, *supra* note 1, at 718.

manner in which Mr. Fox portrays such discussions or his discomfiture at the mere thought that ethical lawyers actually might consider the business impacts on their law firm, discussions about the relative size and scope of client relationships to the law firm already occur whenever a decision is made whether to seek a waiver of a *specific* actual conflict. Indeed, it would be as irrational as it would be economically self-abnegatory for a law firm to seek a waiver from its largest client to appear against its smallest one without at least considering the potential consequences. It is neither unseemly nor unethical to evaluate the nature of the law firm's relationship to a client from or for whom a waiver is sought. On the contrary, the inquiry is ethically mandated into the nature and scope of the law firm's relationship to the two clients in order to determine whether the law firm "reasonably believes the representation will not adversely affect the relationship with the other client,"¹⁶³ or whether the law firm "can adequately represent the interest[s] of each [client]."¹⁶⁴ Accordingly, these considerations provide no more reason to oppose prospective waivers than current consents. Mr. Fox's argument to the contrary leaves little doubt that he opposes both.

163. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (1999).

164. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(C) (2001).