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ALL’S O.K. BETWEEN CONSENTING ADULTS: ENLIGHTENED RULE ON PRIVACY, OBSCENE RULE ON ETHICS

Lawrence J. Fox*

I. INTRODUCTION

We are blessed to live in “interesting times.” Those of us who have labored long in the ethics vineyard have observed with surprise as the issues relating to the professional responsibility of lawyers have evolved from topics which were addressed, if at all, at mandatory continuing legal education seminars to fulfill some “damn” state supreme court’s

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This Article was written to reflect the contents of the Lichtenstein Lecture which I was honored to deliver on October 18, 2000, at Hofstra University School of Law. Before delivering the substance of the speech, I had the privilege of recognizing both John DeWitt Gregory, the Sidney and Walter Siben Distinguished Professor of Family Law at Hofstra University School of Law, who was my first “boss” at Community Action for Legal Services, and the remarkable ethics “tag team” at the Hofstra University School of Law, which includes Professors Monroe H. Freedman, a Howard Lichtenstein Distinguished Professor of Legal Ethics, and Roy D. Simon, Jr., who have made the Hofstra Institute for the Study of Legal Ethics a leading force in the professional responsibility world by sponsoring symposia and publications that have shaped the debate in the profession for years. I particularly noted the extraordinary lifetime of work by Professor Freedman, who has been a beacon for all of us who believe our ethical values are not something to be compromised because of discomfort, expediency, or the eroding forces of the marketplace. I dedicate this Article to Professors Freedman, Simon, and Gregory, three of my professional heroes. Hofstra University School of Law is blessed to have all three and to share their talents with the rest of our legal professional world.
ethics education requirement, until today, when, not only has the law governing lawyers been the subject of a multi-volume restatement published in August by the American Law Institute, but also the topic of great debates in the policy-making bodies of many bar associations, articles in the popular press, and programs that are attended by lawyers voluntarily because they are genuinely concerned with where the profession is going and how their clients will be protected in the future.

1. See, e.g., Fla. Bar R. 6-10 (2001) (mandating five hours of ethics and professionalism every three years); N.Y. COMP. CODES R. & REGS. tit. 22, § 1500.22(a) (1995-1999) (requiring attorneys to complete four hours of ethics and professionalism every two years); N.C. ADMIN. CODE tit. 27, r. 1D.1518(a)-(b) (Nov. 2000) (requiring lawyers to complete two hours of ethics every year plus three consecutive hours of ethics every three years); PA. R. Ct. 105 (mandating continuing legal education in ethics each year for every active lawyer).


5. See generally Remarks at the ABA Annual Meeting (July 8, 2000) (providing Presidential Showcase: May It Please the Court, I am from Arthur Price & Deloitte: MDP's,
Of course, this attention to ethics is not necessarily an unmixed blessing. Ethics is *au courant* today in part because fundamental principles are under attack, from both within the profession and from without. This Article addresses yet one more fundamental issue that the Author is dismayed to predict may well become a centerpiece of the ethics debate over the next few years.

The discussion begins with what might seem to be a relatively insignificant matter. A client goes to a major law firm, perhaps one of the great law firms in Gotham. The client says to the law firm, "I would love to hire you." The law firm is flattered that the client wants to hire it; the firm happily announces, "Yes, we will be glad to do the work that you have requested. We will send you our standard retention letter." The client receives the standard retention letter and, unlike the practice in the past when there was no retention letter, or only a perfunctory single-page confirmation of engagement, this retention letter is quite long—maybe not quite as long as the fine print governing airline liability for lost luggage, but quite lengthy nonetheless. Buried in it is a clause which says that the law firm is free to take on any matters against the client in the future, so long as the matter the law firm is taking on is not substantially related to the work the law firm is currently undertaking for the client. In other words, the firm proclaims to the client, "We are really happy to take you on, but we want you to understand that what we give with one hand, we take with the other." The Author has always been shocked by the *chutzpah* of a law firm greeting a new client and saying, "We would love to represent you, we are lawyers, we are professionals, but let us remind you that we have this little clause buried on page three of our five-page, single-spaced letter of retention."

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6. *See generally* JAY G. FOONBERG, *HOW TO START AND BUILD A LAW PRACTICE* 283 (3d ed. 1991) (stating the previously accepted view against the need for written agreements between lawyers and clients).

7. *See, e.g., id.* at 57-58 (providing an example of a short retention form used by lawyers in the 1970s); KAY OSTBERG, *USING A LAWYER... AND WHAT TO DO IF THINGS GO WRONG: A STEP-BY-STEP GUIDE* 91-98 (rev. ed. 1990) (offering a more recent model of a significantly longer retention agreement).
While the use of such letters should be the source of great disillusionment, one could always take some comfort that most assuredly these provisions were unenforceable, not worth the paper on which they were written. This did not mean that some clients would not be hoodwinked by unsavory lawyers into acquiescing in these waivers—both at the time of retention, and again when the law firm relied on the earlier waiver to take on an otherwise conflicting representation that the client, if asked contemporaneously, would never have waived. However, the fact that the waiver did not identify the potentially conflicting representation meant that the consent of the client at the time the prospective waiver was sought could hardly be considered informed, a fundamental ethical requirement for any waiver of a conflict of interest, whether prospective or contemporaneous. Thus, at least those clients who were knowledgeable and fortified enough to challenge these prospective waivers were not injured by them, except to the extent they had to spend time and money litigating their validity.

II. PROSPECTIVE WAIVERS

A. Prospective Waivers Under Formal Opinion 372

This significant limitation on the efficacy of prospective waivers received one of its better expressions in a formal opinion issued by the American Bar Association (“ABA”) Standing Committee on Ethics and Professional Responsibility (“ABA Committee”). The ABA Committee began its analysis with a review of the requirements for

9. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.7 (2001) (requiring client consent after consultation before a lawyer may represent a client whose interests are directly adverse to another client’s interests or before representing a client whose “representation ... may be materially limited by the lawyer’s responsibilities to another client”).
10. See, e.g., id. (requiring client consent after consultation before a lawyer may represent a client whose interests are directly adverse to another client’s interests or before representing a client whose “representation ... may be materially limited by the lawyer’s responsibilities to another client”).
11. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 372 (1993) (providing that “if [a] waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so [that] the client’s consent can reasonably be viewed as having been fully informed when it was given”). The Author admits the text characterization is self-serving since he was the principal draftsman of this opinion.
contemporaneous waivers. Noting that contemporaneous waivers may be primarily sought from present clients because the client being asked to waive a conflict knows "two important pieces of information: (1) the subject matter of the adverse representation, and (2) the character of confidential information that the client has [already] disclosed to the lawyer in the course of the existing representation," the ABA Committee reminded the profession that client "consent after consultation"—the requirement found in Rule 1.7 of the Model Rules of Professional Conduct ("Model Rules") for seeking waivers—was defined in the Terminology Section of the Model Rules as a "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The opinion then recalled two cases that provided "useful guidance [to the profession] as to what disclosure is necessary to make the client's consent to a [present] conflict effective." In Financial General Bankshares, Inc. v. Metzger, the district court defined "full disclosure" under Disciplinary Rule 5-105(c) of the ABA Code of Professional Responsibility as the "affirmative revelation by the attorney of all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation. A client's mere knowledge of the existence of his attorney's other representation does not alone constitute full disclosure." Similarly, in Rogers v. Robson, Masters, Ryan, Brumund & Belom, the Illinois Appellate Court held that full disclosure for waiver of a present conflict must include "all facts and circumstances which in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make a free and intelligent decision regarding the representation."

Turning then to prospective waivers, the ABA Committee's opinion addressed the following question: Since informed consent was also required for these non-contemporaneous waivers, how could that

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12. See id.
13. Id.
14. Id.
15. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (providing that a lawyer cannot represent a client if representation "will be directly adverse to another client," unless the client "consents after consultation").
17. Id.
19. Id. at 771.
21. Id. at 1371.
requirement be fulfilled in this circumstance? The ABA Committee concluded that a prospective waiver "which did not identify either the potential opposing party [i.e., the other client for whom the law firm planned to take on a matter in the future] or at least a class of potentially conflicting clients" was unlikely to be efficacious. But the ABA Committee did not stop there. It continued:

Even that information might not be enough if the nature of the likely matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought. For example, a prospective waiver from a client bank allowing its lawyer to represent future borrowers of the bank could not reasonably be viewed as permitting the lawyer to bring a lender-liability or a RICO action against the bank, unless the prospective waiver explicitly identified such drastic claims.

The ABA Committee observed:

The closer the lawyer who seeks a prospective waiver can get to circumstances where not only the actual adverse client but also the actual potential future dispute are identified, the more likely it will be that a prospective waiver is consistent with the requirement of the Model Rules that consent be attended by a consultation that communicates "information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The ABA Committee then warned that the difficulty of placing a client in a position in which the client would "be able to recognize the legal implications and possible effects of the future representation at the time the [prospective] waiver is signed" only highlighted "the substantial burden that those seeking enforceable prospective waivers must meet."

Finally, the ABA Committee addressed the issue of whether prospective waivers could ever be viewed as consent to the use of client confidential information, recognizing at the outset that any waiver of the latter must be as fully informed as a prospective waiver of a conflict. Since, at the time the prospective waiver is sought, neither the client nor the lawyer will "have or could have an[y] understanding" of what confidential information will yet be shared in the representation, the

23. Id.
24. Id.
25. Id. (quoting Model Rules Terminology).
26. Id.
27. See id.
ABA Committee concluded that "a client's prospective waiver of conflicts cannot be presumed to waive objection to disclosure or use of confidential client information subject to Rule 1.6."23

The ABA Committee’s closing observation on prospective waivers was designed to provide cautionary instructions.

Given the foregoing analysis, one principle seems certain: no 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.29

At the present time, the law governing prospective waivers conforms with the reasoning of the ABA Committee’s opinion. The district court in Schwartz v. Industrial Valley Title Insurance Co.13 held

28. Id. Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978), demonstrates the important principle that courts are unwilling to conclude that a client has waived his or her right to keep privileged communications confidential. See id. at 229. Westinghouse Electric Corp. (“Westinghouse”) instituted a uranium price-fixing action against both Gulf Oil Corp. (“Gulf”) and United Nuclear Corp. (“United”). See id. at 222. The latter sought to be represented in the Westinghouse litigation by a Santa Fe firm that had been engaged previously to represent Gulf on a number of occasions in connection with Gulf’s largest supply of uranium ore reserves in New Mexico. See id. at 222-23. Gulf sought to disqualify United’s counsel on the basis of this prior representation and the fact that while the two entities were co-defendants United would seek to exculpate itself by implicating Gulf. See id. at 223. The lower court denied the motion, but the Seventh Circuit reversed, addressing, among other issues, the claim by United that Gulf had prospectively waived any conflict between them on as many as three different occasions. See id. at 223, 227-28, 229. Recognizing that this proposition was bottomed on the client authorizing a lawyer to use confidential information against the client, the court noted: 29. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 372.

[H]e [the former client] would thus willingly and freely consent, apparently without the slightest objection or hesitancy, to furnish his adversaries in this very same litigation with weapons with which to contest, and, possibly defeat, his valuable rights . . . is . . . almost unworthy of credence . . . . Ordinary experience teaches us that men endowed with the ordinary business sense and experience do not enter into such remarkable and prejudicial engagements. See id. at 228-29 (quoting In re Boone, 83 F.2d 944, 956 (N.D. Cal. 1929)) (alterations in original). The court then held that “consent to the mere representation of a client with adverse interests does not amount to either consent to breach of confidential disclosure or to the use of that information against the consenting party.” Id. at 229. The consent therefore was no defense to Gulf’s motion for disqualification. See id.

that a prospective waiver given in 1993 in a related but separate action was not sufficient in a 1996 action. The district court observed that "[t]he right to be fully informed about possible conflicts of interest cannot be easily waived." Similarly, in In re Suard Barge Services, Inc., the district court emphasized that any "standing consent must by necessity be exceedingly explicit and cannot arise merely from prior failures to object to adverse representation.

In Worldspan, L.P. v. Sabre Group Holdings, Inc., the district court held that a six-year-old waiver was ineffective to constitute an informed prospective consent to the current representation. In Worldspan, the law firm offered its 1992 "standard engagement letter" to show that plaintiffs in that matter prospectively gave the required waiver of a conflict that ultimately arose in 1998. Nonetheless, the plaintiff in Worldspan "strenuously objected" when informed that the law firm had undertaken to represent the defendants. The court held that the six-year-old waiver letter was insufficient, and stated that the lapse of time since the waiver was signed "would seem to make it most difficult for a consent that may have been thoroughly informed in 1992 to be informed in 1998."

B. Prospective Waivers and the Business Law Section

Ad Hoc Committee

But this careful attention to the rights of clients—protecting them from all but the most carefully circumscribed prospective waivers—has left the portion of the profession that wishes to expand their use

32. Id. at *6.
34. Id. at *16 (citation omitted); see also Fla. Ins. Guar. Ass'n v. Carey Can., Inc., 749 F. Supp. 255, 260 (S.D. Fla. 1990) (holding that the firm's standing consent was insufficient and that such consent must be exceedingly explicit). Addressing a similarly vague waiver, the bankruptcy court in In re Granite Partners, L.P., 219 B.R. 22 (Bankr. S.D.N.Y. 1998) stated the following: "[B]oilerplate disclosure of prospective connections is rarely satisfactory." Id. at 36 (citing N.Y. County Law. Ass'n Comm. on Prof'l Ethics, Formal Op. 724 (1998)) (stating that "if the waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so that the client's consent can reasonably be viewed as having been fully informed when it was given") (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 372 (1993)).
36. See id. at 1358, 1360.
37. See id. at 1358.
38. See id.
39. Id.
disgruntled, dissatisfied, and ornery. That dissatisfaction is vividly reflected by what has occurred as the Ethics 2000 Commission of the ABA ("Ethics 2000 Commission") has embarked on a comprehensive review and revision of the Model Rules. Among the many comments the Ethics 2000 Commission received were a number of proposed revisions from an ad hoc committee of the Business Law Section of the ABA ("Ad Hoc Committee"). Included in the Ad Hoc Committee’s package was a proposal regarding prospective waivers.

The Ad Hoc Committee began its presentation by artfully couching the reason for the proposal in terms that sounded almost acceptable. "[U]ncertainty concerning the [future] validity of prospective waivers 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." Certainly, no one would want to be in favor of prejudice or to dash expectations.

Despite its ambiguity, the Author assumes that what the Ad Hoc Committee was identifying with this carefully crafted language is a situation in which a law firm finds itself suddenly confronted with a

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41. The membership of the ad hoc committee of the Business Law Section of the ABA ("Ad Hoc Committee") is almost exclusively a distinguished group of major law firm partners who were careful not to purport to write on behalf of the Business Law Section.

42. Two other proposals were to amend Rule 1.10 of the Model Rules of Professional Conduct ("Model Rules") so as to permit screening and, therefore, bar imputation of conflicts attributable to the side-switching lawyer, and to repeal imputation altogether. See discussion infra Part II.K.


44. Id. at 2.
conflict between two present clients of the firm, since presumably only present clients of the firm could ever have any "expectations" in this regard. But how they would have such "expectations" and be prejudiced by their failure to be met escapes the Author entirely. Rather, clients, especially sophisticated clients, unless misled by their lawyers, should have no such expectations; their expectations, to the contrary, should be that, if the lawyer finds herself with two clients directly adverse to each other, the lawyer would represent neither. Indeed, could there be anything more unseemly than a lawyer, absent client consent, choosing between two clients? Even if there were a right reason for making such a choice, it defies belief to expect that, if lawyers were permitted to do so they would make the choice between "two children" based on any reason other than which client presented the more lucrative, high powered, high visibility representation.

Similarly, it is impossible to imagine that any ethical lawyer would have a legitimate "expectation" that he or she would be free to represent one existing client against another. Certainly, both ethics codes governing lawyers and case law teach precisely the opposite. Contrary to the suggestion quoted above, lawyers' expectations, like clients' expectations, should be that, when two present clients are directly adverse, absent consent by either to the adverse representation by the law firm against it by the other, the lawyer represents no one. The lawyer is never free to drop one present client "like a hot potato" to keep the representation of the other.

One need not, in any event, spend much time on the impliedly "sympathetic" limitation contained in the foregoing quote from the Ad Hoc Committee presentation—this special consideration for "present" clients taking positions directly adverse to other "present" clients from whom prospective waivers have been extracted—because when the proposal of the Ad Hoc Committee itself is reviewed, that limitation is nowhere to be found. Rather, while wrapping itself in this tear-generating notion of the "prejudice" that would result by dashing present client "expectations," the Ad Hoc Committee does not care one iota whether the future conflict of interests that the prospective waiver is

45. The most fundamental proposition in the rules governing conflicts of interest is that, absent consent, a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client." MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2001); see also Harrison v. Fisons Corp., 819 F. Supp. 1039, 1041 (M.D. Fla. 1993) (explaining that ethical rules governing lawyers in Florida prohibit a lawyer from representing a client whose interests are directly adverse to another client).

46. See infra note 77 and accompanying text.
said to waive are ones arising from another present client of the firm or some client who picks up the telephone and seeks the lawyer’s services for the first time. Either one is equivalently waiveable in the totally open-ended, undefined prospective waiver for which the Ad Hoc Committee would like to make the ethics world safe. 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 separately represented.” As the proposal is presented, it will, shockingly enough, “permit the lawyer and client to enter into a binding agreement that neither could abrogate under a ‘second look’ concept.”

In particular, the Ad Hoc Committee proposed the following comment with respect to prospective waivers which neither identify the particular client nor the nature of the future adverse representation:

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.

The proposed comment then gave its blessing to the permissibility of securing a prospective waiver of the use by the lawyer of confidential

48. Id. Whatever can be said of the Ad Hoc Committee’s ethics, there is no doubt its use of Orwellian language wins high marks. Imagine abrogating a client’s right to be sued by its own lawyer. That would be a real sin.
49. Id. at 2-3 (emphasis added).
information: "Consent to future use of client confidential information will not be implied from the grant of a waiver of future conflicts unless expressly agreed to by the client."

Finally, the comment proposed by the Ad Hoc Committee emphasized the "evergreen" nature of these general prospective waivers, even to the point of providing that, if a client later wished to escape the effect of a previously granted waiver, the lawyer would have grounds to "fire" the client:

However, 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 the lawyer will be able to continue to provide competent and diligent representation to that client in those matters in which the lawyer 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.  

This proposal would eviscerate the ABA opinion in a number of respects. First, it sets forth two standards for prospective waivers: one for the sophisticated or represented and another for everyone else.  

Second, while the opinion required the lawyer to identify both the likely client, or class of clients, and the nature of the future matter, this proposal states the requirements in the disjunctive—"such as conflicts with a particular client or conflicts involving a discrete practice area."  

Third, the proposed Ad Hoc Committee comment distinguishes between the prospective waiver of adverse transactional and litigation matters; however, either seems to be enforceable under this construct. Fourth, the ABA opinion recognized that, when a prospective waiver is

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50. *Id.* at 3 (emphasis added).
51. *Id.*
52. *See id.*
53. *See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 372 (1993)* (providing that "[t]he closer the lawyer who seeks a prospective waiver can get to circumstances where not only the actual adverse client but also the actual potential future dispute are identified" the greater the likelihood that the waiver will be effective).
55. *See id.*
executed, no one knows where the representation will go, how long it will last, what confidential information will be shared, how many additional engagements will be undertaken by the firm, or when the law firm will seek to enforce the prospective waiver:55 Thus, the opinion concluded that, almost certainly, a look back will be required at the time the prospective waiver is dusted off,57 an essential ethical limitation that is affirmatively eschewed by the Ad Hoc Committee proposal.55 Fifth, the Ad Hoc Committee comment explicitly contemplates that the law firm cannot only snare a prospective waiver of a conflict of interest, but also a waiver of the use of confidential information, even though at the time the waiver is secured, no one knows that confidential information will be shared.59 Sixth, if the client ever revokes this prospective waiver of the protection of Rule 1.660 and Rule 1.761 of the Model Rules, the lawyer may treat the revocation (apparently, even if based on subsequent events in the representation) as a termination of the lawyer-client relationship.62

C. Prospective Waivers and the Ethics 2000 Commission

While this proposal was not adopted in *haec verba* by the Ethics 2000 Commission, proposed comment 22 to Rule 1.7 unambiguously rejects the learning of ABA Formal Opinion 37263 and comes surprisingly and distressingly close to the relief requested by the Ad Hoc Committee.64 It begins innocently enough:

> Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to

57. See id.
58. See id.
59. See id. "Consent to future use of confidential information will not be implied ... unless expressly agreed to by the client." Id. Nowhere is it explained how such consent could ever be informed.
60. Model Rule 1.6 states that "[a] lawyer shall not reveal information relating to [the] representation of a client unless the client consents after consultation." MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2001).
61. Model Rule 1.7 prohibits a lawyer from representing a client "if the representation of that client will be directly adverse to another client, unless ... [the] client consents after consultation." Id. R. 1.7(a).
which the client reasonably understands the material risks that the waiver entails. 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.65

But then it adopts a surprising three-handed approach. On the one hand, it provides: "[I]f 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."66 On the other hand, it observes: "If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved."67 But then, on the third hand, the Ethics 2000 Commission’s comment 22 proposal provides:

[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. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).68

Thus, believe it or not, the 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,69 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!70

One of the ironic aspects of the Ethics 2000 Commission’s creation of this yawning breach in the client protections provided by the Model Rules is that this same Ethics 2000 Commission, in a related context,

66. Id. at 31.
67. Id.
68. Id. (emphasis added).
69. See id.
70. See id. The use of the word “particularly” is particularly troubling because it admits that the prospective waiver might be enforceable as to the experienced client, even if the client is not represented and the waiver does not exclude substantially related matters.
has taken a giant step toward enhancing the safeguards available to clients when they are asked to waive conflicts of interest. To assure that such consent is informed, the Ethics 2000 Commission has proposed as an ethical mandate that the lawyer memorialize the client's consent in a writing from the lawyer to the client. While this heightened sensitivity to the protection of clients is certainly cause for celebration—particularly given the courage it took to recommend a rule that will undoubtedly prove controversial among practitioners too long accustomed to handling these pesky matters, if at all, in a desultory telephone conversation—it seems almost impossible to reconcile this enlightened approach with the Ethics 2000 Commission's expansive laissez faire attitude toward prospective waivers and those who demand them from their clients.

D. What Is Wrong with Prospective Waivers: Prospective Waivers and Informed Consent

To understand the mischief of this prospective waiver approach, one need only hold up to the harsh light of day the arguments offered by the proponents of enforceable, open-ended prospective waivers. First, it

71. See id. at 181. Proposed comment 20 provides:
Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or oral consent that the lawyer promptly records and transmits to the client. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, 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. 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. The writing need not take any particular form; 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. (underscoring omitted). In adopting this proposal the Ethics 2000 Commission was following the lead of California. See CAL. RULES PROF'L CONDUCT R. 3-310(C), (E) (2000) (requiring attorneys to obtain informed written consent from clients in specified situations before accepting representation). Consider, for example, how the Reporter's Explanation of Changes justifies the Ethics 2000 Commission's proposal that the standard be changed from "consultation" to "informed consent." See Ethics 2000 Report, supra note 40, at 134. It is said that the old standard of "consultation" "does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions." Id. at 155.
is asserted that experienced clients are better informed. Well, just think about it. What kind of an experience would experienced clients have to possess to be better informed about something they do not know anything about? Are we saying that people who are experienced or sophisticated have clairvoyance? Do they know where the representation will go? Do they know whether any additional representations are going to be added? Do they know what confidential information they are going to share? Do they know what that confidential information is? Do they know when the waiver is going to be used? Do they know who the adverse clients are and what the new matters they are now waiving will be?

It does not matter how smart a client is, how experienced a client is, how sophisticated a client is, how many lawyers a client has representing him or her, for how many years he or she has hired lawyers, or how many lawyers he or she has hired. It makes no difference. Clients do not know anything about this prospective waiver except that they are informed that they are not informed. And so, the requirement of informed consent, so strenuously supported by requiring a confirmatory writing, disappears entirely when it comes to prospective waivers snatched from experienced clients.

E. Prospective Waivers and Client Autonomy

Second, the proponents of prospective waivers point out that, if the client does not wish to accept the prospective waiver when it is first tendered, the client can simply choose another law firm. While this sounds like a reasonable proposition at first blush, further consideration reveals the two great flaws in this justification. Some of those from whom prospective waivers are demanded will be existing clients of the law firm. When the client asks its present firm to take on a new matter, a prospective waiver will be demanded. When asked whether the client wishes the law firm to take the assignment, the client has no choice but to acquiesce in this new ordering of the lawyer-client arrangement, since the client will have to consider that he or she has used this firm for years and that moving his or her work to another firm would work its

72. See Ethics 2000 Report, supra note 40, at 31 (explaining that open-ended consent is generally not effective, unless the client is "an experienced user of the legal services involved and is reasonably informed regarding the risk that an unforeseeable conflict may arise").

73. For a reminder of how important information is, see infra note 75.

74. See Nora J. Pasman, The Conflict of "Conflict of Interest": The Michigan Example, 1995 DET. C.L. REV. 133, 173-74 (asserting that "citizens have ample choice of counsel without being burdened with one whose loyalties may or should lie elsewhere").

http://scholarlycommons.law.hofstra.edu/hlr/vol29/iss3/1
own hardship. Therefore, the client will feel that he or she has anything but a "cost free" choice in deciding whether to accept the prospective waiver ultimatum.

More importantly, when one looks at the issue of prospective waivers from the macro-economic perspective of the legal business, one can easily envision client choice becoming, over time, a hollow promise. After all, seeking prospective waivers can hardly make lawyers feel more ethical or better about themselves. The very notion of telling a brand new client, let alone an old one, whose trust, confidence, and respect the lawyer wishes to develop or maintain, that he or she wants the client in advance to permit his or her law firm to take on matters directly adverse to the client at some future date must diminish the lawyer who makes this unsavory request in some significant way. Thus, the only reason to traverse this uncomfortable terrain is to enhance the economics of the law firm. Every conflict a law firm never has to confront is just that much more revenue for the enterprise.

But, if some firms start using these prospective waivers wholesale, it will not be long before these 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 crowd, where the leaders are those who successfully demand the most and most far-reaching prospective waivers from the most clients.

F. Prospective Waivers and Lawyers Choosing Between Clients

Third, one might seek to minimize the downside of prospective waivers by asserting that, just because law firms have snared prospective waivers, they will not always employ them. While it is true that some prospective waivers, even under the Ethics 2000 Commission formulation, may not be enforceable, the important point to recognize

75. The Ethics 2000 Commission comment concludes: "In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b)." Ethics 2000 Report, supra note 40, at 31. But, once
here is that, as the law firm faces the crossroads of whether to rely upon a prospective waiver, its decision is likely to turn on anything but considerations of which the firm can be proud.

Suppose the firm possesses a prospective waiver, secured five years ago from an experienced client, sitting in the firm’s hip pocket. 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? And undiscussed, but definitely considered, will be questions relating to the relative power of the partners, offices, and practice areas of the firm that are involved in the two competing opportunities. Finally, overarching everything else will be an attempt to determine the likelihood that the old client will fire the firm if the firm insists on relying upon the prospective waiver to take on the new matter.

Just contemplating these unseemly discussions provides one with a high level of discomfort and unease. Yet, if the prospective waiver proposal were adopted, the profession would have gone beyond condemning to encouraging precisely this kind of decision-making process.

G. Firing the Lawyer as Client Protection

The proponents of prospective waivers raise a fourth argument in their favor: the “safety valve” of client protection that may be found in the freedom of the client to fire the lawyer at the time the client learns its firm is about to take a position directly adverse to the client on behalf of another client, whose identity, matter, and circumstances were never identified in a prospective waiver. Now, why lawyers would ever, as a

76. Dean Dan R. Fischel of the great University of Chicago Law School has addressed the paradigm of the little client of a minor partner in a branch office that gives credit to the truth of this assumption. In a recent article, Professor Fischel argued that it was “draconian” to allow a “small matter” for a “subsidiary” accepted by a “junior partner” in a Washington firm’s “Los Angeles office” to block another representation against the “parent,” presumably by a senior partner in the headquarters office. See Daniel R. Fischel, Multidisciplinary Practice, 55 BUS. LAW. 951, 965 (2000).

77. See, e.g., Pasman, supra note 74, at 173-74 (suggesting that a client may fire a lawyer whose loyalties lie elsewhere); Ronald D. Rotunda, Conflicts Problems When Representing

http://scholarlycommons.law.hofstra.edu/hlr/vol29/iss3/1
profession, get themselves into the business of encouraging clients to fire lawyers is beyond reason. But lawyers should recognize that even making that argument suggests that the client will have "freedom" that the client, in reality, may not have.

Firing is not always available as a remedy for the client. The client may be about to go to trial. The client may be engaged in a short deadline transaction. The client may have invested thousands, tens of thousands of dollars, in getting the law firm up to speed and may not want to switch law firms. The client may actually like his or her lawyer. The lawyer and the client may have developed a rapport, even a sense of trust. So, there are many reasons why clients may not want to go around firing their lawyers.

And do lawyers, as a profession, really want to put clients in the position where the only way they can protect their loyalty interests is by switching lawyers? When it is also recognized that the client could well be forced to retain another law firm that will present the client with yet another prospective waiver, it is easy to imagine how this problem can cascade out of hand.

Another great irony that should not be lost is that the Ethics 2000 Commission's proposed prospective waiver comment actually contemplates treating present clients of the firm worse than the rules currently treat former clients. As to a former client, Rule 1.9 of the Model Rules provides that a lawyer cannot take on a matter materially adverse to a former client that is substantially related to the work the lawyer did for that former client. But, under proposed comment 22, a prospective waiver that contemplates taking on a matter substantially related to the work the lawyer is currently undertaking for the client apparently could pass ethical muster. This is very bad ethics and reflects no client loyalty.

Members of Corporate Families, 72 NOTRE DAME L. REV. 655, 674 (1997) (noting that if a client "is offended that the law firm is representing another client in a matter adverse to the[x] interests . . . the offended client can always end its retention and terminate the lawyer").

78. Forcing clients to "fire" lawyers to achieve loyalty from their counsel is just as invidious as lawyers "firing" clients to take on a new, better, and conflicting representation, a practice that has been uniformly condemned by the courts. See Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345 n.4 (9th Cir. 1981); Picker Int'l, Inc. v. Varian Assoc. Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. c (2000).

79. See MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2001).

80. See Ethics 2000 Report, supra note 40, at 182.
Ethics rules governing lawyers, by and large, are designed to protect clients. Indeed, without that raison d'être, there would be little cause to have a code or even to call the law a profession. Nonetheless, some of the ethics rules quite properly reflect the balancing of competing interests. For example, if the legal profession were to adopt a rule governing confidentiality that was entirely client-centered, the rule would contain no exceptions to the obligation of a lawyer to keep his or her client's secrets. The rules that have been adopted, however, though hardly uniform, reflect the judgment of different jurisdictions as to how to strike a balance between the client's interest that what takes place in the privacy of the lawyer-client relationship remains sacrosanct, with society's and, perhaps, the lawyer's interest in preventing imminent death, serious bodily injury, perjury before a tribunal, and, in many states, client crimes or fraud that may result in substantial financial injury, particularly if the lawyer's services have been employed in the client misdeeds.

Similarly, if one were designing an entirely client-centered loyalty rule one would say that a lawyer never could take a representation adverse to a former client. The rules that have been adopted, however, balance that interest against the interest of lawyers not being forced to retire by age forty and, therefore, they limit prohibited representations against former clients to those that are substantially related to the earlier representation or representations that involve the use of confidential information of the former client.

82. See id.
83. See id. § 66(1).
84. See id.
85. See id. § 63 cmt. a.
86. See id. § 67(1)(a).
87. See id. § 67(1)(d).
88. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2001). Model Rule 1.9(a) provides:
   A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
   Id.
89. See, e.g., id. R. 1.9(c)(1). Model Rule 1.9(c)(1) provides:
   A lawyer who has formerly represented a client in a matter ... shall not thereafter ... use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known ....
Yet, when one considers prospective waivers, there is no similar legitimate lawyer interest to enter into the balance. Other 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, one that would permit a lawyer to take a position directly adverse to the client on a matter never identified at the time the "informed" waiver is received.

I. Should Consenting Adults Receive Only the Ethics They Can Negotiate?

While the Author trusts that the foregoing places a fatal stake in the heart of undefined prospective waivers, even as presented to experienced clients, the real threat presented by this proposal is much more dangerous than whether clients will be forced to acquiesce to unethical, unanticipated adverse future representations. Rather, it introduces the concept of "the consenting adult exception" that abandons the minimum standards that ethics rules have always provided for all clients, regardless of their station in life. Whether a lawyer was dealing with General Motors or Grandma Tilley, both were entitled to competent representation, confidentiality, loyalty, professional independence, and a myriad of other important obligations and protections. While the legal profession has long recognized that a lawyer might not have to explain as fully to the knowledgeable client what the lawyer was doing, what the clients options were, or why the client might want to consent, for example, to a confidential disclosure or to a conflict, the base-line protections were identical for each. But now, with proposed comment 22, the legal profession treads down a new pathway, one the profession should avoid at all costs, for reasons the Author hopes to articulate with all the fervor he can muster.

First, all experienced or sophisticated clients are anything but powerful and knowledgeable. Any practicing lawyer, even those at high-powered law firms, has encountered many clients, long-time clients, clients who are voracious users of legal services, clients who are titans of industry who nonetheless remain vulnerable and without bargaining power in their relationship with counsel. How many times

Id.

90. Compare Ethics 2000 Report, supra note 40, at 31 (distinguishing between experienced and inexperienced clients), with MODEL RULES OF PROF'L CONDUCT R. 1.7 (demonstrating a lack of distinction between sophisticated and unsophisticated clients).

91. See MODEL RULES OF PROF'L CONDUCT R. 1.7.
have lawyers seen chief executive officer bravado so brazenly exercised within the corporate enterprise disappear when the latest threat to corporate prosperity arises in the legal arena? Often, these clients view "the law" as the ultimate black box and gratefully switch from being independent warriors to accepting a dependent relationship with their lawyer; indeed, a lawyer’s professional stock in trade is to encourage trust among clients that will make clients feel comfortable reposing these matters with lawyers. Lawyers should not be in the business of being obliged to warn clients that one of the things they should be alert to is possible (even likely) overreaching by their own lawyer.

Second, adding in-house counsel to the equation does not necessarily tip the balance. The proponents of this experienced client notion might have the General Counsel of General Motors in mind; yet, so often, in-house counsel, even in-house counsel for Fortune 100 companies, are unsophisticated, young, and inexperienced. In addition, there are thousands of smaller businesses that are represented by in-house counsel, or even outside counsel, in their hiring of powerhouse firms, where that counsel’s presence does not right the power or information imbalance between lawyer and client that the rules correctly assume.

Third, should the legal profession encourage a system in which the determination of whether the lawyer complied with the ethical mandates turns on after-the-fact litigation over whether the client (with or without his or her lawyer) fell into that category of the experienced or sophisticated client such that the lawyer was free to escape the effect of the rules? The process of adjudicating this question would not only be standardless and unseemly ("are too," "are not"), but it also would not provide the pre-representation, pre-decision-making certainty the rules should foster when discussing ethical protections for clients.

Fourth, some might recognize the problems with prospective waivers but post the simple question: "Is there anything wrong with the lawyer simply asking? After all, the client can always say ‘no.’" But that answer simply is not correct and only emphasizes how out of touch those lawyers are with how things look from the client’s side. It is far more likely that the client will think: "If my lawyer wants this favor, I guess I should give it to him. The last thing I want to do is anything that will dim his ardor for my cause," than for the client to really feel "free" to go either way. And, as the following discussion demonstrates, even if the client feels comfortable resisting the request, the act of asking taints not only the lawyer doing the asking, but, in the Author’s view, the profession as a whole.
This discussion reveals a far more fundamental issue. Does the legal profession really want its ethical rules to be waiveable to the extent that they are won or lost in a battle between a concededly high-powered client and a high-powered lawyer? Does the legal profession want the ethical protections that are to be provided to the client to turn on the number of protections the lawyer is able to avoid in a free market free-for-all in which each engagement starts at an ethical ground zero? Will the legal profession's rules ever be entitled to be associated with the words "ethics" or "professional responsibility" if the process by which they are established represents something not unlike the give and take over "representations and warranties" between a buyer and a seller in a commercial transaction? Does the legal profession want the "rules of engagement" literally to be decided in this preliminary skirmishing between lawyer and client? Is that where the legal profession wishes client protections to devolve?

J. Is Everything Open to Negotiation?

Thinking about the other "opportunities" that the abandonment of minimum standards for lawyers might provide demonstrates the mischievous seeds that are planted by this proposed comment 22. A little tour of the rules provides an opportunity to think about how many more of them the legal profession would be prepared to abandon if a motivated lawyer were able to squeeze consents from her experienced clients, if the tendered retainer letter did not just contain a prospective conflict waiver clause, but was a lengthy single-spaced document designed to snare as many waivers as Avis tries to collect when the busy lawyer signs a rental car contract at LaGuardia.

Start with non-waiveable conflicts. Included in that concept are directly adverse representations before tribunals and any other representation in which it is unreasonable for the lawyer to conclude that the conflict will not have a materially adverse effect on the representation. Can the legal profession abandon that requirement if it

92. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. g(iii) (providing examples of cases in which courts have held that the lawyer cannot represent directly adverse parties in the same lawsuit).

93. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1), (b)(1). The exact formulation is that a lawyer cannot represent a client unless the lawyer reasonably believes that representation of the client "will not adversely affect the relationship with the other client" or that representation of the client "will not be adversely affected" by the lawyer's responsibilities to another client. Id. The comment to the rule is helpful:

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client,
secures the consent of an experienced client? If that same client can be asked to consent to a conflict not yet even identified, it is hardly an ethical leap to conclude that the client can also be asked to consent to one that is identified, but non-waiveable. After all, those who are being asked are experienced.

Confidentiality may be another fertile area for abandoning minimum standards in our ethics rules. Those who wish to amend Model Rule 1.6 governing confidentiality argue that a change is necessary to protect lawyers. If a lawyer's services have been employed innocently in the client's commission of a crime or fraud, the proponents of this change argue that the lawyer should be free to disclose confidential information to prevent, mitigate, or rectify the damages flowing therefrom. This, in turn, raises the question in jurisdictions in which this amendment has not yet been adopted, whether lawyers, nonetheless, should be able to gain prospective permission from the client to disclose that which is prohibited by the rule, so long as the retainer agreement is signed by an experienced client. Even though the client at the time of the waiver has no idea what confidential information will be shared in the future, if the experienced client understands that he or she is waiving these protections, the reasoning behind the proposed prospective waiver comment certainly supports the proposition that such an additional waiver should also be permitted.

Lawyers are prohibited from charging unreasonable fees. This rule applies with equal force to Microsoft and Uncle Milt. But should it?
If an experienced client agrees to a fee, should not that client be "stuck" with the resulting arrangement? Two theories might support this exception to the prohibition of Rule 1.5: (1) Any agreement entered into by an experienced client is per se reasonable or (2) a waiver by the experienced client of the protections of this rule in a retainer agreement—before the client knows what fee will be charged—is enforceable just like the prospective waiver of unknown client conflicts. The securing of such a waiver would provide counsel with a wonderful level of confidence and certainty that the fee agreement will be fully enforceable. But then dare one ask whether that is an important enough achievement to permit lawyers to avoid the requirements of Rule 1.5 as to experienced clients.

If one goes that far, why stop the campaign to promote lawyer peace of mind at this point? Ethics rules governing lawyers provide that a lawyer may not seek a waiver of unlimited malpractice liability, unless the agreement is permitted by law and the client is advised in writing of the advisability of being separately represented by another lawyer. However, proposed comment 22 suggests that this rule's waiver requirements are far too strict. Certainly, the experienced client should be free to give her lawyer an opportunity to reduce his or her malpractice premiums by waiving malpractice liability in the retainer agreement, regardless of the rule's protective requirements. An effective law firm, armed with enough of these waivers, might decide it could forego malpractice insurance altogether.

The recent trend of lawyers' accepting or even insisting on the client paying some or all of the fee for professional services in shares of

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

Id.

98. See, e.g., id. R. 1.8(h) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement . . . ").


100. See Debra Baker, Who Wants to Be a Millionaire?: Law Firms Investing in Hot High-Tech IPOs Are Making a Fortune, but Some Critics Worry the Stock Craze Is Clouding Ethics
the client raises issues under Rule 1.8(a) of the Model Rules, the rule governing business transactions with a client.\footnote{See Richard B. Schmitt, \textit{Little Law Firm Scores Big by Taking Stake in Clients: Specializing in Web Start-Ups, Venture Law Group Turns Its Back on Corporate Stars}, \textit{WALL ST. J.}, Mar. 22, 2000, at B1 (stating that the Venture Law Group "insists on having an opportunity to buy in . . . at the idea stage").} Rule 1.8(a) requires the lawyer to give the client an opportunity to disclose the terms of the proposed transaction in writing in a manner the client can understand, subjects the lawyer to an objective review of the transaction for entire fairness at a later date, and mandates client consent to the transaction in writing.\footnote{See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 418 (2000) (concluding that "a lawyer who acquires stock in her client corporation in lieu of or in addition to a cash fee for her services enters into a business transaction with a client, such that the requirements of Model Rule 1.8(a) must be satisfied"); ABA Section of Litigation, Task Force on the Independent Lawyer; Lawyers Doing Business with Clients: Identifying and Avoiding Legal and Ethical Dangers (2000).} But, if ethics rules permit lawyers to seek waivers of these protections before commencement of representation in which compensation will be the payment of stock, then those lawyers would not have to worry whether the stock-for-fee arrangement would pass ethical muster. Again, peace of mind for lawyers would be promoted, admittedly at the expense of their experienced clients; but, that is certainly a tolerable expense about which one can now be confidently
unconcerned, since these clients, as one learns from proposed comment 22, obviously can protect themselves.  

Permitting an erosion of the protections offered by the rules as to experienced clients need not stop with important aspects of the lawyer-client relationship. Rule 4.2 of the Model Rules prohibits lawyers from contacting represented persons—all represented persons—without the permission of the person’s lawyer.  

Applying the lessons of this discussion, that rule can be viewed as so paternalistic. What experienced client does not understand the threat posed by opposing counsel and does not possess the wherewithal to resist any overreaching approach the adverse lawyer might undertake? Surely, if one follows the reasoning of proposed comment 22, the protections of Rule 4.2 need not remain in place for experienced clients; those parties who wish their lawyer to get around the officious intermeddling of the other side’s counsel ought to be free, through counsel, to make a direct approach to a represented person who is experienced in such matters.  

Our friends at the Department of Justice, for sure, will dance with glee when they learn that, finally, the impediment to “the legitimate needs of law enforcement” posed by Rule 4.2 can be obviated—at least as to experienced clients, particularly those directors, officers, and key employees of miscreant corporations and other organizations with whom the Department of Justice lawyers are so determined to chat.  

Finally, many jurisdictions have enacted ethical rules prohibiting sex with clients. The Ethics 2000 Commission has offered a similar proposal.  

The impetus for the rule is the overreaching that can occur in the relationship between a powerful lawyer and a vulnerable client. As the Ethics 2000 Commission’s proposed comment to its “no sex with clients” rule observes: “The relationship between lawyer and client... is almost always unequal; thus, a sexual relationship... can involve unfair exploitation of the lawyer’s fiduciary role...” But does one really need this rule to protect experienced clients when the relationship

106. See Model Rules of Prof’l Conduct R. 4.2 (prohibiting all contact between lawyer and represented client “unless the lawyer has the consent of the other lawyer”).  
109. See Ethics 2000 Report, supra note 40, at 198-99 (“A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”) (underscoring omitted).  
110. Id. at 41.
is "equal?" Proposed comment 22 more than suggests the answer is "no." The Author, of course, will resist the temptation to ask at what these clients, whom the proposed rule is going to exempt from the protection of the "no sex with clients" rule, must be experienced.

K. The Real Goal: Abolish Imputation

The proposal to permit prospective waivers not only reflects an opening wedge in a campaign to water down ethical rules for experienced clients, but also a frontal assault on imputation. The Author has asserted elsewhere that imputation is the foundation stone of the legal profession's commitment to the core value of loyalty to clients. Imputation holds that all lawyers within a given practice setting carry with them the obligation to uphold the loyalty interests of the clients of every other lawyer in the practice setting. If any lawyer in the firm or law office is representing A, then no one else in the firm can take on a matter adverse to A, without A's informed consent.

The result of this rule is that firms must recognize many conflicts and, as a result, turn down a great deal of business. A good size law firm could operate on the matters the ethics committee—also known as the "no business" committee at Drinker Biddle & Reath—rejects each year. This rule on imputation also means that firms must maintain these huge databases, circulate conflicts memoranda to all lawyers, and maintain a time consuming and expensive infrastructure to keep the firm on the straight and narrow ethical path. Think how many more hours lawyers could dedicate to billable endeavors if they were not required to address these conflicts, to say nothing of how much more business the firm could keep if it could escape the annoying clutches of this conflict-generating rule. In this day, when law firms operate in ten or more cities and partners have never even met, let alone know each other, the argument is advanced why a lawyer in the Miami office should keep his

111. See id. at 182.

112. This discussion just addresses some of the many examples one can find in the Model Rules. The reader might wish to consider others. Ethics rules governing competence (Rule 1.1), scope (Rule 1.2), and diligence (Rule 1.3) come to mind, but there could be more. See generally MODEL RULES OF PROF'L CONDUCT R. 1.1 to 1.3 (2001).


114. See id. at 1542-43.

115. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.10(a). Model Rule 1.10(a) 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), 1.9 or 2.2." Id.
partner in Philadelphia from taking on an intriguing and lucrative matter in Boston.

To correct this "unfortunate" situation, the aforementioned Ad Hoc Committee has added to its suggestion that the Ethics 2000 Commission endorse and enforce open-ended prospective waivers wrenched from experienced clients, the frontal abandonment of imputation altogether. This latter proposal is so breathtaking in its scope that it really obviates the need for the former proposal altogether. What the Ad Hoc Committee seeks is the adoption by the Ethics 2000 Commission of a rule that would permit a lawyer to take on a new matter directly adverse to a present client, the only caveat being that the new matter not be substantially related to the matter or matters currently being handled on behalf of the present client. Only Wild West Texas has adopted such a swashbuckling rule, and even there a federal court has found its attack:


117. See id. The full proposal of the Ad Hoc Committee for amending Rule 1.10 reads:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.7(a), 1.8(e), or 1.9 or 2.2, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm except as permitted in paragraphs (b) and (c).

(b) If the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client, any of the remaining lawyers in the firm may represent the client.

(c) The provisions of paragraph (a) shall not be applicable to conflicts arising under either Rule 1.7 or 1.9 if:

(1) The prohibited lawyer is screened from any contact with the new matter in accordance with paragraph (f);
(2) the lawyer undertaking the new matter is screened from any contact with any disqualifying matter in accordance with paragraph (f);
(3) any disqualifying matter and the new matter are not the same or substantially related;
(4) there is no significant risk of a diminution of the obligation of loyalty by a lawyer of the firm to its clients; and
(5) in the case of conflicts arising under Rule 1.7, each affected client is advised in writing of the circumstances warranting the implementation of screening procedures and of the actions taken to comply with this rule.

Id.

118. See TEX. RULES OF PROF'L CONDUCT R.1.06(b)(1) (2000). Rule 1.06 provides in part:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
on client loyalty too much to stomach. But, that is what the Ad Hoc Committee asks and, to support the idea, it actually has the temerity to suggest that the new rule would maintain “undivided and undiminished loyalty” to the client because, in the world of the Ad Hoc Committee, the lawyers “actually serving” this present client would be screened from the other lawyers in the firm working simultaneously on the matters adverse to the client.

In presenting this proposal, the Ad Hoc Committee is simply echoing sentiments expressed by others. Right here at the Hofstra University School of Law, I recall Sheila Birnbaum, the great products liability lawyer from Skadden, Arps, Slate, Meagher and Flom LLP, asserted that she should be free to take on a matter directly adverse to clients of her firm’s Hong Kong office, since she did not even know the Skadden lawyers in the Hong Kong office; though she was not as quick to give up sharing in the revenues from the office. Similarly the great Dean of the University of Chicago School of Law, Dan R. Fischel, has argued in the Business Lawyer, a publication of the same ABA section that has organized the Ad Hoc Committee, that imputation is “obsolete” and “should be discarded” altogether, since it simply serves as an impediment to law firms “grow[ing] to their efficient size” when unimpeded by the rule. This approach to conflicts—no imputation—is the model already adopted by the Big 5 accounting firms, which in fact has permitted those enterprises to become behemoths. For the Big 5, there are no non-waiveable conflicts, and all conflicts are personal to

\[(1)\text{ involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; and}
\[(2)\text{ reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.}
\]

Id. R. 1.06(a), (b).

119. See, e.g., In re Am. Airlines, Inc., 972 F.2d 605, 619 (5th Cir. 1992) (explaining that ethical prohibitions against successive representations cannot be enforced merely by requiring protection of client confidences to the extent necessary to prevent “‘taint[ing]’ the trial with their adverse use).

120. See Letter from the Business Law Section Ad Hoc Committee on Ethics 2000, supra note 116, at 4. Meanwhile, unstated, is the fact that all lawyers, screened and unscreened, would happily enjoy all of the fees generated by these conflicting representations.

121. Ms. Birnbaum’s remarks, though unrecorded, were presented at Hofstra University School of Law on March 11, 1996, during a conference entitled Legal Ethics: The Core Issues.

122. Fischel, supra note 76, at 966.

the individuals working on the engagement, with each professional being judged by a totally subjective standard of whether each feels comfortable providing services to any given client.\textsuperscript{124}

This proposed abandonment of imputation reflects the potential effects of open-ended, undefined, non-abrogateable prospective waivers, but on a far larger scale. The successful securing of a prospective waiver from a client means that the law firm does not have to impute any conflicts that an individual client might generate to any of the other lawyers in the firm, at least as to matters not substantially related to work being done on that client's behalf. Thus, prospective waivers produce abandonment of imputation one client at a time.

From the Ad Hoc Committee's perspective, a wholesale adoption of its amendment to Rule 1.10 would be ideal. But, if the Ad Hoc Committee can simply garner permission for open-ended prospective waivers that never have to be revisited at a later date, it would have achieved a major victory, giving the Ad Hoc Committee just the incentive it needs to return to the battle for the purpose of ending imputation altogether on yet another day.

III. CONCLUSION

So it all starts with one small comment buried in the lengthy comments annexed to proposed new Model Rule 1.7. And maybe, even if adopted, it will not go beyond its bounds. But do not count on it. The path to victory for the forces of economic hegemony over professional responsibility is already well marked by its most ferocious proponents. Proposed comment 22 is just one milepost along the way. And when we get there, heaven forefend, it will then be used as a precedent to accelerate the profession along a route whose end-point is something that looks remarkably like where the Big 5 reside today. So, now is the time to raise the alarm, launch the counter-attack, recommit ourselves to our professional values, and defend the role of ethical lawyers—inspired by that conscience of our profession, the Lichtenstein Professor of Ethics, my good friend and hero, Monroe H. Freedman.

\textsuperscript{124} See id.