The Model Rules contemplate that a lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest. General and open-ended consent is more likely to be effective when given by a client that is an experienced user of legal services, particularly if, for example, 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. Rule 1.7, as amended in February 2002, permits a lawyer to obtain effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment. Formal Opinion 93-372 (Waiver of Future Conflicts of Interest) therefore is withdrawn.

This opinion applies the ABA Model Rules of Professional Conduct to the subject of a lawyer obtaining a client’s informed consent to future conflicts of interest. The Committee concludes, for the reasons discussed below, that ABA Model Rule of Professional Conduct 1.7 permits effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.

Model Rules 1.7, 1.6, and 1.9

Rule 1.7 addresses concurrent conflicts of interest and the circumstances in which a lawyer may, with the informed consent of each affected client, represent a client notwithstanding a concurrent conflict. Rule 1.6, regarding confidentiality of information, and Rule 1.9, regarding duties to former clients, are relevant with respect to the confidentiality issues relating to obtaining such consent.

In 1993, when the Committee issued Opinion 93-372, the Model Rules did

2. This opinion is based on the Model Rules of Professional Conduct as amended by the American Bar Association House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.
not expressly address a client’s giving informed consent to future conflicts of interest. Moreover, no Rule or Comment provided express guidance as to when an earlier matter for a former client and a later matter for a different client should be considered substantially related. In 2002, that changed in both respects.

In February 2002, Model Rule 1.7 was restructured and revised. Rule 1.7(a) defines a “concurrent conflict of interest.” Rule 1.7(b) addresses the circumstances under which a lawyer may undertake or continue representation of a client in reliance upon the client’s informed consent to a conflict:

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

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

The Comments to Model Rule 1.7 were also revised. New Comment [22] expressly addresses the subject of a client’s giving informed consent to future conflicts:

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) [of Model Rule 1.7]. The effectiveness of such waivers is generally determined by the extent to 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. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. 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. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel.

3. “The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.... The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.” Model Rules of Professional Conduct Preamble: A Lawyer’s Responsibilities cmt. 21.

4. What constitutes a conflict of interest is beyond the scope of this opinion.
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).

The Committee believes that the term “waiver,” as used in the first part of Comment [22], is intended to mean the same thing as the term “informed consent,” as used in Rule 1.7 and elsewhere in the Comments.

We interpret the meaning of the term “unrelated to the subject of the representation” in Comment [22] by referring to Comment [3] to Model Rule 1.9, also added in February 2002. Comment [3] provides guidance on when an earlier matter for a former client and a later matter for a different client are to be considered “substantially related.” The Comment, which is lengthy, begins with the general principle that “[m]atters are ‘substantially related’ for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” We are of the opinion, therefore, that the term “unrelated to” as used in Comment [22] should be read as meaning not “substantially related to,” as that term is used in Rule 1.9 and its Comment [3], i.e., that the future matters as to which the client’s consent to the lawyer’s conflicting representation is sought do not involve the same transaction or legal dispute that is the subject of the lawyer’s present representation of the consenting client, and are not of such a nature that the disclosure or use by the lawyer of information relating to the representation of the consenting client would materially advance the position of the future clients.

**Opinion 93-372**

As noted above, when the Committee issued Opinion 93-372 no Model Rule or Comment expressly addressed informed consent to future conflicts of interest, and none provided express guidance on when successive matters for different clients are to be considered substantially related. Opinion 93-372 cites Model Rules 1.7 and 1.6, Disciplinary Rule 5-105(c) of the predecessor Model Code of Professional Responsibility, and authorities that pre-date (with the exception of one decision) the Model Rules. Opinion 93-372 does not cite Model Rule 1.9.

Opinion 93-372 concludes that the effectiveness of a client’s “consent after consultation” is generally limited to circumstances in which the lawyer is able to and does identify the potential party or class of parties that may be represent-

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5. In 2002, as a result of a recommendation by the ABA Commission on Evaluation of the Rules of Professional Conduct, the term “consent after consultation” was replaced in the Model Rules with the term “informed consent.” No change in the meaning of the term as it is used in Rule 1.7 and in other affected Rules was intended by this amendment. *See “Model Rule 1.0, Reporter’s Explanation of Changes” ¶ 5*, available at http://www.abanet.org/cpr/e2k-rule10rem.html.
ed in the future matter(s). Opinion 93-372 also concludes that, in some instances, the lawyer may need to identify the nature of the likely future matter(s). Although Opinion 93-372 acknowledges that clients differ in their level of sophistication, the opinion does not vary its conclusions as to the likely effectiveness of informed consent to future conflicts when the client is an experienced user of legal services or has had the opportunity to be represented by independent counsel in relation to such consent. Also, although Opinion 93-372 is based to a considerable degree on concerns about the possibility of disclosure or use of the client’s confidential information against it in a later matter, it does not address those concerns in the context of the lawyer’s seeking informed consent that is limited to future matters that are not substantially related to the client’s matter. An informed consent that is limited to future matters that are not substantially related should not raise the concerns regarding the disclosure and use of confidential information that were among the central considerations underlying Opinion 93-372, given the criteria, discussed earlier, for determining whether successive matters are substantially related.

Comment [22] supports a lawyer’s seeking, and the effectiveness of, a client’s informed consent to future conflicts of interest in the circumstances that are acknowledged by Opinion 93-372. The Comment goes further, however, by supporting the likely validity of an “open-ended” informed consent if the client is an experienced user of legal services, particularly if, for example, the client has had the opportunity to be represented by independent counsel in relation to such consent and the consent is limited to matters not substantially related to the subject of the prior representation. Thus, Opinion 93-372 is no longer consistent with the Model Rules.

Additional Limitations and Requirements

The Committee notes the following additional limitations and requirements relating to a client’s giving informed consent to a future conflict of interest. First, under Rule 1.7(b)(2) and (3), some conflicts are not consentable. An

6. Opinion 93-372 stated that consent to waive a future conflict of interest does not have the effect of authorizing the lawyer to reveal or use confidential client information. See Formal and Informal Ethics Opinions 1983-1998 at 171-73. That remains the case. See also Rules 1.6(a) and 1.9(b)(2) and (c)(1). Opinion 93-372’s reliance on confidentiality concerns as a basis for limiting the scope of the effectiveness of consent to future conflicts seemed to be based on the risk that the lawyer later may violate Rules 1.6 or 1.9. The Committee does not view the hypothetical risk that the lawyer later might violate the Model Rules as a sufficient basis for proscribing the sort of informed consent to future conflicts contemplated by Rule 1.7 cmt. 22.

7. Opinion 93-372’s limitation of the scope of effective consent to future conflicts, which is its central conclusion, is inconsistent with the amended Model Rules. Hence, we withdraw Opinion 93-372 in its entirety. The Committee notes that other conclusions in Opinion 93-372 on related points are consistent in whole or in part with the Model Rules as amended; those other conclusions are incorporated in this opinion.

8. See also Model Rule 1.7 cmts. 14 to 17.
informed consent to a future conflict (like an informed consent to a current conflict) cannot alter that circumstance. Second, under Rule 1.7(b)(4), the client’s informed consent must be confirmed in writing. Third, as noted earlier, a client’s informed consent to a future conflict, without more, does not constitute the client’s informed consent to the disclosure or use of the client’s confidential information against the client. Finally, a lawyer, when considering taking on a later matter covered by an informed consent given in advance, even if the conflict is consentable, still must determine whether accepting the engagement is impermissible for any other reason under Rules 1.7(b) and 1.9, or any other Model Rule. The lawyer also must determine whether informed consent is required from the client that is to be represented in that later matter.
Ethics Opinion 309

Advance Waivers of Conflicts of Interest

Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct. Such waivers, however, must comply with the overarching requirement of informed consent. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character. Regardless of whether reviewed by independent counsel, an advance waiver of conflicts will not be valid where the two matters are substantially related to one another.

Applicable Rules

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification: General Rule)
- Rule 2.2 (Intermediary)

Inquiry

The Ethics Committee has been asked whether advance waivers of conflicts of interest are permissible and, if so, whether there are requirements for such waivers additional to, or different from, those prescribed by Rules 1.7 and 1.9 for waivers generally. For purposes of this opinion, the term “advance waiver” means one that is granted before the conflict arises and generally before its precise parameters (e.g., specific adverse client, specific matter) are known.

Discussion

The practice of law in this country has changed markedly in the century since the ABA Canons of Professional Ethics were promulgated. As was the case then, many lawyers practice in relatively small firms, or as solo practitioners, in a single geographic location. Increasingly, though, law firms have hundreds or even thousands of lawyers, with multiple offices across the country and around the globe. In such firms, individual partners or associates may not even know one another, let alone the identities of the clients their colleagues represent or the details of the matters their colleagues are pursuing for such clients.

Moreover, the manner in which clients—particularly commercial clients—use lawyers is quite different than in the past. The days when a large corporation would send most or all its legal business to a single firm are gone. Today,

when corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm’s New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers.

ABA Formal Op. 93-372 (1993) (“ABA Opinion”), in American Bar Association, Formal and Informal Ethics Opinions, 1983-1998, at 167-68. This means, for example, that if the law firm hypothesized in the ABA Opinion is looking out for its own interests, it might decline the Miami representation. This in turn would deny the client's choice of a lawyer and would reduce its potential choice of lawyers generally.

One alternative is to let clients waive such conflicts if they view such waivers as being in their interest. This approach has been recognized as proper at least since the promulgation of the ABA Canons of Ethics in 1908. See American Bar Association, Opinions on Professional Ethics 22 (1967) (text of Canon 6); D.C. Code

https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion309.cfm

Rule 1.7(b) sets out four types of current-client conflicts that may be overcome by a waiver. These are conflicts in which—

(1) in a matter involving a specific party or parties, the position to be taken by the lawyer’s client is adverse to the position taken by another client of the lawyer in that matter, even though the other client is represented by a different lawyer;

(2) the representation “will be or is likely to be adversely affected by [the lawyer’s] representation of another client’;

(3) “representation of another client [of the lawyer] will be or is likely to be adversely affected by such representation’; or

(4) “the lawyer’s professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer’s responsibilities to or interests in a third party or the lawyer’s own financial, business, property, or personal interests.”

Conflicts under subparagraphs (2), (3), and (4) of Rule 1.7(b) sometimes are referred to as “punch-pulling” conflicts because they address situations where a lawyer’s commitment to the adverse client, or to some personal situation related to the representation, arguably might tempt her to “pull her punches” on behalf of her client.

“The difference between Rule 1.7(a) and Rule 1.7(b) is that in the former, the lawyer is representing multiple interests in the same matter, while in the latter the lawyer is representing a single interest, but a [current] client of the lawyer who is represented by different counsel has an interest adverse to that advanced by the lawyer.” D.C. Rule 1.7, comment [1] (emphasis added).

Where a former client is involved, a conflict exists only if the adversity arises in a matter that is the same as, or substantially related to, the matter in which the lawyer formerly represented that client. D.C. Rule 1.9; see Brown v. D.C. Bd. of Zoning Adjustment, 486 A.2d 37 (D.C. 1984) (en banc); In re Soffaer, 728 A.2d 625 (D.C. 1999) (decided under Rule 1.11).

As noted above, a conflict under Rule 1.7(a) may not be waived. See D.C. Rule 1.7, comments [2]-[4], [6]. A conflict under Rule 1.7(b) may be waived, however, “if each potentially affected client consents to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.” D.C. Rule 1.7(c). “Consent is “a client’s uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question.” D.C. Rules, Terminology, ¶[2]. In turn, “consultation” means “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” Id. ¶[3]. A waiver must be predicated upon disclosure sufficient to allow the client to make “a fully informed decision” and to make the client “aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation.” D.C. Rule 1.7, comment [19]; see In re James, 452 A.2d 163, 167 (D.C. 1982) (requiring “a detailed explanation of the risks and disadvantages to the client”).

A conflict of interest under Rule 1.9 (former client) also may be waived. D.C. Rule 1.9, comment [3]. Such a waiver is valid “only if there is disclosure of the circumstances, including the lawyer’s intended role in behalf of the new client.” Id. ¶[6]. That is, the Rules require that a client who is asked to waive an actual or potential conflict have an adequate appreciation of what protection she is giving up. This requirement is subjective, meaning that more explanation may be required to satisfy the Rules’ consent and consultation criteria where a less sophisticated client is involved than where a more sophisticated client is being asked to waive its rights. See D.C. Rule 1.7, comment [20]; ABA Opinion at 170.

We know of no District of Columbia Court of Appeals decision that expressly permits or prohibits advance
waivers of conflicts of interest. The D.C. Rules are silent on whether a client may give an advance waiver as to itself, though a comment to Rule 1.7 permits an organization client to “give consent to the lawyer in advance to engage in representations adverse to an affiliate, owner or other constituent of the client . . . so long as the requirements of Rule 1.7(c) can be met.” D.C. Rule 1.7, comment [17]. Similarly, this committee has not addressed the issue directly, though we have expressed doubt about the enforceability of advance waivers, “especially where the client is not a sophisticated consumer of legal services,” D.C. Ethics Op. 265 (1996), and doubt whether advance waiver of a client’s right to accept a confidential settlement could have been the product of informed consent, D.C. Ethics Op. 289 (1999). Nevertheless, we do not write on a clean slate: The American Bar Association’s Committee on Ethics and Professional Responsibility, the Restatement of the Law Governing Lawyers, the ABA’s Ethics 2000 Commission, various courts, bar associations in other United States jurisdictions, and at least one respected academic figure have said that while advance waivers are not per se improper, they will be sustained only where the client can be said to have given informed consent.

The ABA Opinion, for example, observes that “[u]nlike the client issuing a specific waiver, the client issuing a prospective waiver cannot know what confidences he will in the future disclose or in what adverse representations the attorney may engage.” ABA Opinion at 171 (quoting Note, Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest, 79 Mich. L. Rev. 1074, 1082 (1981)). Accordingly, that opinion states that a prospective waiver probably will not stand unless it identifies the opposing party or at least a class of potential opponents, as well as giving the client sufficient information to appreciate “the nature of the likely matter and its potential effect on the client.” Id. at 171. The ABA Opinion also cautions that a waiver of conflicts does not constitute a waiver of confidentiality, see infra n. 10, and suggests strongly that any advance waiver be in writing, ABA Opinion at 172-73.

The ABA Opinion also requires that when a conflict arises, the lawyer revisit the judgment(s) she made originally about the propriety of the waiver. Id. at 171. This does not apply literally in the District of Columbia because the ABA Model Rules of Professional Conduct (“Model Rules”) require that the lawyer “reasonably believe[] the representation will not adversely affect the relationship with the other client” in addition to requiring that the clients consent after consultation. Model Rule 1.7(a). The D.C. Rules, on the other hand, permit a lawyer to seek a waiver even though the representation reasonably may be expected to affect adversely the relationship with the other client. D.C. Rule 1.7(b)(2)-(3), 1.7(c). We nevertheless believe that a prudent lawyer in this jurisdiction should revisit the issue when a conflict actually arises, so as to ensure that adequate disclosure will be made to the new client from whom a contemporaneous waiver of conflicts is being sought, see ABA Formal Op. 99-415, and that the lawyer is satisfied that she will be able to represent both clients adequately.

The Restatement does not rule out advance conflict waivers but says that they are subject to special scrutiny, particularly if the consent is general. A client’s open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.

On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client’s interest while assuring that the lawyer did not undertake a potentially disqualifying representation.


The Restatement adds that if, between the time a prospective waiver is given and the time a conflict arises, “a material change occurs in the reasonable expectations that formed the basis of a client’s informed consent, the new conditions must be brought to the attention of the client and new informed consent obtained.” Id. Presumably, by “material change” the comment means something short of the change that itself creates the conflict, else there could be no advance waivers.

The general test of such a waiver is “the extent to which the client reasonably understands the material risks that the waiver entails.” *Id.* This in turn depends on the completeness of the explanation of possible conflicts and the “actual and reasonably foreseeable adverse consequences” of such conflicts. *Id.* Therefore, consent to a type of conflict with which the client is familiar is more likely to be effective than a general or open-ended consent. *Id.* Thus, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., 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.

*Id.* The Commission’s comment on “informed consent” echoes this theme:

In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

*Id.*, Rule 1.0, comment [6] (emphasis added).

Most courts that have considered this issue have ruled along the lines set out by the ABA Opinion, the Restatement, and the proposal of the Ethics 2000 Commission. Advance conflict waivers have been sustained where the potential adverse party was known and identified, the client giving the waiver was sophisticated, and the waiver had been reviewed by the client’s in-house counsel. *E.g., United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981); *Fisons Corp. v. Atchem North Amer, Inc.*, 1990 U.S. Dist. LEXIS 15284, 1990 WL 180551 (S.D.N.Y. 1990); *Interstate Properties v. Pyramid Co. of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982). The Fisons court stated that where the waiving client is sophisticated, notification of the potential conflict itself is sufficient to satisfy the requirement. *Fisons Corp.*, 1990 WL 180551, at *5. Moreover, at least one court has held that an advance waiver may be implied where the objecting client, including its in-house counsel, had extensive knowledge of the law firm’s longtime representation of the other client. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio 1976), *aff’d mem.*, 573 F.2d 1310 (6th Cir. 1977).

On the other hand, advance waivers have been struck down where they are unduly general and unsophisticated clients are involved. Correspondence with the objecting client’s nonlawyer employees (claims adjusters), for example, was held insufficient to constitute “consultation” or “full disclosure.” *Florida Ins. Guaranty Ass’n, Inc. v. Carey Canada, Inc.*, 749 F. Supp. 255 (S.D. Fla. 1990); *see Marketti v. Fitzsimmons*, 373 F. Supp. 637 (W.D. Wisc. 1974) (where client a labor union local, mere knowledge of second representation insufficient to constitute waive). Similarly, an open-ended release of the lawyer from “all rights, burdens, obligations, and privileges which appertain to his [former] employment,” coupled with consent for the lawyer to “engage his services pro and con, as he may see fit,” was held (notwithstanding the relative sophistication of the client) grossly insufficient to justify the lawyer’s subsequent activity—including disclosure of confidential information—adverse to the former client. *In re Boone*, 83 F. 944 (N.D. Calif. 1897). Instead, said the court, the release would be effective only if it were “positive, unequivocal, and inconsistent with any other interpretation.” *Id.* at 956. A more recent decision held that a general advance consent covering all unrelated matters is insufficient to waive adversity in litigation unless it expressly refers to “litigation.” *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

Future directly adverse litigation against one’s present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information.


At least two major local bar associations have opined that advance waivers of conflicts are permissible, particularly where the waiving client is sophisticated. *N.Y. County Lawyers’ Ass’n Ethics Op. 724* (1998); *Los Angeles County Bar Ass’n Forma Ol 471*...
(1994). The New York County opinion adopts the ABA Opinion’s recommendations regarding disclosure of potential adverse clients (or types of clients) and types of adverse representations, adding that the lawyer also should disclose the steps to protect the client (e.g., erection of an ethical wall) that will be taken should a conflict arise. The ultimate issue, the opinion states, is whether “the subsequent conflict should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought.” Taking cognizance of the subjective nature of informed consent, the New York County opinion observes that for a sophisticated client, such as a large corporation with in-house counsel, the adequacy of disclosure will be put to a less stringent test than if the client were a small business, an individual unsophisticated with respect to legal matters, a child or an incapacitated person.

Indeed, a “blanket” waiver of future conflicts involving adverse parties may be informed and enforceable depending on the client’s sophistication, its familiarity with the law firm’s practice, and the reasonable expectations of the parties at the time consent is obtained. For example, a subsequent representation may be said to have been reasonably contemplated by a sophisticated client, advised by in-house counsel, who is familiar with a law firm’s multi-disciplinary practice and wide variety of clients.

Finally, a prominent academic recently has suggested a “bright line” standard under which even a broad advance conflict waiver generally should be enforced “if it is unambiguous and the client is independently represented by another lawyer, including in-house counsel, at the time the waiver is given.” Richard W. Painter, Advance Waiver of Conflicts, 13 Geo. J. Legal Ethics 289, 312 (2000) (“Painter”); accord Brian J. Redding, Suiting a Current Client: A Response to Professor Morgan, 10 Geo. J. Legal Ethics 487, 497-99 (1997). Professor Painter suggests using solely the “independent representation” criterion rather than coupling it to the “sophisticated client” criterion suggested by the Restatement. Painter, at 327. His approach avoids the uncertainty inherent in making the validity of the waiver depend on a subjective judgment of whether a client is “sophisticated.” Id.

Professor Painter also suggests that the “substantially related” criterion that applies where a former client is involved, see D.C. Rule 1.9; Brown, 437 A.2d 37, should be part of the test of which conflicts can be waived in advance. Painter, at 321.

Although loyalty and confidentiality concerns are heightened when a lawyer is concurrently representing clients with adverse interests, the sweeping prohibition of concurrent conflicts rules can sometimes be intolerable. Many lawyers respond by not taking on a new client who might in the future have interests adverse to current clients, knowing that once they begin representing a client, they will not be permitted to represent other clients in matters where the first client’s interests are adverse.

Although the risk of adverse use of confidential information is increased by a waiver that imposes the substantial relationship test on concurrent conflicts, information learned in an unrelated representation is generally of limited value and the client is furthermore still protected by separate prohibitions on disclosure or adverse use of client information (Model Rules 1.6 and 1.8(b)).

Id.

**Conclusions**

Thus the modern view—held by the courts, the American Bar Association, local bar associations and the American Law Institute—is that advance waivers of conflicts of interest are permissible, within certain limits and subject to certain client protections. We conclude that the D.C. Rules are consistent with that view and that they permit advance waivers under Rules 1.7 and 1.9. See United Sewerage Agency, 646 F.2d at 1349-50. “Clients who are fully advised should be able to make choices of this kind if they wish to do so.” Id. at 1350.

Such waivers, however, are permissible only if the prerequisites of the D.C. Rules—namely “full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation”—are satisfied. See D.C. Rule 1.7(c). As noted above, the client must have “information reasonably sufficient to permit the client to appreciate the significance of the matter in question,” D.C. Rules, Terminology, ¶ [3], and to allow the client to make “a fully informed decision” with awareness “of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation.” D.C. Rule 1.7, comment [19]; see In re James, 452 A.2d at 167 (requiring “detailed explanation of the risks and disadvantages to the client”). Ordinarily this will require that either (1) the consent is specific as to types of potentially adverse representations and types of adverse clients (e.g., a bank client for whom the lawyer performs corporate work waives the lawyer’s representation of borrowers in mortgage loan transactions with that bank) or (2) the waiving client has available in-house or other current counsel independent of the lawyer soliciting the waiver.
Further, the lawyer must make full disclosure of facts of which she is aware, and hence cannot seek a general waiver where she knows of a specific impending adversity unless that specific instance also is disclosed. See D.C. Rule 1.7, comment [19]; *City of El Paso v. Salas-Porras*, 6 F. Supp. 2d 616, 625-26 (W.D. Tex. 1998). A corollary of this rule is that if the lawyer cannot disclose the adversity to one client because of her duty to maintain the confidentiality of another party’s information, the lawyer cannot seek a waiver and hence may not accept the second representation. D.C. Rule 1.7, comment [19] (“If a lawyer’s obligation to one or another client or to others or some other consideration precludes making . . . full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue”).

A conflict arising from the lawyer’s appearance on both sides of the same matter is, as noted above, nonwaivable. D.C. Rule 1.7(a) & comment [1]. Because of the greatly increased potential for misuse of client confidences—inadvertently or otherwise—advance waivers should exclude from their coverage not only the same matter but also any substantially related matter. See Painter, at 321. For this reason, advance waivers ordinarily will not come into play in former-client situations under Rule 1.9 because disqualification under that rule extends only to matters that are the same as, or substantially related to, the initial matter.

Further, although the D.C. Rules do not require that waivers be in writing, D.C. Rule 1.7, comment [20], we join the ABA Committee on Ethics and Professional Responsibility in recommending that—for the protection of lawyers as well as clients—advance waivers be written. See ABA Opinion at 173. We note in this connection that the ABA Ethics 2000 Commission has proposed that the Model Rules require all waivers to be written. Ethics 2000 Report, prop. Model Rule 1.7(b)(4) & prop. comment [20].

Finally, any decision to act on the basis of an advance waiver should be informed by the lawyer’s reasoned judgment. For example, a prudent lawyer ordinarily will not rely upon an advance waiver where the adversity will involve allegations of fraud against the other client or is a litigation in which the existence or fundamental health of the other client is at stake.

In accordance with the foregoing, a client not independently represented by counsel (including in-house counsel) generally may waive conflicts of interest only where specific types of potentially adverse representations or specific types of adverse clients are identified in the waiver correspondence. A client that is independently represented by counsel generally may agree to waive such conflicts even where the specificity requirements set out in the preceding sentence are not satisfied.10 (bar-resources/legal-ethics/opinions/opinion309.cfm#footnote10).

**Appendix**

**Sample Advance Waiver of Conflicts of Interest**

Below is a sample of text for an advance waiver of conflicts of interest. The committee does not view this text as authoritative or exclusive:

“As we have discussed, the firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on __________, we have or may have clients whom we represent in connection with __________.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you.”

September 2001

1. Waivers of conflicts of interest, which are the principal subject of this opinion, are different from waivers of confidentiality. See infra note 10.

2. D.C. Rule 1.8 addresses conflicts of interest arising from certain types of transactions. This opinion does not address waivers of such conflicts.

3. We accordingly view a conflict waiver given as part of an agreement for representation by a single lawyer of multiple clients, see D.C. Rules 1.7(c), 2.2, as more in the nature of a current than an advance waiver.
4. “Giving effect to a client’s consent to a conflicting representation might rest either on the ground of contract freedom or on the related ground of personal autonomy of a client to choose whatever champion the client feels is best suited to vindicate the client’s legal entitlements.” Charles Wolfram, Modern Legal Ethics § 7.2.2, at 339 (1986).

5. Because a conflict of interest under Rule 1.7 or 1.9 is imputed to a lawyer’s entire firm, D.C. Rule 1.10(a); D.C. Ethics Op. 279 (1998), “lawyer” in this discussion comprehends not only the individual lawyer but her entire firm. Thus, if one lawyer in a law firm is disqualified by reason of Rule 1.7 or Rule 1.9, the entire firm is disqualified. D.C. Rule 1.10(a); see D.C. Rule 1.7, comment [23]; D.C. Rule 1.9, comment [3]; D.C. Ethics Op. 279 (1998).

6. Where the former client is the government, issues of disqualification, imputation, and waiver are governed by Rule 1.11 rather than Rule 1.9. D.C. Rule 1.9, comment [3].

7. A 1994 decision expressly declined to rule that an advance waiver by an individual member of a business partnership of a lawyer’s representation of the partnership as well as the individual partners is binding as a matter of law. Griva v. Davison, 637 A.2d 830, 846 (1994). The statement was dictum, however, and in any event is consistent with this opinion.


9. The Commission’s recommendations will not become part of the Model Rules until and unless they are adopted by the ABA House of Delegates. The House of Delegates began consideration of the proposals at its August 2001 meeting but did not complete the effort and is scheduled to resume consideration of the report at its February 2002 meeting. ABA Stands Firm on Client Confidentiality, Rejects “Screening” for Conflicts of Interest, 70 U.S.L.W. 2093, 2095 (Aug. 14, 2001). Comment [22] was considered expressly at the August 2001 meeting but a proposed amendment that would have altered or deleted it was not adopted. Id. at 2094

10. Waivers permitting the adverse use or disclosure of confidential information, see D.C. Rule 1.6(c)-(d), may not be implied from waivers of conflicts of interest. Because of their considerable potential for mischief, waivers of confidentiality require particular scrutiny and may be invalid even when granted by sophisticated clients with counsel (in-house or outside) independent of the lawyer seeking the waiver. See Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 229 (7th Cir. 1978) (expressing doubt as to the efficacy of “a vague, general” advance waiver of confidentiality); In re Boone, 83 F. 944 (prohibiting waiver of confidentiality requirement). But see ABA Formal Op. 99-415 (1999) (suggesting that a more flexible standard may apply where the waiving client is sophisticated or has in-house counsel); Brian J. Redding, The “Confidential Information” Conflict—Is it Time for the ABA to Rethink Its Position on Waiver?, Prof. Law., Winter 1999, at 10 (same). As with conflicts of interest, see supra note 3, we view the waivers of confidentiality that commonly are found in joint and “intermediary” representation situations, see D.C. Rules 1.7, 2.2, as constituting current, rather than advance, waivers.
Clearly Enforceable Future Conflicts Waivers

BY PETER JARVIS, ALLISON MARTIN RHODES AND CALON RUSSELL

I. Summary and Introduction

As practiced in every United States jurisdiction other than Texas, the "duty of undivided loyalty" means that unless the clients consent, individual lawyers and their firms cannot oppose any current firm client on any legal matter—even if the matters are entirely factually and legally unrelated. At times, this rule has been extended to prohibit representations adverse to related entities or affiliates as well. By contrast, many if not all European countries and the Texas Rules of Professional Conduct allow a lawyer or firm to represent one current client adversely to another without client consent as long as the matters are factually and legally unrelated.

One way to think about the difference between the American and European rules is with respect to who has the burden of dealing with the conflict. In the United States, the burden is on the lawyer or firm to seek client consent to allow an adverse representation. In Europe, the burden is on the client to get the firm to agree up front not to undertake such a representation.

In a perfect world, the two systems might end up with exactly the same ultimate net result. In the world in which we live, however, lawyers and their firms have at times found it difficult to obtain conflicts waivers that will be judicially enforced when the adverse representation subsequently arises. In addition, some commentators appear to believe that there is no such thing as an ethically sufficient future conflicts waiver.

We therefore set out to write what we believe to be a future conflicts waiver letter that should withstand virtually any imaginable ethical or legal attack. This article is the result. In short, our goal here is not to present the minimum that is or should be acceptable for a future conflicts waiver to be upheld but instead to present a letter that should clearly meet any and all requirements. As the reader will note, we will also discuss the factual and legal circumstances under which future waivers are more or less likely to be upheld.

Before turning to the letter itself, we will review three authorities from 2013 that uphold future conflicts waivers. After discussing these authorities, the article will first identify the general preconditions or helpful conditions for effective future conflicts waivers and then turn to the specific draft language.

II. Three Recent Authorities on Future Conflicts Waivers

A. Galderma v. Actavis

114 (N.D. Tex. 2013), enforced a future conflicts waiver given by a legally sophisticated business client after review by the client’s in-house counsel. Before Vinson & Elkins (“V&E”) began to represent Galderma in several employment law matters that were factually and legally unrelated to the subsequent litigation brought by Galderma against Actavis, Galderma had signed a so-called advance conflict waiver provided by V&E which stated in part:

We [i.e., V&E] understand and agree that this is not an exclusive agreement, and you [i.e., Galderma] are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client with interest materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with yours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.

(id. at 393.) The court then analyzed whether this advance waiver gave enough information to support informed consent and whether the information was reasonably adequate for the particular client.2

In upholding the waiver, the court noted the following:

- The waiver included “agree[ment] to a course of conduct” for handling conflicts by specifying when the firm would and when it would not handle matters for other clients with adverse interests. (id. at 399.)

- The waiver included an “explanation of the material risk of waiving future conflicts of interest” because it specified that the firm would be able to represent clients adverse to plaintiff. (id. at 400.)

- The waiver explained “reasonably available alternatives to the proposed course of conduct” by specifying that plaintiff could retain any other counsel of its choosing. (Id.)

With regard to Galderma, the particular client giving the waiver, the court discussed the company’s substantial size and sophistication, noting how Galderma held itself out to the general public, its revenues, the quantity of its patent applications, and the fact that Galderma “routinely retains different, large law firms to advise the corporation on various matters across the country.” (Id. at 401-02.)

The court also noted that Galderma’s in-house counsel, who had reviewed and approved the waiver, was an attorney with over 20 years’ experience. As the court stated: “When a client has its own lawyer who reviews the waivers, the client does not need the same type of explanation from the lawyer seeking the waiver because the client’s own lawyer can review what the language of the waiver plainly says and advise the client accordingly.” (Id. at 405.)

B. Macy’s v. J.C. Penney

Macy’s, Inc. v. J.C. Penney Corp., Inc., 107 A.D.3d 616, 968 N.Y.S.2d 64, 29 Law. Man. Prof. Conduct 393 (2013), also upheld a future conflicts waiver. At issue was the question whether a conflicts waiver given by J.C. Penney in 2008 would allow Jones Day to represent Macy’s adversely to J.C. Penney in the prosecution of an action for tortious interference with contract notwithstanding the fact that Jones Day was representing J.C. Penney in unrelated intellectual property matters. As the court succinctly stated:

By agreement dated March 7, 2008 Jones Day undertook to represent defendant regarding certain “intellectual property litigation and trade mark registration” in Asia. That agreement expressly informed defendant about the possibility that Jones Day’s present or future clients “may be direct competitors of [defendant] or otherwise may have business interests that are contrary to [defendant’s] interests,” and “may seek to engage [Jones Day] in connection with an actual or potential transaction or pending or potential litigation or other dispute resolution proceeding in which such client’s interests are or potentially may become adverse to [defendant’s] interests.” That agreement unambiguously explained that Jones Day could not represent defendant unless defendant confirmed this arrangement was amenable to defendant, thereby “waiving any conflict of interest that exists or might be asserted to exist and any other basis that might be asserted to preclude, challenge or otherwise disqualify Jones Day in any representation of any other client with respect to any such matter.” The agreement also provided, “However, please note that your instructing us or continuing to instruct us on this matter will constitute your full acceptance of the terms set out above and attached.” It is undisputed that Jones Day continued to represent defendant with respect to defendant’s Asian trademark portfolio thereafter and, thus, defendant accepted the terms of the agreement, including waiver of the alleged conflict at issue.

Moreover, the interests of defendant that Jones Day represents, namely intellectual property litigation and trademark registration exclusively in Asia, do not conflict with defendant’s interests at issue here.

(968 N.Y.S.2d at 616-17.)

C. New York State Opinion 990

New York State Ethics Op. 990, 30 Law. Man. Prof. Conduct 50 (2013), addressed several conflict of interest situations, one of which involved future conflicts waivers. In that portion of the opinion, a lawyer who regularly represents both Client A and Client B sought both a present waiver to represent Client A adversely to Client B negotiating a loan transaction while also obtaining consent to represent Client A adversely to Client B if the loan transaction led to litigation between the two. With respect to the future conflicts issue, the opinion states that “Whether each affected client can give informed consent to a future conflict depends on the extent to which the lawyer is able to explain adequately the material risks of the proposed course of conduct and reasonably available alternatives, and on the sophistication of the client.” The opinion notes, among other things, that as a part of meeting the required ethn

2 Although the matter arose in Texas, the court applied the ABA Model Rules of Professional Conduct rather than the Texas RPCs.

3 The court also noted that in-house counsel had previously approved another future conflicts waiver for another firm in another matter. (Id. at 406.)
cal obligations, the lawyer should consider factors including but not necessarily limited to: whether the client is likely to understand the content and implications of the lawyer's disclosures; the client's experience in dealing with lawyers; the steps to be taken to protect or limit harm to each client; the scope of the future waiver being sought; and whether the client is independently represented by in-house or outside counsel in deciding whether to waive the conflict.

III. Building Effective Future Conflicts Waiver Letters

A. Background Factors and Conditions for Effective Waivers

In this section, we note some of the general background conditions that make it more likely that a future conflicts waiver will be upheld. As will become apparent, most if not all of these are referenced in one or more of the three authorities discussed above.

1. Waiving Clients Should Have Business AND Legal Sophistication

A client with a high degree of business and legal sophistication is much more likely to be able to give an effective waiver. This makes sense because such a client is more likely to understand what is at stake.

We stress both business and legal sophistication because they are not necessarily the same thing. Although one New York City Bar ethics opinion appears to state in a footnote that mere access to counsel makes a client sophisticated for at least some purposes, a client that not only engages in sophisticated business matters but has also had substantial and multiple interactions with lawyers (or even multiple law firms) is a much better candidate for a future conflicts waiver.

2. Actual Review by Independent Counsel

No black-letter rule requires independent counsel review before a present or future conflicts waiver letter can be effective. Nonetheless, actual review by independent counsel helps a great deal. As with client sophistication, review by independent counsel makes it much more likely that the client will in fact have understood, or at least be deemed to have understood, what it was asked to do.

To the extent that sophisticated clients, as we have defined them, tend to have in-house counsel who interact with outside counsel in the engagement and conflicts waiver letter process, this condition will often be met without any special effort on the law firm's part. Absent in-house counsel, however, a law firm that wants to rely upon a future conflicts waiver should at least expressly recommend (and may sometimes even wish to require) such review.

3. Conspicuousness

Conflicts waiver language that is hidden within multiple pages of "boilerplate" engagement letter language are less likely to be upheld because they are less likely to have brought key points home to the client. Of course, the benefits of "conspicuousness" can be met in significant part through a verbal discussion of conflicts issues as well as written disclosure. In this context, a belt and suspenders approach is better than either one alone.

4. Internal Screening

In most instances, the lawyers at a firm who will or may work for a client will not be the same lawyers who will or may be expected to represent other clients in adverse matters. Generally speaking, it is therefore not at all burdensome for the law firm to include in a future conflicts waiver a commitment that different lawyers will in fact be involved and that they will not share files or information. Where practicable, this kind of voluntary screen should also include paralegals and support staff.

5. Client Signatures That Confirm Client Understanding

Some, but not all, states require client signatures for conflicts waivers. Better practice is always to get the signature—whether by traditional mail, facsimile, or e-mail. Ideally, clients should also be told that they should not sign the letter unless they are satisfied that they understand it and have no unanswered questions or concerns.

B. Substantive Issues for Effective Waiver Letters

1. Don't Ask for the Impossible or Implausible

To the extent that a future waiver attempts to obtain present consent to a conflict that could not be waived, even in the future, the future waiver will necessarily be ineffective. It is therefore a fool's errand to make such a request. Similarly, it is helpful to avoid waivers that, while arguably or theoretically permissible, may look quite extreme in retrospect.

Suppose, for example, that a law firm that is presently representing a client in one or more business or litigation matters is asked by a prospective new client to bring a RICO action, a securities fraud action, or a common law fraud claim seeking punitive damages from the existing client. Even if the new action is factually and legally unrelated to the firm's present work for its existing client, the firm is likely to face a steep uphill battle in attempting to argue that its disclosure adequately informed the client of these risks or that the client actually and reasonably consented. We therefore recommend that future conflicts waiver letters expressly exclude extreme adverse representations.

2. Ask Clearly for What You Need but Not More

Does the firm want and need a future waiver for business/transactional matters only or is a waiver also needed for litigation or arbitration? Does the firm want and need a future waiver limited to the right to represent a specific firm client or group of clients, as distinct from all present or potential future clients regardless of

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4 New York City Bar Association Formal Ethics Op. 2006-1, n. 1

5 See also General Cigar Holdings, Inc. v. Altadis, S.A., 144 F. Supp.2d 1334 (S.D. Fla. 2001); Restatement (Third) of the Law Governing Lawyers § 122 (2000) Comment g(iii) ("Decisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel, such as by inside legal counsel, rarely hold that a conflict is nonconsentable.")

subject matter? The greater the limitation of the scope of the future conflicts waiver, the greater the likelihood that it will be upheld. In addition, and based on our experience, one of the reasons that in-house counsel sometimes reject future conflicts waivers is that they appear to be too broad.

3. Expressly Address Conflicts That Exist or Have Been Foreseen

Any existing or presently foreseen conflicts should be expressly disclosed and discussed. This makes sense both because a present conflict may be more significant to a client than the risk of a future conflict and because the failure to mention a present or presently foreseen conflict could otherwise be seen as an attempt to sweep it under the rug.

4. Expressly Address Potential Risks to Confidentiality

The duty of confidentiality that lawyers owe their clients is broader than the attorney-client privilege. Even if the matters on which a law firm may oppose a present client are strictly circumscribed in a way that makes it highly unlikely that there is any material risk of adverse disclosure or use of confidential client information, the risk should nonetheless be discussed.

5. Expressly Address Potential Risks to Loyalty

Almost by definition, any limitation on the duty of undivided loyalty creates at least a risk that the law firm with a conflict may be less zealous or eager when working on a client’s behalf—even when the conflict arises in connection with an unrelated matter. It is therefore necessary to discuss this risk as well.

6. Expressly Define What Will and Will Not Be Considered Unrelated Matters

A great deal of judicial ink has been spilled in the course of defining when matters are and are not sufficiently or significantly related for conflict of interest purposes. Although no definition will be impervious to challenges, a reasonable definition should reduce the risk of such challenges considerably.

7. Provide Updates for Additional Work

A lawyer or law firm that takes on a new matter for a client that has previously provided a conflicts waiver should ask for reaffirmation of the future waiver at the time of the engagement letter for the new matter. Otherwise, the new matter may be considered to have been undertaken without any waivers.

8. Materiality 101

In the course of helping many lawyers and law firms draft conflicts waiver language over many years, we have sometimes been told by lawyers that certain specific subjects or risks should be left out of a waiver letter because their inclusion will cause the client to refuse to grant a waiver.

To us, this is as good a definition of “materiality” as one can provide. If a client may refuse to sign a waiver letter if a specific subject or risk is discussed, it is much better to know that before the representation begins than after the disqualification motion, damage claim or action for fee disgorgement has been filed.

IV. Our Proposed Future Conflicts Waiver Form

We now turn to what we believe should, in our opinion, be an ethically and legally effective future conflicts waiver letter. Although this document is presented in the form of a separate conflicts waiver letter from attorney to client, it could easily be changed to become a part of an overall engagement letter:

Dear __________:

You have asked __________ (“the Firm”) to represent __________ (“the Client”) in __________ (“the Matter”). As you know and as we have discussed, the Firm’s ability to represent any and all clients is governed by what are commonly called Rules of Professional Conduct, which include but are not limited to rules regarding conflicts of interest between multiple clients of a law firm or between a law firm and its clients (collectively, “the Conflicts Rules”). Although the Firm is not presently aware of a conflict created by the proposed work on the Matter that would trigger the Conflicts Rules at this time, the nature and scope of the Firm’s work for other clients may give rise to conflicts of interest in the future.

The purpose of this letter is to explain how the Firm proposes to resolve future conflicts issues so that the Client can decide whether or not to be represented by the Firm. In other words, the purpose of this letter is to seek a waiver of future conflicts but to do so subject to the conditions and limitations noted herein.

The Scope of the Requested Waiver

The Firm only seeks a waiver for work that is entirely factually and legally unrelated to the Matter. Thus, the Firm does not request a waiver that would allow it:

- at any time, to attack the work that the Firm performs for the Client in the Matter;
- at any time, to disclose or use adversely to the Client, or to place itself in a position to disclose or use, any confidential and nonpublic information of the Client;
- at any time, to allow lawyers [or nonlawyer staff] who work for the Client simultaneously to work adversely to the Client;

[optional: for so long as the Firm continues to represent the Client, to sue the Client/represent any clients other than — adversely to the Client, etc.]; or

[Note: if there are any current conflicts requiring waivers, they must be expressly discussed and waived.]

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for so long as the Firm continues to represent the Client, to allege criminal, fraudulent or intentionally tortuous conduct by the Client.

Outside of these limitations, the Firm is and will remain free to represent other clients adversely to the Client. In other words, we may represent other clients in negotiations, business transactions, litigation, alternative dispute resolution, administrative proceedings, discovery disputes, or other legal matters even if those matters are adverse to Client. For example, and solely by way of illustration, the Firm could list at least some types of clients and/or specific clients who could be represented adversely to the Client in at least some types of matters.

Although the Client may revoke this waiver as to future matters at any time, such revocation will not affect any matters undertaken by the firm prior to receipt of notice of the revocation. In addition, and to the extent permitted by the applicable rules of professional conduct, the Client must consent to the Firm’s withdrawal from the Client’s matters if withdrawal is necessary for the Firm to continue representing other clients. If the Firm does withdraw from a matter, however, it will assist Client in transferring the matter to other counsel of Client’s choice and will not bill Client for legal fees, expenses, or other charges arising from the need to assist successor counsel in coming up to speed.

**Considerations Relating to the Decision to Waive**

As you know, we have discussed this conflicts waiver and its potential implications with you [by phone/in person] and we strongly urge you not to sign this waiver if you have any unanswered or unaddressed reservations or concerns. [If sent to someone other than in-house or outside counsel: We also [recommend/insist] that you discuss this waiver with independent counsel of your choice.]

As we have already explained, there are questions that Client should address before a decision to waive future conflicts is made:

- Is there a material risk of adverse disclosure or use of confidential client information?
- Is there a material risk that the Firm will be less zealous or eager when representing the Client in the Matter because of other adverse representations?
- Is the Client ready, willing, and able to live by its commitments in the future?

As to the first two questions, we believe that any risk to the Client is minimal to nonexistent in light of the protections and limitations contained in this letter. As to the final question, that is necessarily the Client’s choice and not ours. Although we are certainly willing to discuss potential amendments to this waiver that you would like us to consider, you should know that without a mutually acceptable waiver, we will not represent the Client in the Matter or in any other matter.

If you find these conditions acceptable, please sign the enclosed extra copy of this letter and return it to me for my files at your earliest possible convenience. If not, please let me know.

Very truly yours,

Attorney

**V. Concluding Remarks**

Motions to disqualify raise satellite issues that do not typically advance resolution of the underlying disputes between the parties. To the extent that clearer standards for future conflicts waivers can be enunciated, their use should decrease the time devoted to these issues by the parties, their counsel, and the courts. Similarly, lawyers and their firms can be more certain of their right to proceed without disciplinary risk. A client who falls within the criteria described in this article and who signs a conflicts waiver letter consistent with our suggestions should have little to nothing of substance to say in support of a disqualification motion, damage claim or ethics complaint.
ETHICS OPINION 826

NEW YORK STATE BAR ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS

Opinion #826 - 09/12/2008

Topic: Conflicts of interest; multiple representation

Digest: No per se rule prohibits a lawyer from representing plaintiffs in declaratory judgment actions against an insurance carrier and simultaneously defending that carrier against other insureds in other declaratory judgment actions, or from obtaining advance waivers of the conflict. Where the actions involve related issues of law, however, whether the clients can validly consent depends on, among other things, potential "positional conflicts," the possibility that the lawyer may need to cross-examine employees of a client, and the possibility that confidential information derived from one representation may be of use in another.

Code: DR 4-101(B)(2); DR 5-101(A); DR 5-105(A) and (C); EC 5-15

QUESTION

1. May a lawyer agree to defend an insurance company in coverage disputes arising out of construction accidents while simultaneously representing other insureds in other coverage cases against that insurance company arising out of unrelated construction accidents?

OPINION

1. The inquirer is a member of a law firm that regularly represents property owners and construction managers who are defendants in construction accident cases and who were denied insurance coverage. The firm represents these clients, as plaintiffs, in actions filed against the insurance carriers for declaratory relief invalidating the coverage disclaimers and enjoining the carriers to defend and indemnify them, on grounds that the plaintiffs are "additional insureds" in subcontractor liability policies. The firm has been approached by one of the defendant insurance companies to represent it as a defendant in other, unrelated declaratory judgment and injunction actions brought by other insureds. The inquirer asks whether the firm may take on these engagements.

2. A lawyer may not take on or continue the concurrent representation of multiple clients if the representation would "involve the lawyer in representing differing interests" or if "the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected," unless the lawyer obtains the informed consent of each client affected by the conflict "after full disclosure of the implications of the simultaneous representation and the advantages and risks involved" and "a disinterested lawyer would believe that the lawyer can competently represent the interest of each."[1] "Differing interests" are defined broadly by the Code to "include every interest
that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest."[2]

3. Here, there clearly is a conflict with respect to the matters involving the carrier that the lawyer or law firm proposes to defend. If the lawyer or law firm takes on those matters, the lawyer or firm will be representing in the existing actions one client - the insurance company - adverse to another client - the insureds - and can proceed only if the conflict is consensutable and all clients involved provide informed consent.[3] In considering whether the conflict is consensutable and the nature of the disclosure required in obtaining consent, the situation in this inquiry presents particular issues.

4. First, because of the standardized nature of many insurance policies, there is a significant probability that a lawyer or law firm representing the carrier may be called upon to take the opposite side of an issue that the lawyer is simultaneously litigating on behalf of a declaratory judgment plaintiff in another case - for example, the outer time limit for timely notice of claim, the required specificity for a valid notice of disclaimer, or the scope of coverage afforded by a particular clause. This type of "positional" or "issue conflict" does not present an automatic bar to the multiple representation. EC 5-15 states, "[A] lawyer may generally represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts."[4]

5. Even where there is a risk of creating an adverse precedent, such conflicts are generally subject to consent if the client is adequately informed of the issues involved.[5] There may be circumstances, however, in which the lawyer’s effectiveness on behalf of one client may be impaired by the representation of the other client, as for example, where the lawyer’s own advocacy of the contrary position may be used against the lawyer in the representation of one of the clients, or where the lawyer will feel constrained by the position he or she has taken in one case from arguing vigorously for the contrary position. In such cases, it will generally not be possible to meet the requirement of DR 5-105(C) that "a disinterested lawyer would believe that the lawyer can competently represent the interest of each."

6. A second consideration is whether the lawyer may need to cross-examine an employee of the carrier client in the representation of an insured. There is nothing in the abstract that prevents an adequately advised client from consenting to be sued by the client’s lawyer in unrelated matters, particularly if the client is a sophisticated consumer of legal services, as are most insurance companies. But depending on such questions as the seniority of the employee, the importance of the testimony, and the nature of the cross-examination, it may be impossible to meet the disinterested-lawyer test where such a suit would require cross-examination of an insurance carrier employee. Similar considerations would be presented if the lawyer were required to cross-examine an expert that the lawyer might have used or be using in a case for the other side.

7. Third, the firm that seeks to represent both the carriers and the declaratory judgment plaintiffs in coverage disputes should be mindful of DR 5-101(A), which concerns conflicts arising from a "lawyer’s own financial, business, property or personal interests." To the extent there may be a significant disparity in the fees likely to be generated by the owners and construction managers on the one hand, and the carrier on the other hand, there may be an "inclination . . . to ‘soft peddle’ or de-emphasize certain arguments or issues - which otherwise would be vigorously pursued - so as to avoid impacting the other case."[6]

8. In addition, a lawyer may not use for the benefit of the insureds any confidential information that the lawyer has learned in the course of representing the carrier.[7] If in a particular case for an insured, for example, the practices of the carrier or of individual employees of the carrier with respect to a certain issue may be called into question, it may well not be possible for the lawyer to avoid using confidential information derived from a prior representation of the carrier regarding those practices. [8] In such cases, again, the lawyer might not be able to satisfy the "disinterested lawyer" test.
9. To the extent that the lawyer concludes that a conflict is consentable, the lawyer should advise the clients of these considerations in obtaining that consent. The lawyer’s disclosure should address, as necessary in a particular case and depending on the sophistication of the client, questions such as the possibility that advocating a favorable legal position in one client’s case may be prejudicial to a client in another case, the possibility that the lawyer or a lawyer in the firm may need to cross-examine an employee of the carrier, and any other considerations that may reasonably be thought to affect the lawyer’s independent professional judgment or the vigor of the lawyer’s representation of the clients.

10. A further consideration is whether the lawyer or law firm seeking to represent a carrier in a series of actions while continuing to bring actions by insureds against that carrier may seek an advance waiver of conflicts with respect to future cases the lawyer or law firm may take on. If the conflicts are otherwise consentable, there is sufficient disclosure of the nature of the conflicting representations that may arise and the client is capable of understanding the waiver, a lawyer or law firm generally may ethically request and rely upon the advance waiver of a future multiple-representation conflict. [9] The extent of the disclosure necessary, and potentially the scope of the advance waiver, may depend on, among other things, the sophistication of the client.[10] For example, where a client is relatively unsophisticated in legal matters, an advance waiver is more likely to be enforceable if it is limited to lawsuits on behalf of the carrier of the same general kind as the lawyer or law firm is then prosecuting, as opposed to a more open-ended waiver.

11. The lawyer should review the validity of such an advance waiver both when the waiver is given and when it is triggered. For example, the lawyer would not be able to rely on an advance waiver by an insured broadly permitting the lawyer or firm to represent the carrier defendant in other construction-accident suits against other insureds if the lawyer or firm thereafter wishes to take on a lawsuit on behalf of the carrier that would require the lawyer or firm to argue for a position that would limit the lawyer’s effectiveness in arguing for the insured.

CONCLUSION

1. There is no per se rule that would disqualify a lawyer from representing certain declaratory judgment plaintiffs against the insurance carrier and simultaneously defending the carrier against other declaratory judgment plaintiffs in coverage disputes. The possibility of positional conflicts, however, will require careful consideration in each case of the nature of the issues presented and the effect on the representation of other clients of the positions taken on behalf of one. In some cases, considerations such as the identity of the likely witnesses and whether the lawyer has confidential information derived from representation of the carrier that may be of use in the representation of the insured may also limit the lawyer’s ability to obtain informed consent to the conflict. For these reasons, the burden of satisfying the "disinterested lawyer" test in these cases will often be a high one.

(17-07)

[1] DR 5-105(A) and(C).


[3] Under the Code, individual lawyers have the conflict, but pursuant to DR 5-105(D) their conflict is imputed to every lawyer in their firm.
See also Model Rule 1.7 cmt. 24 ("The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."); ABA 93-377 ("[I]f the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters."); Restatement (Third) of the Law Governing Lawyers § 128(f) (2000) ("A lawyer ordinarily may take inconsistent legal positions in different courts at different times. . . . However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. . . . If a conflict of interest exists, absent informed consent of the affected clients . . . , the lawyer must withdraw from one or both of the matters.").

See, e.g., Model Rule 1.7 cmt. 24 ("If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.") (emphasis added); sources cited in the preceding footnote.

ABA 93-377.

DR 4-101(B)(2) bars a lawyer from knowingly using "a confidence or secret of a client to the disadvantage of the client."

See N.Y. City 2005-2 ("There are situations, however, where information that the lawyer has in his or her mind from the first representation is so material to the second representation that the lawyer cannot avoid using the information.").

See N.Y. City 2006-1.

See id. at 5.

Related Files

Ethics Opinion 826(PDF File)
FORMAL OPINION NO 2005-122

Conflicts of Interest, Current Clients:
Multiple Government Clients, Future Conflict Waivers

Facts:

Lawyer is engaged in a general private practice. Lawyer also acts as a special prosecutor in certain misdemeanor cases in the Circuit Court for County in which City is located. In those cases, Lawyer represents the State of Oregon, but is paid by City. In Lawyer’s work as a special prosecutor, Lawyer sometimes must coordinate efforts with the County district attorney’s office.

Lawyer also has private clients who, from time to time, may be adverse to the State, to City, or to County in civil matters that are unrelated to Lawyer’s misdemeanor prosecutions. Lawyer’s representation of these private clients does not, for example, put Lawyer in a position to use any confidential client information of the State against the State. Similarly, Lawyer’s work as a special prosecutor does not put Lawyer in a position to use confidential client information of Lawyer’s private clients against those clients.

Questions:

1. May Lawyer represent a private client adversely to the State or to a department or agency of the state?
2. May Lawyer represent a private client adversely to City or County or to a department or agency of City or County?
3. May Lawyer obtain a blanket waiver of future conflicts from the State that will permit Lawyer to represent Lawyer’s private client and against the State and its departments or agencies?

Conclusions:

1. Yes.
2. Yes.

3. Yes, qualified.

Discussion:

When Lawyer appears on behalf of the State as a special prosecutor, the State is Lawyer’s client. Cf. ORS 8.680; ORS 8.726; ORS 8.760. This is true even though one of the principal purposes of the prosecutions may be to cause misdemeanants to make restitution to private parties injured by the underlying wrongful conduct and even though Lawyer is paid by City and may at times coordinate efforts with the County district attorney’s office. Cf. Oregon RPC 1.8(f); Oregon RPC 5.4(c);1 Gibson v. Johnson, 35 Or App 493, 582 P2d 452 (1978); OSB Formal Ethics Op No 2005-85; OSB Formal Ethics Op No 2005-46.

Within the context of the governmental entity, the client will sometimes be a specific agency, will sometimes be a branch of government, and will sometimes be an entire governmental level (e.g., city, county, or state)2 as a whole. ABA Model RPC 1.13 cmt [9] (“Although

1 Oregon RPC 1.8(f) provides:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and

(3) information related to the representation of a client is protected as required by Rule 1.6.

Oregon RPC 5.4(c) provides:

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

2 Representation of a state does not constitute representation of political subdivisions of the state, and vice versa. Among other things, political subdivisions of a state, such as its cities and counties, are independent bodies and are not subject to
in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.”). In essence, it is up to the lawyer and the government “client” to define who or what is to be considered the client, much as the process works in private-side representations of for-profit entities. *See also* Oregon RPC 1.7(c).

It is also necessary to address what it means to represent a client adversely to a state or to a department or agency of a state. Clearly, representation of a client in litigation against a state or against a state department or agency would qualify, as would negotiations on the opposite side of a state or state agency or department. *Cf.* OSB Formal Ethics Op No 2005-86; OSB Formal Ethics Op No 2005-40. On the other hand, we do not believe that merely giving a private client advice about structuring a transaction to minimize state taxes would constitute a representation adverse to the state. *Cf.* Oregon RPC 1.7. Similarly, appearing on behalf of a private party before a state agency which may adjudicate a matter between that private party and a third party would not, by itself, constitute representation adverse to a state.

Under the facts described above, it appears that any conflict that would result from Lawyer’s simultaneous representation of the State of Oregon in criminal misdemeanor matters and private parties on unrelated civil matters could be waived. *Cf.* Oregon RPC 1.7. 3 If a

the direction and control of the executive branch of state government. *Cf.* ORS 203.010–203.030; ORS 203.720; ORS 221.410(1).

3 Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
Formal Opinion No 2005-122

nonwaivable conflict were present, Lawyer could not proceed even with informed consent, confirmed in writing. *Cf.* Oregon RPC 1.7; *In re Phelps*, 306 Or 508, 760 P2d 1331 (1988); *In re Thies*, 305 Or 104, 750 P2d 490 (1988).

Lawyer’s representation of private clients against the State or its departments or agencies would give rise only to waivable conflicts under Oregon RPC 1.7(a)(1) and (b). This is because, although the interests of the private clients and the State may be “directly adverse,” Lawyer would not be obligated to contend for something for one of the clients that Lawyer has a duty to oppose for the other. *Cf.* Oregon RPC 1.7(b)(3). In waivable conflict situations, a lawyer may proceed if the affected clients provide informed consent, confirmed in writing as

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.
defined in Oregon RPC 1.0(b) and (g).\(^4\) \textit{See, e.g.}, OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-40.

Because City and County are not Lawyer’s clients solely because of Lawyer’s duties as a special prosecutor, representation of private parties adverse to City, County, or a department or agency of City or County would not give rise to any conflicts problems under Oregon RPC 1.7. Whether, or under what circumstances, the representation of private parties adverse to City or County could ever give rise to a problem due to a personal-interest conflict of Lawyer requiring Lawyer to obtain informed consent, confirmed in writing, pursuant to Oregon RPC 1.7 is a question that these facts do not require us to consider.

Nothing in Oregon RPC 1.7 prohibits a blanket or advance waiver from the State or from a nongovernment client as long as Lawyer adequately explains the material risks and available alternatives. \textit{See, e.g.}, ABA Formal Ethics Op No 05-436. Lawyer must be sensitive, however, to situations that were not contemplated in the original disclosure or that constitute nonwaivable conflicts. In the former situation, Lawyer would need to obtain the informed consent of each affected client as to the new

\(^4\) Oregon RPC 1.0(b) and (g) provide:

\begin{quote}
(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

\end{quote}

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\ldots

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.
\end{quote}
conflict. In the latter situation, Lawyer would have to decline representation in the new matter that gives rise to the conflict. Oregon RPC 1.16(a)(1).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see The Ethical Oregon Lawyer § 3.5-3 (payment of fees by nonclients), § 9.6 (informed consent), § 10.2 to § 10.2-2(d) (multiple-client conflicts rules), § 10.2-3 (issue conflicts), § 11.4-1 (client identification for a government lawyer), § 11.4-5 (duties applicable to government lawyers), § 11.5-2 (confidentiality issues for government lawyers) (OSB Legal Pubs 2015); Restatement (Third) of the Law Governing Lawyers §§ 121–122, 125, 128–130, 132 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); ABA Model RPC 1.7; ABA Model RPC 1.8(f); and ABA Model RPC 5.4(c).