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Lawrence J. Fox

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FORGEDDABOUT CONFLICTS—IF CITIBAR HAS ITS WAY, WE CAN HAVE JUST ONE BIG LAW FIRM

*Lawrence J. Fox**

I. INTRODUCTION

I once wrote a short story, *The Phone Call*.¹ In it, a female partner of great capability at a major New York City law firm finally breaks through yet another professional glass ceiling by receiving a request that she handle a major transaction for an “important” new client, finally generating her own client snaring opportunity after spending her entire career undertaking work for the clients of others.² Our heroine stands on the threshold of becoming a rainmaker when she learns, to her dismay, that another partner, this one male, though not yet contacted, expects to be retained by the adverse party to the proposed hostile transaction.³ Because of that anticipated business, he demands the firm turn away the new representation.⁴ Needless to say my protagonist is crushed, and in response to her disappointment, the management committee of the firm proposes that they represent both sides to the matter.⁵ That way “each [client] will get the best representation money can buy,” one of the lawyers rationalizes the proposed solution.⁶ One team was to be on the forty-third floor of the building, and the other on the forty-sixth floor.⁷ “And since we’re all in the same building, they’ll be no need for

* Partner, Drinker Biddle & Reath; Adjunct Professor, University of Pennsylvania Law School. B.A., LL.B., University of Pennsylvania.

1. Lawrence J. Fox, *The Phone Call*, LITIG., Fall 1996, at 8.

2. *See id.* at 8-9.

3. *See id.* at 10-11.

4. *See id.* at 11.

5. *See id.* at 12.

6. *Id.*

7. *See id.*

messengers or faxes. . . . sav[ing] thousands [for the clients],” is the way one partner in the firm expresses his support for this clever solution.⁸

It should then have come as no surprise to me when, just recently, fact followed fiction as the Association of the Bar of the City of New York (“Citibar”) issued an ethics opinion concluding that a law firm was free, with client consent, to represent both sides of a transaction.⁹ As the opinion holds: “[C]lients who are fully advised of the relevant circumstances and of the *material* and reasonably foreseeable ways that the conflict could adversely affect their interests have the *right* to waive the conflict in order to be represented by the lawyer of their choice.”¹⁰

This opinion is the culmination of a campaign that has been led by the same major New York firms—who make up so much of the membership of the Citibar—to negotiate around so many of our profession’s rules governing professional conduct. They assert these rules are outdated, antiquated and unnecessary in this era of globe-girdling law firms and sophisticated clients for whom the protections of loyalty and confidentiality are simply annoying impediments to law firm growth and prosperity that can and should be waived to accomplish these desirable ends.

The opinion, however, is embarrassingly reasoned, premised on many flawed principles, and represents an undermining of our professional values. As a result, rather than provide a basis for the final destruction of our basic ethical principles, one would hope the opinion might provide a launching pad for a recapture of those values and their celebration. This Essay will consider first the opinion’s consideration of two other related ethics issues, then the premises of the opinion’s centerpiece—a law firm representing each side of the same transaction—and, finally, some thoughts on the role of in-house counsel in all of this.

II. WE ARE TALKING ABOUT CONSENT

It is important to be careful about the topic of this opinion. The Citibar Committee was not addressing when lawyers could take on representations adverse to present or former clients without picking up the telephone. This was not, at least frontally, an attack on our rules

8. *Id.*

9. Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics, Formal Op. 2001-2 (2001) [hereinafter Formal Op. 2001-2], available at <http://www.abcny.org/eth2001-02.html> (last visited Apr. 1, 2002).

10. *Id.* at 2 (emphasis added).

governing imputation that require all lawyers in a practice setting to be subject to the conflicts of all other lawyers in the same practice setting,¹¹ a topic that has been a subject of much gnashing of teeth, particularly by the New York mega-firms.¹² Nor did it dredge up the classic New York argument that when a law firm represents a corporation it was perfectly free, without client consent, to take positions directly adverse to the corporate parent, subsidiary or affiliate of the corporate client.¹³

Rather, this opinion asked the question of when a lawyer could call up a client and seek the client's consent to the law firm taking on the adverse representation, presumably on the understanding that the law firm would abide the client's decision in that regard.¹⁴ This inquiry affects two different ethical issues. First, it raises the question of the scope of nonwaivable conflicts. While lawyers are free to seek consent from clients in a broad range of situations, there is a category of representations that are nonwaivable, i.e., conflicted representations as to which no reasonable lawyer would seek consent because the conflict is such that the ensuing representation cannot pass ethical muster, regardless of the consent of the client.¹⁵

Second, the Citibar opinion required one to consider what is the meaning of consent, how informed and voluntary need it be and, in the situation posited by the Citibar opinion, the role of in-house counsel in the consent process.¹⁶ Both of these ethical issues should be kept in mind as the Citibar opinion is considered.

A. *Hypothetical # 1—Position Adverse to Client in an Unrelated Matter*

Part of the strength of any opinion must spring from the foundation upon which it is built. Thus, the two situations first addressed by the Citibar opinion as it leads up to the grand finale, must be scrutinized. In

11. Rule 1.10(a) of the *Model Rules of Professional Conduct*, the general rule governing imputed disqualification, provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c) or 2.2." MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2001).

12. See Sheila Birnbaum, Address at Legal Ethics: The Core Issues, Hofstra University School of Law (Mar. 11, 1996).

13. See, e.g., *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, No. 01 Civ. 11523, 2002 U.S. Dist. LEXIS 1201, at *7-9 (S.D.N.Y. Jan. 28, 2002).

14. See Formal Op. 2001-2, *supra* note 9, at 2.

15. The recently amended Model Rules provide that no lawyer may seek consent to a conflict unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1) (2002), available at <http://www.abanet.org/cpr/e2k-redline.doc> (last visited Apr. 9, 2002).

16. See generally Formal Op. 2001-2, *supra* note 9.

the first, the committee posits a hypothetical loan transaction between Big Bank and ABC.¹⁷ Law firm currently represents ABC in product liability lawsuits and the law firm wants to represent Big Bank on a loan to ABC.¹⁸ The opinion argues that the conflict should be easily waivable because ABC will not care that the law firm is representing Big Bank since it is in everyone's interest—Big Bank's and ABC's—to have ABC successfully defend those lawsuits.¹⁹

That Big Bank and ABC have the same interest in having ABC's liability on those mischievous lawsuits kept to a minimum is certainly beyond dispute. But for the Citibar to end its analysis as to why this conflict of interest can be easily waived by ABC with this one proposition demonstrates the dangers for both client and lawyer inherent in the conflict waiving process. If a sophisticated group of ethical gurus, such as those who serve on the Citibar Committee, have so much trouble appreciating the fragile ethical terrain they seek to traverse, one must really wonder whether the average lawyer should be given so much free rein in seeking client consent.

Just imagine that the conversation seeking ABC's waiver of the conflict in law firm's representation of Big Bank is limited to: "You have nothing to worry about, ABC. Your interests and Big Bank's vis-à-vis these product liability claims are the same—you both want ABC to get defense verdicts in every one of them. So we hope you will let us represent Big Bank." Has anything been left unsaid?

The Citibar approach to this hypothetical ignores the issue of confidential information entirely. While Big Bank may be rooting for ABC, what if ABC ends up with more lawsuits? Or during one of the existing lawsuits, law firm learns that ABC's exposure has changed considerably? Or the product does have a defect? Or the judge warned ABC it better settle quickly? Or the director of ABC's quality control laboratory has a drinking problem? The list, of course, could go on, but one need not belabor the point to demonstrate the predicament law firm's waiver from ABC causes both law firm and ABC. There is, in fact, a significant chance that there is a substantial relationship between law firm's representation of ABC and its representation of Big Bank. It is almost a given that law firm will learn confidential information from ABC in the course of defending these suits that Big Bank would find of more than passing, if not compelling interest; information that Big Bank

17. *See id.*

18. *See id.* at 3.

19. *See id.* at 9.

might think must be reported²⁰ and that might even result in an event of default or other material event in the loan agreement. And all of that will turn on how law firm represents Big Bank in the upcoming negotiations, negotiations in which Big Bank will be seeking to expand ABC's reporting obligations and its own protections regarding representations, events of default, and the like. Indeed, curiously, law firm may actually find itself, as it represents Big Bank, actually defining some of its own future obligations as counsel to ABC in connection with these product liability suits. Does ABC really want to consent to this representation by its law firm adverse to ABC? It may be lulled into thinking so if the only disclosure ABC receives is that which the Citibar opinion identifies. But if, in fact, ABC is really warned of the potential conflicts discussed here, one wonders whether the result will or should be the same.

Nor does the Citibar opinion even begin to suggest that there are waiver issues for Big Bank. It assumes that Big Bank will be thrilled that the law firm it has hired to represent it in these loan negotiations will be defending its customer ABC on these nagging product liability suits.²¹ But Big Bank should consider at least two limitations on law firm's undertaking this engagement. First, in negotiating for Big Bank, law firm will certainly be in a very awkward position whenever the negotiations address issues relating to contingent liabilities, reporting requirements, and events of default. Second, if any due diligence must be undertaken by Big Bank of the product liability predicament of ABC, law firm will be disabled from participating in the process because of its confidentiality obligations to ABC, obligations that ABC should not be asked to waive merely to permit law firm to take on a representation adverse to ABC.

The foregoing analysis does not mean that it would be impossible to secure waivers from both ABC and Big Bank to permit law firm to take on the new representation. Perhaps the products liability suits are a flyspeck in the affairs of ABC or the loan to ABC is secured by assets that will not be affected by possible devastating results in the lawsuits. The only point I wish to make at this juncture is that the Citibar opinion races ahead far too fast and in doing so ignores some very important ethical considerations that a law firm that seeks to represent a new client

20. It is no solution to this ethical dilemma to argue that disclosure by ABC to Big Bank is a matter of contract and therefore does not put the lawyer for ABC in a conflict situation. Issues relating to disclosure are always subject to interpretation, the interests of ABC and Big Bank as to any given disclosure are quite different and, therefore, the scope of the duty to disclose is likely to be disputed.

21. See Formal Op. 2001-2, *supra* note 9, at 9.

in a matter adverse to a present client must consider. Are the matters really unrelated? Is confidential information implicated? Will the law firm find itself in a position where it is conflicted or must pull its punches? How does the representation affect each client? The Citibar opinion did not ask, let alone answer, any of these questions, but the conscientious lawyer must, and to the extent that this hypothetical was posited to create a glide path to the ultimate conclusion of the Citibar's opinion, perhaps that glide path is not quite so smooth as the Citibar opinion would like a watching world to think.

The lapse by the Citibar Committee in this regard is quite instructive. In my view, it is symptomatic of the problems inherent in a law firm's seeking a waiver from a client which the law firm very much wants to snare. Just as the Citibar Committee apparently ignored these important issues because it so desired to construct a foundation for an opinion approving consent by clients to a law firm representing both sides of a transaction, so too might a law firm gloss over the intimidating disclosures regarding the implications of a conflict in order to secure the client's waiver.

B. Hypothetical # 2—Representing Client A and Client B on the Same Transaction on “Unrelated” Matters

Before addressing the same law firm representing both sides of the same transaction on all matters, the Citibar opinion addresses what it considers a more benign example. In this one, law firm is representing client *A* in negotiations adverse to *B* while at the same time representing *B* on the antitrust issues that arise from the same transaction.²² Think of representing AT&T in its sale of its cable business to Comcast while representing Comcast on issues raised by the Federal Communications Commission.

The Citibar Committee concludes that this joint representation is perfectly acceptable with client consent because these two representations are “unrelated.”²³ Yet, if one thinks about it, it is hard to imagine how this could ever be the case. This example, presumably chosen with care by the Committee to demonstrate how benign such a representation can be, in fact actually demonstrates the opposite.

Assume, without too great a reality leap, that on this hypothetical transaction *A* is anxious to sell and its goal is to sell all of its assets. It

22. *See id.* at 10.

23. *See id.* (saying that mergers and acquisitions counsel has a different primary interest than the antitrust counsel and, therefore, “informed client consent could be effective”).

wishes to seek an antitrust solution that will permit this goal to be achieved, even if it requires litigation. Consider for a moment what obligations the lawyer for *A* therefore has in terms of negotiating an “antitrust out” clause in the sale or merger agreement.

Now look at the issues from the viewpoint of *B*. Assume its real interest is in less than all the assets of *A*, that it would welcome some limitation on what assets of *A* it might acquire. Or assume *B* needs this transaction to close this year and it has no tolerance for protracted antitrust litigation. The possibilities here are multiple and many more could be imagined. But there is one alternative that is almost impossible to imagine: that as to these antitrust issues the interests of *A* and *B* are identical. And if they are not identical, how can law firm be representing *A* in achieving its overall goals when it is representing *B* in achieving its goals in this one critical area of the matter? As a result, if law firm is undertaking any antitrust analysis or counseling on this transaction, one would think it should be on behalf of *A* and consistent with *A*'s goals, whatever they might be.

In any event, the seeking of a waiver of this conflict would certainly be a significant undertaking and one that would have to be addressed with considerably more circumspection, thought and discussion with both clients than is reflected in the Citibar opinion. First, the law firm would have to ask itself if this is a road it wants to go down at all. Here it is being hired to help *A* achieve a result: a sale of its assets to *B*. The law firm knows *A* greatly desires this result, maybe even to the point that the transaction is a necessity or otherwise *A* will go out of business. Now in considering its representation of *B* on an antitrust matter, law firm has to consider that the result of *that* work may be the sabotaging or significant restructuring of the transaction to the considerable detriment of *A*. That does not mean there could not be a situation where the antitrust issues would not be that important or likely to go to the heart of the transaction.²⁴ But if they are, it is clear that this may very well be a representation no reasonable lawyer would seek to undertake, even if a waiver could be secured.

Any doubt on that score might be eliminated if one were to consider the conversations law firm would have to conduct in order to get informed consent from each client, conversations the Citibar opinion does not even suggest are required. As to *A*, law firm would have to ask if it could represent *B* on antitrust matters. First, the law firm would have to explain how the firm planned to deal with the confidential information

24. But, of course, if that is the case, one must ask why would law firm go to all this trouble?

of *A*. Is it not going to learn anything about the antitrust issues from *A*'s point of view? Is this going to force *A* to hire separate antitrust counsel? How will *that* counsel deal with law firm when it comes to addressing the antitrust issues in the agreement? Then law firm must explain the possible effects on *A* of law firm's representation of *B* on antitrust matters. "You recognize this work could end up thwarting this transaction? Or demands from *B* that the transaction be restructured? Or . . . ?" Just these admonitions alone demonstrate why it would be a nonstarter from *A*'s perspective.

But *B*'s position is equally problematic. "You understand that we represent *A* and our firm's goal is to get the best deal for *A* and that, consciously or subconsciously, that obligation may limit the advice we would give you or the approaches we might recommend." Should *B* really be asked to accept a representation that comes with these warts? And even if asked, would any objective lawyer recommend that the client choose this firm, no matter how great its antitrust expertise, to take on this representation?

The foregoing is anything but an hysterical analysis of the situation presented; rather it presents realistic possibilities of actual impediments this hypothetical's simultaneous representation presents. Yet it stands in stark contrast with the *laissez-faire* approach suggested by the Citibar opinion which lackadaisically treats the undertaking of this antitrust engagement as if it were a telephone call ordering in tuna fish sandwiches.

C. Hypothetical # 3—The Dream: Representing Buyer and Seller in a Wall Street Journal Page One Merger

Standing on the quicksand of its casual and flawed analysis of the two earlier hypotheticals, the Citibar opinion reaches for the brass ring when it opines that, with consent, the same law firm can represent both buyer and seller, borrower and lender, and each merger partner, in a major transaction.²⁵ This opinion is not only built on an infirm analysis of the two other situations, but on a number of other deeply misguided notions as well.

First, there is the misguided notion that conflicts involving transactional matters are somehow significantly different from conflicts in litigation.²⁶ But if you think about it for more than a minute, you

25. See Formal Op. 2001-2, *supra* note 9, at 4-5, 10.

26. See *id.*

realize that the presence of a “v.”²⁷ between the parties and the fact that the clash takes place in a courtroom barely affects the conflict analysis. The proponents of the proposition say that joint parties in a transaction want to achieve a result—the purchase and sale of a company, the lending and borrowing of money, the hiring of a key employee. But that goal, even if it is mutual (and it really is not, since each party only wants that result if it can get terms satisfactory to it) does not mask the fact that every dollar in buyer’s pocket is one less in seller’s pocket; every representation not made by seller is one less protection received by buyer; every event of default insisted upon by lender is one more trap for borrower. Needless to say, this list could go on and on.

The fact that transactions generally take place without raised voices, and litigation often includes temper tantrums, does not change the fact that from a conflict analysis point of view, the interests in a face-to-face transaction are just as directly adverse as they are in litigation. Indeed, if one wished to push the proponent’s analogy just a little further, one could assert that the interests of the parties in litigation are just like the interests of parties in transactions. The parties in litigation wish to resolve their differences, they have a mutual interest in doing so, they seek the solution in a process that is carefully orchestrated through rules of procedure, and they more or less accept the result. But this mutual interest in resolving the dispute, no more than the mutual interest in achieving a sale or granting a loan, does not mask the adverse interests at play.

Second, the authors of the opinion do not share with us how this will work in practice. But a simple hypothetical I often use in class should demonstrate the problem. I tell my students that two eager clients appear before them, buyer and seller of a residential piece of real estate. They tell the lawyer they have agreed on what is to be sold, when it is to be sold, and the price at which it is to be sold. They ask the lawyer to document the transaction. Can the lawyer do so? After I have convinced at least one student that the lawyer can, I then add to the hypothetical the question: What should the lawyer do when he realizes the parties have not mentioned a termite clause? Suddenly the light bulb goes off and the difficulties for the lawyer become apparent.

Now let us assume that lawyer *A* and lawyer *B* from the same law firm are representing buyer and seller on the same transaction. Let us assume buyer’s lawyer draws up the first agreement and presents it to seller’s lawyer, his partner. Seller’s lawyer notices there is no termite

27. Or in New York, an “against.”

clause. Since he is representing seller, there is no capital in raising the topic. But doesn't that lawyer for the seller have to worry about his own malpractice liability when the buyer, who is also a client of the firm, learns later that there is termite damage, that he could have been protected with a termite clause, and that his lawyer never suggested one? I do not think we need any more than this simple example to put a stake in the heart of the idea that two lawyers from the same law firm could represent buyer and seller in the same transaction.

Third, the Citibar opinion relies heavily, far too heavily, on what they characterize as the sacred right of clients to request, no "insist," on the right to be represented by the counsel of their choice.²⁸ Every time I see those words, I wince because I know that "the right to counsel of one's own choice" is the great shield behind which avaricious lawyers seek to destroy the rules governing loyalty. It is never characterized as lawyers being forced to turn down business; rather the proponents describe the disappointed clients with tears in their eyes being forced to pick a firm other than Skadden Arps²⁹ to represent them. But, nonetheless, that is what motivates this idea: law firms not wanting to turn away more business.

The opinion searches for support for this fundamental right of clients to select counsel of their choice by relying upon *Levine v. Levine*.³⁰ But the truth is that our conflict rules cannot coexist with this so-called "fundamental right."³¹ Clients only have the right to secure conflict-free representation; when the representation they seek creates a conflict, that conflict must be waived, or the representation cannot go forward.³² And if that representation involves a nonwaivable conflict, then the client, no matter how bereft and down-at-the-heels, will have to continue the search for alternative counsel, even if a conflict waiver otherwise might be forthcoming.³³

Fourth, the idea of the same law firm representing multiple parties in a transaction clearly raises questions of confidentiality. Even the Citibar recognizes this little problem.³⁴ However, they offer two solutions. First, they, of course, seek refuge in the idea of screens.³⁵ We are going to screen team A, the team working for the buyers, from team

28. See Formal Op. 2001-2, *supra* note 9, at 9.

29. See Birnbaum, *supra* note 12.

30. 436 N.E.2d 476, 479 (N.Y. 1982).

31. See Formal Op. 2001-2, *supra* note 9, at 7.

32. See *id.* at 8.

33. See *id.* at 9.

34. See *id.* at 11-13.

35. See *id.* at 13.

B, the team working for the seller. In fact they do not just call them screens, they call them “firewalls”³⁶ as if somehow, just like the accountants who have enthusiastically adopted this wonderful term,³⁷ something more substantial is in place when you say you have erected a firewall instead of a screen.

The opinion asserts that maybe the two teams will be from different departments in the law firm or different offices, and team *A* might not even know the lawyers in that other department or other office who form team *B*.³⁸ But that is not what the law firms are selling their clients when they tout their capabilities.³⁹ All one need do is read the excerpt from the web page of one of these law firms.

III. ACCESSIBLE EXPERTISE

When clients communicate with any lawyer in any one of our offices—however large or small—they have access to our firmwide, substantive breadth. Resources and experience that exist in a particular office are available to clients worldwide.

....

... Each is different, yet each provides clients with access to the firm’s integrated legal services.⁴⁰

For decades, the firm has “take[n] pride in our tradition of teamwork.”⁴¹ Lawyers at every level place top priority on responding to calls for support from colleagues anywhere in the firm.⁴² Every client receives that “level of institutional support.”⁴³

Such teamwork and service have been greatly enhanced by leading-edge communications technology.⁴⁴ Through telephone and computer linkages, lawyers function with fully integrated efficiency.⁴⁵ Draft

36. *See id.* at 5.

37. *See, e.g.*, Kathryn A. Oberly, Vice Chair and General Counsel, Ernst & Young LLP, Oral Remarks Before the ABA Commission on Multidisciplinary Practice (Feb. 4, 1999), available at <http://www.abanet.org/cpr/oberly2.html> (last visited Apr. 13, 2002).

38. *See id.*

39. *See, e.g.*, Morgan Lewis, Counselors at Law, at <http://www.morganlewis.com> (last visited Mar. 26, 2002).

40. *Id.*

41. *Id.*

42. *See id.*

43. *Id.*

44. *See id.*

45. *See id.*

documents are exchanged instantly among practice groups and offices, allowing interactions among lawyers whose skills create the best client team.⁴⁶

Since clients are free to waive the privilege under certain circumstances, they also argue that there is no reason why clients cannot agree to waive confidences in order to consent to a conflict.⁴⁷ The problem here is twofold. Is the client being asked to waive the conflict for its benefit or for the benefit of an aggressive law firm that wants to represent everyone? It is one thing for a client to be counseled to waive the privilege for its own benefit; it is quite another to waive when the benefits to the client are so dubious. Moreover, waiving the conflict and agreeing to compromise confidences is an event that takes place at a time when the client does not know what confidences will be shared. Therefore, a prospective waiver of confidences should be no more effective than an open-ended prospective waiver of a conflict of interest,⁴⁸ since neither is given with informed consent.

IV. THE DUBIOUS ROLE OF IN-HOUSE COUNSEL

Finally, the opinion relies very heavily on the notion that if clients are represented by in-house counsel in this position, then everything should be ethically acceptable.⁴⁹ This notion of in-house counsels' blessing various waivers of the protections provided by the rules of professional conduct has been around for some time. We have seen it in the prospective waiver arena.⁵⁰ We have seen it in the unreasonable fee arena. Now we see it in the same-law-firm-representing-both-sides-of-a-transaction arena. It is not clear to me upon what principle those proponents rely. Are they saying that a client can properly assume more risk if the client does so with the benefit of the advice of in-house counsel? Or are they saying that the risk that the clients can be asked to assume is the same but that the explanation that the client needs to receive from outside counsel is less because the client is represented by

46. *See id.*

47. *See* Formal Op. 2001-2, *supra* note 9, at 4.

48. *See generally* Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701 (2001).

49. *See* Formal Op. 2001-2, *supra* note 9, at 5.

50. *See* Fox, *supra* note 48, at 722 (noting that in many cases, in-house "counsel's presence does not right the power or information imbalance between lawyer and client that the rules correctly assume"). *But see* Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1010-11, 1011 n.157 (2001) (discussing corporations' increasing and "well-deserved" reliance on in-house counsel for managing their legal matters).

in-house counsel? It is my view that the same conflict should be nonwaivable regardless of how sophisticated the client is and how many other lawyers bless the nonwaivable conflict.

Far more important I think, we should be asking ourselves why we are prepared to lapse into this regime where we allow in-house counsel to bless items otherwise unbleisable. Are not these in-house counsel subject to our standards, don't these in-house counsel have an obligation to apply those standards and when the in-house counsel fails to apply those standards for whatever reasons, should we not say that the in-house counsel has failed, rather than argue that the client is stuck with the result?
