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Enforceability of General Advance Waivers of Conflicts of Interest The Sixth Annual Symposium on Legal Malpractice and Professional Responsibility.

Nathan M. Crystal

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ARTICLES

ENFORCEABILITY OF GENERAL ADVANCE WAIVERS OF CONFLICTS OF INTEREST

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I. INTRODUCTION

Conflicts of interest among clients present some of the most pervasive and difficult ethical problems that lawyers face in practice.¹ In many instances, however, the affected clients may consent to a conflict. Under the American Bar Association's (ABA) Model Rules of Professional Conduct, for consent to be effective, it must be "informed" and must be "confirmed in writing."² Informed consent to a conflict is often referred to as a "waiver" of the conflict.³

In recent years many law firms, particularly large firms with extensive practices, have begun seeking "general advance waivers" of

1. See generally WILLIAM FREIVOGEL, FREIVOGEL ON CONFLICTS, <http://www.freivogelonconflicts.com> (last visited Feb. 18, 2007) (listing areas of possible conflicts of interest for lawyers) (on file with the *St. Mary's Law Journal*).

2. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2006).

3. When used throughout this Article, the term "waiver" means "informed consent, confirmed in writing." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005).

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conflicts of interest.⁴ As the Ethics Committee of the District of Columbia Bar observed, changes in the practice of law and in the manner in which clients use law firms have prompted firms to use such waivers.⁵

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.

....

... This means, for example, that if the law firm hypothesized in the ABA Opinion [93-372] 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.⁶

4. Advance waivers are sometimes referred to as "prospective waivers" of conflicts of interest. See Part II(A) below for a discussion of the types of advance waivers of conflicts of interest.

5. D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcb.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (on file with the *St. Mary's Law Journal*).

6. *Id.* (internal citations omitted).

Rules of ethics did not deal with the issue of advance waivers until 2002.⁷ However, both the ABA's Model Rules of Professional Conduct and the American Law Institute's Restatement of the Law Governing Lawyers now authorize the use of such waivers, at least to some extent.⁸ The importance of the validity⁹ of general advance waivers to the bar is reflected in the fact that both the ABA and New York City Committees on Professional Ethics recently issued major opinions on the use of such waivers.¹⁰

Part II of the Article provides a framework for analyzing types of advance waivers and sets forth the standards for determining the validity of advance waivers found in the ABA's Model Rules of Professional Conduct (Model Rules) and the Restatement of the Law Governing Lawyers (Restatement). Part III argues that the standards set forth in the Model Rules and the Restatement for determining the ethical propriety of seeking general advance waivers are defective because they are different in material respects, vague, and incomplete. As a result, the validity of advance waivers is uncertain, and this uncertainty increases litigation costs and is unfair to lawyers and clients who may seek or be affected by advance waivers. Part IV examines the policy justifications for advance waivers. To the extent that the current rules can be read to authorize general advance waivers, including advance waivers in substantially related matters, the rules are unsound as a matter of policy. The fundamental policy involved in advance waivers is protection of the interest of clients—those seeking representation, existing clients, and future prospective clients—in retaining counsel

7. The ethics codes promulgated by the ABA did not specifically deal with advance waivers until the 2002 revision of the ABA's Model Rules. See Part II(B) below.

8. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000).

9. This Article argues that the issues of ethical propriety of seeking a general advance waiver and the legal enforceability of such waivers are related, but distinct. In this Article the term "validity" refers to both ethical propriety and legal enforceability. When a distinction should be drawn between the two concepts, the Article uses the terms "ethical propriety" and "legal enforceability" as appropriate to the analysis.

10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Mar. 23, 2007) (on file with the *St. Mary's Law Journal*); see also 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §10.9, at 10-25 (Supp. 2007) (observing that the issue of the enforceability of advance waivers is of "great practical importance in modern law practice").

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of their choice. This interest can be protected if the validity of advance waivers is limited to waivers that meet certain requirements. In particular, a valid waiver: (1) should be limited to the specific matter or types of matters in which the waiving client is seeking representation; (2) should be limited to matters not substantially related to the representation of the waiving client, with the exception of representation of co-clients; (3) should include reasonable disclosure of the reasons for and advantages of the waiver, scope of the waiver, disadvantages of the waiver, alternatives to the waiver, and a recommendation that the waiving client seek advice of independent counsel about the waiver; and (4) should be confirmed in writing. Part V focuses on the judicial role in evaluating waivers when disqualification motions are made. Very few cases have considered the enforceability of general advance waivers, and none have established a clear framework for analysis of such waivers. Regardless of the standards set forth in the ethics rules, courts will always retain the power to invalidate a waiver, particularly if the court concludes that enforcement of the waiver would undermine the integrity of an adversarial proceeding. Courts can, however, create reasonable certainty in determining the enforceability of advance waivers and give lawyers desirable incentives not to draft overly broad waivers by establishing a presumption that a waiver that meets the above standards is enforceable.

II. CURRENT STANDARDS GOVERNING THE ETHICAL PROPRIETY OF LAWYERS SEEKING GENERAL ADVANCE WAIVERS

A. *Types of Advance Waivers*

An “advance” or “prospective” waiver of a conflict of interest is a waiver that is made as to conflicts of interest that may arise in the future, but have not yet arisen.¹¹ Under both the Model Rules and

11. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000). The Ethics Committee of the D.C. Bar defined advance waivers as waivers that are “granted before the conflict arises and generally before its precise parameters (e.g., specific adverse client, specific matter) are known.” D.C. Bar Ethics Committee, Op. 309 (2001), *Advance Waivers of Conflicts of Interest*, http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (on file with the *St. Mary's Law Journal*). Thus, the committee concluded that a waiver of conflicts of interest when a lawyer represents multiple clients in a single matter is a current rather than an advance waiver because both the parties

the Restatement, an important factor in determining the validity of an advance waiver is whether a waiver is general (“open-ended”) or specific.¹² Thus, it is important to the analysis of the enforceability of advance waivers to distinguish between these types of waivers.

A “general” or “open-ended” advance waiver is one that does not identify either the adverse party or the matter that is covered by the waiver. For example, suppose a law firm uses the following waiver:

You agree that this firm may represent any existing or future client of the firm, or any affiliate of any such client, in any matter in which you or any of your affiliates have an adverse interest, including litigation against you or any of your affiliates, so long as that matter is not substantially related to any work the firm is doing for you or any of your affiliates.¹³

Such a waiver is general as to both potential adverse parties and subject matter.¹⁴

By contrast, a firm might use an advance waiver that is specific as to both the potential adverse party and type of matter. For example, a waiver might state:

You understand that Computer Corporation is a long-time client of the firm for which the firm provides intellectual property representation. You agree that the firm may represent Computer Corporation or any of its affiliates in any intellectual property matter in which you or any of your affiliates have an adverse interest, including litigation against you or any of your affiliates, so long as the matter is not substantially related to any matter we are handling for you or any of your affiliates.¹⁵

and the general parameters of the conflict are known at the time of the waiver. *Id.* n.3. This Article characterizes waivers of conflicts by co-clients as advance waivers, but ones that are specific as to both parties and type of matter. *See* Part IV(B) below.

12. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000).

13. Parts III(C) and IV(B) below discuss the ethical propriety of advance waivers that apply to substantially related matters.

14. For examples of general advance waivers, *see* Appendices A and B.

15. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d., illus. 2 & 3 (2000) (providing examples of matter-specific advance waivers). Specificity is a matter of degree. This waiver is specific as to the type of matter covered by the waiver. It could be more specific if it identified the particular matter to which the conflict applied. For example:

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Finally, a waiver could be partially specific as to either the potential adverse party or type of matter. For example, a law firm's waiver form might provide:

You understand that Large Bank is a long-time client of the firm for which the firm acts as general outside counsel. You agree that the firm may represent Large Bank or any of its affiliates in any matter in which you or any of your affiliates have an adverse interest, including litigation against you or any of your affiliates, so long as that matter is not substantially related to any work the firm is doing for you or any of your affiliates.

This waiver is specific as to potential adverse party, but general as to type of matter. Similarly, a firm's waiver could state:

You understand that this firm represents a number of clients with regard to their intellectual property matters. You agree that the firm may represent any existing or future client of the firm with regard to an intellectual property matter in which you or any of your affiliates have an adverse interest, including litigation against you or any of your affiliates, so long as the matter is not substantially related to any matter we are handling for you or any of your affiliates.

This waiver is reasonably specific as to type of matter, but general as to potential adverse party.

B. *A Brief History of the Standards Governing the Ethical Propriety of Seeking a General Advance Waiver*

Neither the ABA's 1969 Code of Professional Responsibility nor its 1983 version of the Model Rules of Professional Conduct dealt specifically with the issue of the ethical propriety of advance waivers of conflicts of interest.¹⁶ In 1993, the ABA Committee on Ethics and Professional Responsibility first dealt with the issue in Formal Opinion 93-372.¹⁷ The committee noted the need for pro-

You understand that Computer Corporation is a long-time client of the firm for which the firm provides intellectual property representation with regard to its gaming software and hardware. You agree that the firm may represent Computer Corporation or any of its affiliates in any matter involving its gaming software or hardware in which you or any of your affiliates have an adverse interest, including litigation against you or any of your affiliates, so long as the matter is not substantially related to any matter we are handling for you or any of your affiliates.

16. See Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 MICH. L. REV. 1074, 1076 n.9 (1981) (explaining that "neither the Code nor the New Model Rules directly addresses prospective waivers").

17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993).

spective waivers arose from the dramatic change in the practice of law that occurred during the previous decades: "In an era when law firms operated in just one location, when there were few megaconglomerate clients and when clients typically hired only a single firm to undertake all of their legal business, the thought of seeking prospective waivers rarely arose."¹⁸

Recognizing these changes, the committee gave limited endorsement to prospective waivers.¹⁹ The committee ruled that "it [was] not ordinarily impermissible to seek such prospective waivers," but "the mere existence of a prospective waiver will not necessarily be dispositive of the question whether the waiver is effective."²⁰ The waiver will not be effective as to matters not reasonably contemplated at the time the waiver was executed.²¹ In addition, the waiver will not be effective to allow use of confidential information.²²

Because of the growing importance of the issue to the profession, both the 2002 revision of the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers, published in 2000, now specifically address the issue of the validity of general advance waivers. The Model Rules and the Restatement contain comments providing standards for evaluating the ethical propriety and legal enforceability of such waivers.²³

C. *The Model Rules*

In 2002, the ABA added Comment 22 to Model Rule 1.7, dealing with the ethical propriety of advance waivers.²⁴ The Comment states:

Consent to Future Conflict

18. *Id.*

19. *See id.* (explaining that a prospective waiver may be sought, but the existence of a waiver does not automatically make the waiver effective).

20. *Id.*

21. *Id.*

22. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993).

23. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000).

24. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006). Model Rule 1.7 regarding conflicts of interest for current clients provides that:

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

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[22] 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 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 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).²⁵

Under Rule 1.7 and Comment 22, the basic test for the enforceability of advance waivers is whether “the client reasonably under-

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

(b) 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.

Id.

25. *Id.*

stands the material risks that the waiver entails.”²⁶ The Comment then appears to draw a distinction between matter-specific advance waivers and general advance waivers.²⁷ Matter-specific advance waivers are usually enforceable: “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.”²⁸

By contrast, general advance waivers are normally invalid: “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.”²⁹ However, the Comment then offers the following qualification of the general prohibition against general advance waivers:

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 in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.³⁰

Under the Model Rules, advance consent is ineffective “if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).”³¹ The Model Rules also provide that clients are generally free to revoke consent to a conflict of interest, but the effectiveness of the revocation as to other clients depends on an analysis of various factors:

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the rea-

26. *Id.*

27. *Id.*

28. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006).

29. *Id.*

30. *Id.*

31. *Id.*

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sonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.³²

D. *The Restatement of the Law Governing Lawyers*

Comment d to section 122 of the Restatement (Third) of the Law Governing Lawyers addresses the validity of prospective waivers as follows:

Consent to future conflicts. Client consent to conflicts that might arise in the future is 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.³³

Under the Restatement, general advance waivers are "ineffective unless the client possesses sophistication in the matter" and the client "receive[d] independent legal advice about the consent."³⁴

The Restatement, however, goes on to treat matter-specific advance waivers more generously:

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.³⁵

The Restatement provides the following illustrations of when it is appropriate to use matter-specific advance waivers:

2. Law Firm has represented Client in collecting commercial claims through Law Firm's New York office for many years. Client is a long-established and sizable business corporation that is sophisticated in commercial matters generally and specifically in dealing with lawyers. Law Firm also has a Chicago office that gives tax advice to many companies with which Client has commercial dealings.

32. *Id.* 1.7 cmt. 21.

33. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000).

34. *Id.*

35. *Id.*

Law Firm asks for advance consent from Client with respect to conflicts that otherwise would prevent Law Firm from filing commercial claims on behalf of Client against the tax clients of Law Firm's Chicago office. If Client gives informed consent the consent should be held to be proper as to Client. Law Firm would also be required to obtain informed consent from any tax client of its Chicago office against whom Client wishes to file a commercial claim, should Law Firm decide to undertake such a representation.³⁶

3. The facts being otherwise as stated in Illustration 2, Law Firm seeks advance consent from each of its Chicago-office corporate-tax clients to its representation of any of its other clients in matters involving collection of commercial claims adverse to such tax clients if the matters do not involve information that Law Firm might have learned in the tax representation. To provide further assurance concerning the protection of confidential information, the consent provides that, should Law Firm represent any client in a collection matter adverse to a tax client, a procedure to protect confidential information of the tax client will be established. Unless such a tax client is shown to be unsophisticated about legal matters and relationships with lawyers, informed consent to the arrangement should be held to be proper.³⁷

The Restatement notes circumstances under which an advance waiver will be ineffective:

If 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. If the new conflict is not consentable, the lawyer may not proceed.³⁸

Like the Model Rules, the Restatement provides that a client may revoke consent to a conflict, but the effectiveness as to the other clients affected by the revocation depends on the circumstances.³⁹

36. *Id.* § 122 cmt. d, illus. 2 (internal citations omitted).

37. *Id.* § 122 cmt. d., illus. 3 (internal citations omitted).

38. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000).

39. *See id.* § 122 cmt. f (explaining that after a client revokes consent, the lawyer's continued representation of others is dependent on "whether the client was justified in revoking the consent . . . and whether material detriment to the other client or lawyer would result").

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III. CRITICISM OF THE MODEL RULES AND RESTATEMENT
STANDARDS GOVERNING GENERAL
ADVANCE WAIVERS

This section offers three criticisms of the current standards governing general advance waivers. First, material differences exist between the standards in the Model Rules and the Restatement. Second, both standards are vague in indicating how the concept of “informed consent” applies to general advance waivers. Third, both standards fail to address the important issue of whether a general advance waiver may apply to substantially related matters. As a result of these three shortcomings, the validity of general advance waivers is uncertain. This uncertainty produces significant costs to courts, which must decide disqualification motions; to lawyers, who face risks of disqualification; and to clients, who may be unable to employ or retain counsel of their choice.

A. *Material Differences Between the Model Rules and the Restatement*

The Model Rules and the Restatement provide materially different standards for permitting general advance waivers. The basic test under the Model Rules is whether “the client reasonably understands the material risks that the waiver entails.”⁴⁰ In deciding whether this requirement is met, Comment 22 to Model Rule 1.7 identifies several factors to be considered, including: the comprehensiveness of the explanation of possible types of representations that might arise in the future “and the actual [or] reasonably foreseeable adverse consequences of those representations”; whether “the client is an experienced user of the legal services involved”; whether “the client is independently represented by other counsel in giving consent”; and whether “the consent is limited to future conflicts unrelated to the subject of the representation.”⁴¹ In other words, the Model Rules refuse to adopt a bright line test to determine whether a client has given informed consent to a future conflict. Instead, the validity of the consent turns on an analysis of

40. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006).

41. *Id.*

various factors.⁴² If more factors are present, then “consent is more likely to be effective.”⁴³

The Restatement, on the other hand, appears to adopt a rule for determining the validity of consent to a general advance waiver.⁴⁴ The Restatement provides: “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.”⁴⁵ Thus, under the Restatement, consent to a general advance waiver is valid if two requirements are met: (1) “the client possesses sophistication in the matter in question” and (2) the client “has had the opportunity to receive independent legal advice about the consent.”⁴⁶

In an important article on the enforceability of advance waivers, Richard Painter argued that rule drafters should adopt clear rules regarding the enforceability of advance waivers:

Lawyers and clients should, where possible, have bright line rules telling them when advance waivers are enforceable. Without bright line rules, a lawyer will likely charge an unaffordably high fee or refuse to represent a client if she believes that the cost of possible future disqualification from representing other clients is too high. This will be so even if the prospective client would have preferred to waive some future conflicts in return for the lawyer’s representation.⁴⁷

Painter went on to argue that clients who were independently represented by counsel should be able to consent to future con-

42. *Id.*

43. *Id.*

44. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000). However, as discussed in Part (B) below, there is an element of vagueness in the Restatement’s requirement that the client possess “sophistication in the matter in question.” *Id.*

45. *Id.*

46. *Id.* While the Restatement seems to adopt a rule for determining the validity of consent to general advance waivers, the Restatement appears to adopt a more flexible, case-by-case analysis to analyze the validity of matter-specific advance waivers when a continuing attorney-client relationship exists. *Id.*; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d, illus. 2 & 3 (2000) (illustrating the validity of two matter-specific advance waivers).

47. Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 312 (2000).

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flicts, provided the waiver was unambiguous.⁴⁸ Neither the Model Rules nor the Restatement follows Painter's analysis. The Model Rules adopt a multi-factor approach rather than a clear rule.⁴⁹ The Restatement comes somewhat closer than the Model Rules in adopting Painter's analysis, but the Restatement requires that the client possess "sophistication in the matter in question" and does not require that the client actually be represented by independent counsel, only that the client have the "opportunity" to receive independent advice about the consent.⁵⁰

Aside from a fundamental difference in approach (multiple factors in contrast to a rule), the Model Rules and the Restatement contain a more substantive difference with regard to the role of independent counsel. The Model Rules state that whether "the client *is independently represented* by other counsel in giving consent" is an important factor in determining the validity of consent to an advance waiver.⁵¹ Thus, the Model Rules focus on actual representation by independent counsel.⁵² By contrast, the Restatement only refers to "the *opportunity* to receive independent legal advice about the consent."⁵³

B. *Vagueness in the Model Rules and the Restatement*

As discussed in the previous section, the Model Rules are vague in application because they provide a list of factors for determining whether a client has given informed consent to general conflicts that may arise in the future.⁵⁴ While the Restatement appears to adopt a clear rule with regard to the validity of consent, even the Restatement suffers from an element of vagueness because the Restatement requires that "the client possesses sophistication in the matter in question."⁵⁵ Two aspects of this requirement are worth noting. First, the Restatement seems to demand more than that

48. *Id.* Painter also argued that clients should be able to consent to a variety of other aspects of conflicts of interest. *Id.* at 313-25.

49. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006).

50. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000).

51. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006) (emphasis added).

52. *Id.*

53. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000) (emphasis added).

54. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006).

55. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000).

the client be sophisticated; the client must have “sophistication *in the matter in question*.”⁵⁶ Thus, if an experienced business person seeks representation with regard to a type of matter that the person has never been involved in before, it would appear that this requirement is not met. For example, suppose a small publicly held corporation is contemplating a merger with or acquisition of another company. If the corporation had never been involved in such a transaction before, then it is doubtful whether the corporation has sophistication in the matter in question. Second, the term “matter in question” is vague.⁵⁷ Suppose a United States based company is considering a contract with a foreign supplier. The company might be sophisticated with regard to supply contracts, but if the matter is defined as international contracts, then the company may not be sophisticated as to that type of matter.

Both the Model Rules and the Restatement are vague in another way: the disclosure requirements necessary to obtain informed consent. Comment 22 to Model Rule 1.7 on consent to future conflicts states that the client must be “reasonably informed regarding the risk that a conflict may arise.”⁵⁸ But what does it mean to reasonably inform a client about unknown types of conflicts with unknown other clients that may arise in the future?

With regard to general advance waivers, the Model Rules state that consent to future conflicts is “subject to the test of paragraph (b),”⁵⁹ which includes the requirement of “informed consent, confirmed in writing.”⁶⁰ Informed consent is defined as follows: “‘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.”⁶¹

Comment 6 to Model Rule 1.0 elaborates on the extent of disclosures required by a lawyer to obtain informed consent:

[6] . . . The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to

56. *Id.* (emphasis added).

57. *Id.*

58. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006).

59. *Id.*

60. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2006).

61. *Id.* 1.0(e).

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the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. 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.⁶²

Several aspects of this Comment are worth noting. First, a lawyer who is seeking the informed consent of a client has an obligation to provide "information reasonably adequate [for the client] to make an informed decision."⁶³ Implicit in this obligation is the principle that simply seeking a waiver of a future conflict without any further disclosure is insufficient to obtain informed consent. Second, the amount of disclosure will depend on the circumstances, including whether the client is sophisticated and is independently represented.⁶⁴ Finally, if the client is independently represented with regard to the consent, then the lawyer can normally assume that independent counsel is providing the disclosures and advice necessary to obtain informed consent.⁶⁵ While this Comment provides some guidance to lawyers, the scope of disclosures required

62. *Id.* 1.0 cmt. 6.

63. *Id.*

64. *Id.*

65. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2006).

to obtain informed consent to a general advance waiver remain poorly defined in the Model Rules.

The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York interpreted Comment 22 to Model Rule 1.7 to mean that with regard to sophisticated clients, detailed disclosure of the nature of possible future conflicts was not necessary if the client reasonably understood the material risks involved.⁶⁶ Thus, “[f]or the sophisticated clients described above, blanket or open-ended advance waivers that are accompanied by relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable.”⁶⁷

Under the Restatement, consent to a conflict of interest must be informed.⁶⁸ However, the Restatement does not even discuss the extent of disclosure necessary to obtain informed consent to a general advance waiver.⁶⁹ Perhaps the view of the drafters of the Restatement was that elaborate disclosure is not necessary when the client is sophisticated as to the matter in question and has had the opportunity to receive independent advice.⁷⁰ If the client obtains such advice, then the advice from an independent lawyer arguably supersedes the need for disclosure by the lawyer seeking the waiver.⁷¹ If the client does not seek such advice, the client bears the responsibility for any lack of information because the client is sophisticated as to the matter in question and was given the opportunity to seek advice.

66. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Mar. 23, 2007) (on file with the *St. Mary's Law Journal*).

67. *Id.*

68. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122(1) (2000).

69. *See id.* § 122 cmt. d (noting that general consents to future conflicts of interest are subject to particular scrutiny, but failing to explain the requirement for informed consent to a general advance waiver); *see also id.* § 122 cmt. c (discussing the requirement of informed consent to a conflict but failing to address informed consent to general advance waivers).

70. *See id.* § 122 cmt. d.

71. It could be argued, however, that the lawyer seeking the waiver has independent disclosure obligations to the prospective client. In addition, the lawyer seeking the waiver will often have information about the nature of its clients and about the likelihood of future conflicts that an independent counsel would not have. On the other hand, independent counsel could seek such information as part of its engagement to advise the client about the waiver.

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C. *Failure of the Model Rules and the Restatement to Clearly Address the Validity of Advance Waivers That Apply to Substantially Related Matters*

The Model Rules contain only a brief reference to the issue of whether a lawyer may ethically seek general advance consent to conflicts that are substantially related to a matter being handled for the waiving client:

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 in giving consent *and the consent is limited to future conflicts unrelated to the subject of the representation.*⁷²

Based on this statement, it appears that whether advance consent is limited to matters unrelated to the subject of representation is a positive factor in determining whether the consent is valid. However, the Comment does not seem to absolutely prohibit a waiver that applies to substantially related matters. It remains unclear when a waiver of a conflict of interest may apply to a substantially related matter.

The Restatement does not even mention whether an advance waiver could apply to a substantially related matter.⁷³ As discussed above, the Restatement allows advance waivers if the client is sophisticated in the matter in question and has the opportunity to receive the advice of independent counsel.⁷⁴ It could be argued that if these requirements are met, a waiver for substantially related matters is permissible. On the other hand, it could be argued that the Restatement is simply silent on the issue.

72. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006) (emphasis added).

73. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000) (making no mention of substantially related matters).

74. *Id.*

IV. POLICY FLAWS IN THE APPROACH OF THE MODEL RULES
AND THE RESTATEMENT TO THE VALIDITY OF
GENERAL ADVANCE WAIVERS

A. *Policy Analysis Does Not Support the Validity of General
Advance Waivers*

Lawyers are agents of their clients.⁷⁵ As is true with other agency relationships, clients face the risk that lawyers may use the relationship for their own benefit rather than for the benefit of their clients.⁷⁶ The general “agency problem” is exacerbated in the attorney-client context because of the extreme asymmetry of information between lawyers and clients.⁷⁷ Rules regulating conflicts of interest, including the requirement that the client give informed consent to any conflict, are designed to control the agency risks that clients face when they retain lawyers.⁷⁸

The use of general advance waivers increases the agency risk that clients face. Advance waivers of conflicts of interest differ from standard waivers because the date of the waiver precedes the existence of the conflict, sometimes by a substantial period of time.⁷⁹ Because of this gap in timing, compliance with the ethical requirement of informed consent⁸⁰ becomes more difficult than with standard waivers. At the time the waiver is signed, the parties and nature of the conflict to which the waiver will apply are undetermined.⁸¹ In addition, if the use of general advance waivers becomes widespread, lawyers will increasingly encounter conflicts in

75. *Id.* ch. 2, introductory note.

76. Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 968 (1997).

77. *Id.* at 970-71; *see also* Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 580-81 (1992) (discussing agency costs in the context of conflicts of interest).

78. *See* Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 993 (1997) (arguing that conflict-of-interest rules requiring *ex ante* consent by clients after full disclosure and consultation are generally consistent with principles of economic analysis).

79. *See* *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356, 1357-60 (N.D. Ga. 1998) (disqualifying counsel because the waiver in the engagement agreement preceded the conflict by more than five years, and thus did not provide informed consent).

80. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) & cmt. 22 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 & cmt. d (2000).

81. *See* Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701, 715-16 (2001) (arguing that clients cannot give informed consent for general advance waivers because future conflicts

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which both clients have signed waivers.⁸² In the absence of regulation of such situations, law firms are likely to choose the representation that will maximize their economic interests, regardless of the impact on the clients.⁸³

Proponents of general advance waivers have responded that the arguments against such waivers ignore the fundamental interest of clients in retaining counsel of their choice.⁸⁴ For example, Jonathan J. Lerner, a partner with Skadden, Arps, Slate, Meagher & Flom and former chair of the New York City Bar's Ethics Committee,⁸⁵ argues:

An overly broad application of Canon 5 [the duty of loyalty under the Code of Professional Responsibility, still applicable in New York], which goes beyond what is necessary to protect the client in the non-adverse relationship, needlessly deprives other clients of the extremely important right to select their counsel of choice, can mandate disloyalty to a law firm's client—the very value supposedly advanced by Canon 5—inflicts needless prejudice on blameless clients, does not serve the purpose of the conflict rules, and invites the kind of gamesmanship that the courts have condemned.⁸⁶

Lerner's "choice-of-counsel" argument refers to "other clients." In analyzing this argument, it is important to distinguish among three categories of clients: existing clients, current prospective cli-

are unknown). Mr. Fox makes a number of other arguments against advance waivers in his article. See generally *id.* at 715-30.

82. See *id.* at 717-18 (arguing that when a firm encounters a conflict of interest it "will now engage in a new analysis: Which representation offers the bigger bucks").

83. *Id.*; see also Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1005 n.135 (2001) (discussing invocation of waivers and envisioning a situation "where the law firm would prefer *not* to represent the *existing* client against the waiving client").

84. See Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 972 (2001) (arguing that Fox's position on the prohibition of the use of waivers prevents "one of the most sacrosanct client rights—the right to select counsel of choice").

85. *Id.* at 971.

86. *Id.* at 981-82; see also Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Apr. 2, 2007) (adopting the "choice-of-counsel" rationale for upholding advance waivers) (on file with the *St. Mary's Law Journal*).

ents, and future prospective clients.⁸⁷ The first category consists of the firm's existing clients for which the firm already has an established relationship. Within the category of existing clients, subcategories could be identified. For example, the firm may have a long-standing substantial relationship with some clients, represented by continuous work and perhaps general retainers. Such clients would often be identified on the firm's website; these clients could be labeled as the firm's "major clients." The firm might also represent other clients on a regular basis but without the same degree of relationship as is the case with major clients; these clients could be called "regular clients." The second category of clients involves the firm's "current prospective clients"—clients who are being asked to sign an advance waiver before the firm undertakes representation. The third category consists of clients that may seek to retain the firm's services in the future. These clients can be characterized as "future prospective clients."⁸⁸

The choice-of-counsel argument in favor of the validity of advance waivers applies strongly to existing clients of the firm, particularly to major clients.⁸⁹ These clients have an established relationship with the firm; they have an expectation of continuing representation.⁹⁰ In all likelihood, the firm has developed knowledge and expertise about the client's business and legal situation that would be costly for another firm to duplicate if the current

87. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2006) (addressing conflicts of interest involving concurrent clients); *id.* 1.9 (defining the duties to former clients); *id.* 1.18 (recognizing the duties to prospective clients).

88. Whether a client should be treated as a future prospective client or an existing client may be a matter of interpretation. Many new matters or new clients grow out of and are related to work done for existing clients. For example, suppose a firm has represented an individual in a variety of matters over the years, such that the individual is a regular client of the firm. In the future, the individual might decide to form a business with other individuals, with the law firm representing the entity. Should such an entity be treated as a future prospective client or should it be treated as a regular client because the representation grows out of the representation of a regular client? Should it make a difference if the new matter grows out of work for a major as opposed to a regular client? One test that could be used is to ask whether an existing client has significant involvement in the new matter. If so, the matter should be treated as work for an existing client.

89. See Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1004 (2001) (arguing that "rigid conflicts rules" are detrimental to existing clients).

90. See *id.* at 1002 (allowing prospective waivers prevents a client from being deprived "of counsel when it needs the law firm the most").

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firm were disqualified. Thus, a persuasive choice-of-counsel argument can be made for allowing advance waivers by current prospective clients in order to protect the choice of counsel of existing clients.

The choice-of-counsel argument for general advance waivers can be applied not only to existing clients, but also to current prospective clients who are being asked to sign conflict waivers at the time of engagement.⁹¹ Advocates of general advance waivers argue that if such waivers are not clearly enforceable, firms may refuse to undertake representation of some prospective clients because of concern that the representation of those clients may cause conflicts in the future with the firm's more established (and presumably more lucrative) clients.⁹²

A leading case illustrating the choice-of-counsel argument for upholding advance waivers is *City of Cleveland v. Cleveland Electric Illuminating Co.*⁹³ In *Cleveland Electric*, the law firm of Squire, Sanders & Dempsey had represented Cleveland Electric Company for over sixty-five years when the city of Cleveland asked the firm to handle a bond matter involving the city's competing utility company.⁹⁴ The city was well aware of the law firm's long-time representation of Cleveland Electric Company because of numerous prior dealings with Cleveland Electric; however, it wished to retain the firm's services because it was one of the few firms in Ohio that handled sophisticated bond work.⁹⁵ Squire, Sanders & Dempsey was willing to take on the bond work only if the city waived any objection to future conflicts.⁹⁶ The city had independent advice from its law department and waived its objections to any conflict of interest.⁹⁷ Subsequently, the city moved to disqualify the firm in an

91. *See id.* (touching on the motivation of a current prospective client to sign a waiver).

92. *See id.* (arguing that some firms "may be unwilling to accept the new client if the firm fears . . . it could expose the firm's other clients to the loss of their counsel"); *see also* Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 312 (2000) (discussing that a lawyer may "refuse to represent a client if she believes that the cost of possible future disqualification from representing other clients is too high").

93. 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977).

94. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 197-98 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977).

95. *Id.* at 197-201.

96. *Id.* at 204.

97. *Id.* at 201.

antitrust action brought by the city against Cleveland Electric.⁹⁸ The United States District Court for the Northern District of Ohio denied the motion for disqualification.⁹⁹ In a lengthy opinion, the court held that the city waived any conflict of interest.¹⁰⁰ The court also ruled that the city failed to show that the firm was using confidential information against its interests.¹⁰¹

It should be noted, however, that the choice-of-counsel argument for current prospective clients is less powerful than the case for existing clients. Existing clients have an on-going professional relationship with the firm. As a result, they have invested in the firm's expertise, trust, and client-specific knowledge. By contrast, if a current prospective client cannot retain a particular firm because of a conflict of interest, the prospective client does not lose counsel with whom it has a professional relationship, nor will it incur costs in re-educating new counsel about its legal affairs. Further, a large number of lawyers and firms can provide high quality representation in almost every conceivable matter if a particular firm is unavailable to handle a specific matter. The number of situations in which only one firm will provide the kind of services in question is likely to be extremely small.

Finally, the choice-of-counsel argument can be applied to future prospective clients, as well as to existing clients and current prospective clients.¹⁰² The future prospective client's interest in selection of counsel presents an even less substantial argument in

98. *Id.* at 202.

99. *Cleveland Electric*, 440 F. Supp. at 212.

100. *Id.* at 205.

101. *Id.* at 209. Several other cases support the proposition that firms may refuse to represent prospective clients unless the prospective client agrees to an advance waiver. *See, e.g., Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1102 (N.D. Cal. 2003) (discussing the law firm's refusal to represent First Data unless First Data agreed to an advance waiver allowing the firm to represent Visa in any disputes with First Data). In *Kennecott Copper v. Curtiss-Wright*, the law firm of Skadden, Arps, Slate, Meagher & Flom refused to represent Curtiss-Wright unless Curtiss-Wright waived any conflict that might arise in the future if Curtiss-Wright attempted to acquire any client of the firm. *See Richard W. Painter, Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297-98 (2000) (discussing *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, (S.D.N.Y.) (MacMahon, J.) (Memorandum and Order, Apr. 10, 1978)).

102. *See Jonathan J. Lerner, Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1001 (2001) (arguing that future clients could potentially be "deprived of their counsel of choice").

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support of general advance waivers. Like current prospective clients, they do not have an established relationship with the firm to protect. Moreover, unlike current prospective clients, who have a specific legal matter in which they are seeking representation, future prospective clients present nothing more than an inchoate interest in selection of counsel of their choice, an interest that will only arise at some undetermined time in the future, at which point the interest becomes that of a current prospective client.

While the choice-of-counsel arguments outlined above, particularly on behalf of the firm's existing clients, present a persuasive case for upholding the validity of advance waivers, they do not justify the use of *general* advance waivers. The interests of existing clients, current prospective clients, and future prospective clients in selecting counsel of their choice can be fully protected by a matter-specific waiver rather than a general advance waiver. A waiver signed by a current prospective client in which the prospective client waives all conflicts that might occur in the future with regard to the firm's *existing or future clients*, and that *arise because of the firm's representation of the new prospective client in the particular matter in which representation is sought*, protects the choice of counsel of both the firm's existing and future clients without the breadth of a general advance waiver. This is because the current prospective client waived any conflicts as to existing clients or future clients of the firm that might arise from the firm's undertaking representation of the prospective client in the specific matter for which the prospective client has sought to retain the firm. In particular, if one of the firm's existing or future clients later becomes adverse to the new client in a matter that is unrelated to the subject of representation of the new client, the waiver should protect the existing or future client's interest in retaining the firm in that matter.¹⁰³

In response to this argument, proponents of general advance waivers could claim that a specific waiver of the type discussed above is inadequate to protect the interests of the firm's existing or future clients because those clients would not be protected from conflicts of interest if the firm undertook representation of the current prospective client in another matter in addition to the one for

103. Whether such a matter-specific waiver could include substantially related matters is discussed in Part IV(B) below.

which the waiver was originally sought. While it would be possible to seek a new waiver from a new client as to each new matter for which the firm undertakes representation, seeking a series of waivers is burdensome to both lawyers and clients.¹⁰⁴ Moreover, sophisticated clients ought to be able to sign general waivers at the inception of the relationship and not be forced to sign a waiver every time they seek to engage the firm's services.¹⁰⁵

These arguments have some weight, but ultimately are unpersuasive. The burden on lawyers and clients to execute a waiver for each new matter is likely to be small. Normally a firm will be seeking an advance waiver from a current prospective client when the firm expects to handle only a single matter for the client, or perhaps a very limited number of matters.¹⁰⁶ Thus, the need for additional waivers from such a client should be infrequent. Even in the small number of representations in which the new client decides to expand the relationship by seeking to retain the firm's services in additional matters, the burden of obtaining subsequent waivers seems insubstantial. The firm has already presented the client with a waiver when the representation began.¹⁰⁷ Each new matter would only require an identical waiver, protecting the firm's ex-

104. See Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1002 (2001) (describing the burden which would be placed on clients if asked to execute multiple waivers).

105. See *id.* (noting that requiring sophisticated clients to execute multiple waivers erodes their autonomy).

106. See WILLIAM FREIVOGEL, FREIVOGEL ON CONFLICTS, ADVANCE WAIVERS, http://www.freivogelonconflicts.com/new_page_38.htm (last visited Feb. 23, 2007) (providing a hypothetical situation involving advance waivers) (on file with the *St. Mary's Law Journal*). Freivogel gives the following example at the beginning of his discussion of advance waivers:

The situation is as follows: A lawyer takes on a single piece of business for a very large company that will result in fees totaling \$20,000. *The lawyer has little reason to believe that the company will give the lawyer any other business.* May the lawyer ask the company to waive an objection to future matters in which the lawyer is asked to represent some other client against the company on some completely unrelated matter—even before the original matter is completed?

Id. (emphasis added); see also Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 975-76 (2001) (giving an example of a firm facing disqualification in its representation of a long-standing major client because the firm had recently undertaken representation of a small client in negotiation of a lease).

107. See WILLIAM FREIVOGEL, FREIVOGEL ON CONFLICTS, ADVANCE WAIVERS, http://www.freivogelonconflicts.com/new_page_38.htm (last visited Feb. 20, 2007) (suggesting

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isting and future clients from any conflicts arising from the specific matter that is the subject of representation, which is hardly a burden.¹⁰⁸

The claim that sophisticated clients should be able to execute general advance waivers at the time of initial representation ignores the requirement that a valid waiver be based on the client's informed consent.¹⁰⁹ Informed consent normally requires explanation of the advantages, disadvantages, and alternatives available to the client from whom the waiver is sought.¹¹⁰ A current prospective client might rationally conclude that it would prefer to reserve the right to decide whether to execute waivers of conflict of interest as each matter arises rather than to agree to a blanket waiver that might extend far into the future and apply to any type of matter in which the client might seek the firm's services. The lawyer's obligation to explain alternatives to the client to obtain the client's informed consent to a general advance waiver should require the lawyer to tell the client that the client has a choice either of executing a general advance waiver and thereby avoiding the burden of executing waivers on a case-by-case basis, or of waiting to decide whether to agree to such waivers at the time it decides to seek representation in a particular matter.¹¹¹

that law firms would typically request an advance waiver before the first instance of representation) (on file with the *St. Mary's Law Journal*).

108. *See id.* (listing examples of waiver forms for different purposes).

109. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. c(i) (2000).

110. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. c(i) (2000).

111. If presented with this choice and the minimal cost associated with case-by-case consent, it appears unlikely that many prospective clients would agree to general advance waivers. *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000) (commenting on the advantages of advance consent). None of the published forms reviewed by the author of this Article included such a disclosure. *See* WILLIAM FREIVOGEL, FREIVOGEL ON CONFLICTS, http://www.freivogelonconflicts.com/new_page_38.htm (last visited Feb. 20, 2007) (providing an example of advance waiver) (on file with the *St. Mary's Law Journal*); *see also* D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (offering a model advance waiver form) (on file with the *St. Mary's Law Journal*); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Feb. 22, 2007) (displaying three conflicts waiver examples) (on file with the *St. Mary's Law Journal*).

Moreover, if the client and the firm contemplated a limited relationship when the client originally agreed to a general advance waiver, but the relationship subsequently became more substantial, then a material change of circumstances has occurred.¹¹² The client is now no longer a one-shot client, but rather a client with a continuing relationship with the firm.¹¹³ This continuing relationship leads to a greater feeling of trust and confidence in the firm and greater reliance on the firm's knowledge of the client's business and legal problems.¹¹⁴ Further, if the relationship has become more substantial, it is likely that the client has revealed sensitive confidential information to the firm, and such a material change in circumstance may render the original waiver invalid.¹¹⁵

112. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. 21-22 (2006) (referring to the effect of a material change on the validity of a waiver); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000) (noting that a material change of condition requires the lawyer to obtain new informed consent from the client).

113. The more a new client seeks additional representation, the more the client is becoming a regular client of the firm. See Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297-98 (2000) (characterizing a client with a general retainer as a regular client and a client with a specific retainer as a one-shot client). Requiring the execution of a waiver for each new engagement forces the lawyer and client to renegotiate the waiver, taking into account the changing nature of the relationship. See generally D.C. Bar Ethics Committee, Op. 309 (2001), *Advance Waivers of Conflicts of Interest*, http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (delineating the need for a renegotiated waiver when "'a material change occurs'") (on file with the *St. Mary's Law Journal*). For example, when a new client comes to the firm with what appears to be a one-shot matter, the firm may be unwilling to agree to the representation without a waiver to protect existing clients, and the client may be quite willing to sign a waiver to obtain the counsel of its choice. However, if the client seeks to retain the firm in other matters, the relationship is changing. The client may feel that it has become a more established client and should no longer be asked to waive conflicts of interest. The client could make this point when asked by the firm to sign a waiver for a new matter. In addition, because the client is providing the firm with more business, the firm may be less willing to demand a waiver because the client is moving toward or has achieved the status of regular client. See Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 986 n.58 (2001) (suggesting that a law firm is not likely to ask one of its larger regular clients to sign a waiver).

114. See Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1005 n.134 (2001) (discussing the differences in the level of trust of the firm between new and existing clients).

115. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 21 (2006) (indicating that a client may annul consent if there has been a material change with regard to the circumstances); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (1998)

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The use of the matter-specific type of advance waiver described above rather than a general advance waiver should also be sufficient to protect the interest of current prospective clients in obtaining counsel of their choice.¹¹⁶ If a prospective client is willing to execute a matter-specific waiver that applies to conflicts involving the firm's existing or future clients, then the firm has no reason to turn down the representation to protect its existing or future clients. Indeed, the firm's existing and future clients have greater protection if the firm uses a matter-specific rather than a general advance waiver. Under the Model Rules and the Restatement, an important factor in determining the validity of an advance waiver is the specificity of the waiver.¹¹⁷ By definition, the matter-specific advance waiver is more limited than a general advance waiver; thus, it is more likely that a court will uphold a matter-specific advance waiver if a client challenges an advance waiver in a subsequent matter.¹¹⁸

(emphasizing that an attorney may no longer represent a client if there has been a material change that created a conflict of interest to which there can be no consent).

116. Cf. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Feb. 22, 2007) (categorizing the right of a client to choose counsel as a fundamental right) (on file with the *St. Mary's Law Journal*). See generally D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbare.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (claiming that a law firm's refusal to represent a potential client "would deny the client's choice of a lawyer and would reduce its potential choice of lawyers generally") (on file with the *St. Mary's Law Journal*).

117. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (1998); see Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297 (2000) (explaining that some courts require specificity as to the conflict waived to maintain the validity of the waiver).

118. See Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297 (2000) (claiming that some courts deem nonspecific advance waivers invalid). Indeed, prudent firms in drafting their waivers should consider even more limited forms of waivers. See *id.* at 325 (proposing that advance waivers address with great detail the kinds of matters they are intended to cover). For example, a firm could use a matter-specific waiver limited to protection of existing major clients of the firm (defined as those listed in the waiver or listed on the firm's website, as it may be changed from time to time). This type of waiver is fluid in that it includes clients that will become major clients in the future, but it would not cover all future clients. Such a waiver would have the advantage of protecting the firm's significant business relationships, while doing so with a degree of specificity that would make the waiver more likely to be upheld if challenged. Firms could also consider limiting the waiver to protection of existing clients, eliminating future clients from its scope. Firms should ask themselves whether it is in their economic interest to request

Law firms clearly have an economic self-interest in establishing the validity of general advance waivers. It is much more convenient for a law firm to seek a general advance waiver from a client at the moment of the initial engagement, rather than requesting waivers on a case-by-case basis as conflicts arise. In addition, if such prospective waivers are valid, their use minimizes the likelihood that a firm will be disqualified from representing a client because of an unrelated matter conflict of interest.¹¹⁹ The economic self-interest of law firms, however, is not a sufficient justification for upholding the validity of general advance waivers. Indeed, this is the very type of agency problem that the conflict of interest rules are designed to prevent.¹²⁰ In addition, the economic benefit to firms of the use of such waivers is questionable. Major firms lose business because of conflicts of interest, but they also gain business when they receive clients because other firms have a conflict of interest. If general advance waivers were clearly proper, a particular firm could gain some business because it could reduce the number of its disqualifying conflicts of interest, but the firm would also lose business from other firms that also reduced their disqualifying conflicts by utilizing general advance waivers. In the aggregate, there should be no change in total law firm revenue, although the distribution among firms might change marginally.¹²¹

In summary, the choice-of-counsel argument for upholding general advance waivers is invalid because the interests of existing, current prospective, and future prospective clients of a firm in selecting counsel of their choice is fully protected by a more limited form of waiver—a waiver of conflicts as to existing or future clients

that current prospective clients execute general advance waivers in order to protect non-existent relationships with unknown future prospective clients.

119. Cf. Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273, 277 (1991) (declaring that unrelated matter conflicts of interest often result in a lawyer's disqualification from the matter involved). An unrelated matter conflict occurs when a firm is disqualified from representation of one client because the firm is representing that client's opponent in an unrelated matter. *Id.*; see MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) & cmt. 6 (2006) (noting that an attorney should not represent the opposite party in a case in which a client of his is involved, even in a completely unrelated situation).

120. See Part IV(A) above.

121. In theory, the firms that have the greatest demand for their services should benefit most from the use and validity of general advance waivers. These firms, however, are likely to be the most profitable and therefore most able to afford the marginal loss of revenue that would flow from holding general advance waivers to be invalid.

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growing out of the specific subject matter of the firm's representation of the current prospective client. If the current prospective client seeks to retain the firm in other matters, new matter-specific waivers would need to be executed for each such matter.

B. *As a Matter of Policy, General Advance Waivers That Apply to Substantially Related Matters Should be Invalid*

As discussed previously, the Model Rules and the Restatement are unclear on whether a lawyer may seek an advance waiver of future conflicts of interest in matters that are substantially related to the subject matter of representation of the waiving client.¹²² For several policy reasons, general advance waivers that apply to substantially related matters should be invalid.

First, the policy justification for permitting lawyers to seek general advance waivers of conflicts of interest rests on the interrelated interests of existing clients, current prospective clients, and future prospective clients in being able to retain counsel of their choice.¹²³ Firms often have substantial relationships with existing clients. Because of these relationships, firms may be unwilling to take on some new matters from current prospective clients, absent a waiver of conflicts by the current prospective client, in order to protect the firm's relationship with its existing clients, particularly its major clients. While existing clients of the firm may be surprised and feel wrongfully deprived of the counsel of their choice if a conflict arises with another client of the firm from an unrelated matter, it is doubtful that an existing client will feel unfairly deprived of its counsel if a conflict arises from a substantially related matter.¹²⁴ Clients simply do not have a reasonable expectation of retaining their normal counsel when a conflict involving a substantially related matter arises.

Second, when a waiver of a conflict of interest applies to a substantially related matter, the danger to the waiving client is much

122. See Section III(C) above.

123. See Section IV(A) above.

124. See Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 975-76 (2001) (providing an example of a conflict that surprises an existing client, but one that does not involve a substantially related matter).

greater than when the waiver applies to an unrelated matter.¹²⁵ Waivers of conflicts involving unrelated matters implicate the duty of loyalty, but not the duty of confidentiality, while waivers applicable to substantially related matters involve both the duties of loyalty and confidentiality.¹²⁶ In addition, it is much more difficult for a client to evaluate prospectively the possible impact of an advance waiver of a conflict involving a substantially related matter.¹²⁷ Clients may feel comfortable waiving in advance conflicts involving unrelated matters because they feel confident that the impact on loyalty is unlikely to occur and the impact on confidentiality is non-existent.¹²⁸ The importance of an advance waiver of a conflict involving a substantially related matter is impossible to evaluate without knowing the specific circumstances, particularly the importance of the matters and how closely related they are.

125. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2006). "Matters are 'substantially related' for purposes of [Rule 1.9] if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information . . . would materially advance the client's position in the subsequent matter." *Id.*; *see, e.g.*, *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 229 (7th Cir. 1978) (noting that advance waivers to conflicts involving unrelated matters do not involve the risk that the firm will use confidential information against the waiving client). However, when a conflict involves a substantially related matter, the risk that the firm will use confidential information against the waiving client exists. *See Westinghouse Elec. Corp.*, 588 F.2d at 229 (stating that "[i]n that instance it is impossible to conclude that a client could ever have any reason to desire that information disclosed in confidence should be utilized against him").

126. *See, e.g.*, *Westinghouse Elec. Corp.*, 588 F.2d at 229 (distinguishing disqualification cases based only on loyalty from those that include a possible breach of confidentiality).

127. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006) (stating that the effectiveness of advance waivers is dependent on whether or not the client understands the materials risks involved in granting the waiver). The Comment further notes that an advance waiver is ineffective if it results in a violation of paragraph (b) of Rule 1.7. *Id.* There is an increased likelihood of this type of violation occurring in the case of a conflict involving a substantially related matter. *See id.* 1.7(b) (stating that even in the case of a concurrent conflict of interest, a lawyer may represent an affected client, but only if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and "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").

128. *See* Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1007 (2001) (arguing that "future 'conflicts' will not be totally unknown, and a sophisticated client can readily appreciate the potential impact of agreeing to forego objections to lawyers from the same law firm from being directly adverse in *any unrelated case*").

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Third, conflicts of interest involving unrelated matters often occur, but conflicts involving substantially related matters probably arise much less frequently. Thus, the impact of prohibiting general advance waivers of conflicts involving substantially related matters on choice of counsel is likely to be quite small. In summary, as a matter of policy, general advance waivers should not apply to substantially related matters. In such situations, the expectations of the existing client regarding representation by the firm are significantly diminished, the potential harm to the waiving client is much greater, and the likelihood of occurrence of such a conflict is relatively small.

In Formal Opinion 05-436, the ABA Committee on Ethics and Professional Responsibility considered the enforceability of general advance waivers under the 2002 revision of the Model Rules.¹²⁹ Most of the opinion was devoted to overruling the prior opinion of the committee, Formal Opinion 93-372, which held that that an open-ended waiver would rarely be enforceable.¹³⁰ In Formal Opinion 05-436 the committee found a broader approval of open-ended waivers in Comment 22 to Model Rule 1.7:

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

129. See generally ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005) (addressing informed consent and future conflicts of interest).

130. See *id.* (overruling ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993)). In Formal Opinion 93-372, the committee stated:

Given the importance that the Model Rules place on the ability of the client to appreciate the significance of the waiver that is being sought, it would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993). Formal Opinion 93-372 went on to indicate that even identification of the potential adverse party might not be sufficient; in some instances, depending on the significance of the matter, identification of the nature of the matter might also be necessary. *Id.*

related to the subject of the prior representation. Thus, Opinion 93-372 is no longer consistent with the Model Rules.¹³¹

In the course of the opinion the committee discussed the language in Comment 22 referring to the consent being “limited to future conflicts unrelated to the subject of the representation.”¹³² The committee stated:

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.¹³³

Thus, the committee appears to take the view that general advance waivers cannot include consent to conflicts involving substantially related matters.¹³⁴

Similarly, the District of Columbia Bar Ethics Committee in Opinion 309 decided that advance waivers were generally ethically permissible, so long as they were limited to matters that were not substantially related to the subject matter of the representation.¹³⁵ The opinion stated: “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.”¹³⁶

However, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics in Opinion 2006-01 took a somewhat different approach to the issue of the validity of a general advance waiver that applied to conflicts involving substan-

131. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005).

132. *Id.*

133. *Id.*

134. *See id.* (analyzing “unrelated to” as used in Comment 22 to not include not “substantially related to”).

135. D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbare.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (on file with the *St. Mary's Law Journal*).

136. *Id.*

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tially related matters.¹³⁷ The committee concluded: “At least for a sophisticated client, blanket advance waivers and advance waivers that include substantially related matters (with adequate protection for client confidences and secrets) also are ethically permitted.”¹³⁸

The New York Committee outlined the following requirements for such a waiver to be valid:

We conclude here that a law firm may ethically request an advance waiver that includes substantially related matters if the following conditions are met: (a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation and opposite sides in a starkly disputed transactional matter; (c) the law firm is able to ensure that the confidences and secrets of one client are not shared with, or used for the advantage of, another client; (d) the conflict is consentable under the tests of DR 5-105(C); and (e) special consideration is given to the other factors described in Formal Opinion 2001-2.¹³⁹

It appears that no case has directly decided the issue of whether a general advance waiver covering substantially related conflicts is

137. Ass’n of the Bar of the City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Feb. 22, 2007) (on file with the *St. Mary’s Law Journal*). The New York City opinion was decided under the New York Code of Professional Responsibility, which does not contain a Comment similar to Comment 22 to ABA Model Rule 1.7. *See id.* (citing the New York Code of Professional Responsibility as support for the opinion).

138. *Id.*

139. *Id.* In Opinion 2001-02, the committee outlined factors that a lawyer should consider in deciding whether to undertake representation of multiple clients either in unrelated matters or in the same matter. The committee concluded that these factors were also relevant to the issue of whether a lawyer could seek an advance waiver of conflicts involving substantially related matters:

In Formal Opinion 2001-2, we articulated a number of factors that a lawyer should consider in determining whether the lawyer can represent multiple clients with differing interests in unrelated matters or in the same matter: (a) the nature of the conflict and the possibility of an adverse effect on the exercise of the lawyer’s independent professional judgment; (b) the likelihood that client confidences or secrets in one matter will be relevant to the other representation; (c) the ability of the lawyer or law firm to ensure that confidential information of the affected clients will be preserved, including through screening and other information-control devices; (d) the sophistication of the client and the client’s ability to understand the reasonably foreseeable risks of the conflict; and (e) if the firm is still representing the waiving client when the conflict arises, whether the lawyer’s relationship with the clients is such that the lawyer is likely to favor one client over another.

Id.

valid. The case that comes closest to addressing the issue is *Westinghouse Electric Corp. v. Gulf Oil Corp.*,¹⁴⁰ an antitrust suit brought by Westinghouse against various parties in the uranium industry claiming that they conspired to fix prices.¹⁴¹ Two of the defendants in the case were Gulf Oil Corporation and United Nuclear Corporation (UNC).¹⁴² The law firm of Bigbee, Stephenson, Carpenter & Crout represented UNC in the litigation.¹⁴³ From 1971 to 1976 the Bigbee firm performed substantial services for Gulf with regard to its uranium operations in New Mexico.¹⁴⁴ Gulf moved to disqualify the Bigbee firm based on this prior representation.¹⁴⁵ The Seventh Circuit concluded that the firm's prior representation of Gulf was substantially related to the current litigation and that Gulf and UNC were adverse in this litigation.¹⁴⁶ The court then addressed the issue of whether Gulf had waived the conflict:

UNC now claims that in 1971, as Gulf began development of its New Mexico properties and sought to retain the Bigbee firm, Gulf was informed that the Bigbee firm had a prior relationship with UNC, which like Gulf was involved in the mining of uranium. UNC further claims that Bigbee informed Gulf that due to this relationship the Bigbee firm could only represent Gulf if Gulf consented that should a conflict arise between Gulf and UNC, Bigbee would not be precluded from representing UNC. Although this forms the basis of UNC's argument of waiver, it also argues that the waiver was subsequently reaffirmed by Gulf on two other occasions.¹⁴⁷

The court rejected this waiver argument based on the policy of protecting clients against the adverse use of confidential information:

Disqualification based on the potential for abuse of confidential information, however, involves different considerations which preclude the effectiveness of consent, particularly a vague, general consent given or implied prior to the threat of disclosure or adverse

140. 588 F.2d 221 (7th Cir. 1978).

141. *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 222 (7th Cir. 1978).

142. *Id.*

143. *Id.*

144. *Id.* at 222-23.

145. *Id.* at 222.

146. *Westinghouse Elec.*, 588 F.2d at 227.

147. *Id.*

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litigation. . . . Accordingly, we hold that a simple consent by a client to representation of an adverse party is not a defense to that former client's motion for disqualification, such as the one under review here, based on the possibility that confidential information will be used against the former client.¹⁴⁸

The holding of *Westinghouse* is unclear. The case could be read narrowly to mean that an advance waiver permitting a lawyer to undertake adverse representation in a substantially related matter will not be valid when based on "a vague, general consent given or implied prior to the threat of disclosure or adverse litigation."¹⁴⁹ On this reading, an advance waiver that referred specifically to substantially related matters and perhaps included protection of the client's confidential information by erecting an ethical screen to prevent the use of the client's confidences might be permissible. However, the decision could be read more broadly to preclude advance consent that involves the potential for adverse use of a client's confidences.¹⁵⁰ The facts of the case support the narrow reading, but the language supports a somewhat broader statement of the holding.¹⁵¹

In summary, based on policy considerations and what appears to be the view of most authorities, general advance waivers that apply to substantially related conflicts should be held to be invalid.

There is at least one situation in which an advance waiver of conflicts should as a matter of policy apply to a substantially related matter—conflicts arising from representation by a firm of multiple clients in a single matter. Lawyers are often asked to represent co-clients in a single matter. Such requests could occur in litigation, when a lawyer is asked to represent co-plaintiffs or co-defendants,¹⁵² or it could occur in transactional matters.¹⁵³ In such situations the parties typically share common interests even though the

148. *Id.* at 229.

149. *Id.*

150. *See id.* (referring to the "potential" and the "possibility" of use of confidential information).

151. The facts of the case involved a waiver that allowed the firm to represent UNC against Gulf, but it did not refer to substantially related matters or to the use of confidential information. *Westinghouse Elec.*, 588 F.2d at 227. While the opinion refers to a "vague, general consent," it also expresses concern about the potential for use of confidential information. *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 222 (7th Cir. 1978).

152. *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 139-47 (3d ed. 2004) (discussing codefendants in criminal

possibility exists that an actual conflict will develop in the future. Provided the parties are not directly adverse initially, multiple representation in such matters is generally permissible with the informed consent of the clients confirmed in writing.¹⁵⁴ If a conflict actually develops, however, the lawyer must withdraw from representation and cannot represent either client against the other without the informed consent of both.¹⁵⁵ To avoid disqualification from representation of both parties if an actual conflict develops, a lawyer might seek an advance waiver before accepting the engagement, allowing the lawyer to represent one of the parties in the event an actual conflict arises.

For example, in *Zador Corp. v. Kwan*,¹⁵⁶ the Heller law firm represented Zador Corporation and Kwan as co-defendants in real estate litigation.¹⁵⁷ Each of the defendants consented to multiple representation and signed a detailed consent agreement explaining the advantages, disadvantages, and risks of multiple representation.¹⁵⁸ The consent agreement provided that in the event a conflict developed between the defendants, the firm would be allowed to continue representing the corporate defendant, Zador, and its affiliated companies, and that Kwan would not seek to disqualify the firm.¹⁵⁹ Subsequently, a conflict developed; Kwan retained separate counsel and moved to disqualify the Heller firm.¹⁶⁰ Reversing the trial court, the court of appeals concluded that the mo-

cases); *id.* at 303-23 (explaining representation of multiple plaintiffs and defendants in civil cases).

153. *See id.* at 461-68 (detailing multiple representation in business transactions); *id.* at 509-25 (discussing representation of husband and wife in estate planning).

154. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2006) (stating that absent certain concurrent conflicts of interest, "a lawyer may represent a client if . . . each affected client gives informed consent, confirmed in writing").

155. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2006) (stating that "[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 gives informed consent, confirmed in writing").

156. 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 1995).

157. *Zador Corp. v. Kwan*, 37 Cal. Rptr. 2d 754, 756 (Cal. Ct. App. 1995).

158. *Id.* at 756-57.

159. *Id.* at 756.

160. *Id.* at 757.

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tion to disqualify should be denied because Kwan consented to the firm's representation of Zador in the event of a conflict.¹⁶¹

Enforcement of a provision allowing a firm that represents co-clients to continue to represent one of the clients if a conflict develops is sound as a matter of policy. Specific advance waivers used in connection with representation of co-clients differ in several fundamental respects from general advance waivers of conflicts arising from substantially related matters.¹⁶² First, a general advance waiver of conflicts of interest in substantially related matters does not protect significant client interests in selecting counsel of their choice. As discussed earlier in this section, existing clients of a firm do not have a reasonable expectation of using their regular counsel when that counsel has a conflict arising from representation of another client in a substantially related matter. Specific advance waivers in connection with representation of co-clients, however, do protect significant client interests in retaining counsel of their choice. If such waivers are not permitted, when a conflict arises in joint representation, the firm must withdraw from representation of both clients unless both consent.¹⁶³ Such consent will often not be forthcoming at the time the conflict develops, either because of tactical reasons, emotions, or both. If such waivers are permitted, however, the firm will be allowed to continue to represent the cli-

161. *Id.* at 763-64; see *In re Rite Aid Corp. Secs. Litig. v. Grass*, 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001) (mem.) (relying on the provision in the engagement agreement to deny the motion to disqualify). This case was a securities class action against Rite Aid and several of its executives. *Rite Aid*, 139 F. Supp. 2d at 651. The general counsel of Rite Aid retained the Ballard Spahr Andrews & Ingersoll law firm to represent Rite Aid and Martin L. Grass, one of Rite Aid's executives. *Id.* at 652. Ballard Spahr sent Grass an engagement letter providing that if a conflict developed, the firm would withdraw from representation of Grass and would continue on behalf of Rite Aid. *Id.* at 652-53. When a conflict developed, the firm withdrew from representation of Grass, who then moved to disqualify the firm. *Id.* at 654. Relying on the provision in the engagement agreement, the court denied the motion. *Id.*

162. See D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (considering the propriety of using advance waivers) (on file with the *St. Mary's Law Journal*). The committee noted that in the case of waivers involving co-clients, the waiver should be considered to be more in the nature of a current waiver because the parties are known. *Id.* n.3.

163. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2006) (stating that "[o]rdinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails"); see also *id.* 1.9(a) (precluding representation against a former client in the same or substantially related matter without that client's consent).

ent specified in the waiver. Thus, upholding the validity of such waivers protects the interest of one of the joint clients in retaining counsel of its choice.

Moreover, permitting the use of advance waivers in co-client situations even protects the choice-of-counsel interest of the client who waives representation in the event of a conflict. If such waivers are not allowed, a firm may decline joint representation of co-clients because of the concern that the firm would be disqualified from representation of both clients should a conflict develop. A common situation involves joint representation of a company and corporate officers or employees.¹⁶⁴ If advance waivers allowing the firm to represent the company in the event a conflict develops are not permitted, firms will likely refuse to represent the officers or employees.¹⁶⁵ If such waivers are permitted, the firm can undertake joint representation with reasonable confidence that it could continue to represent the company if a conflict develops.¹⁶⁶

Second, the use of general advance waivers of conflicts involving substantially related matters poses the risk that lawyers in the firm will intentionally or inadvertently use confidential information against the waiving client in a future matter. In addition, it is difficult, if not impossible, for the waiving client to evaluate this risk.¹⁶⁷ This is because the client has no way of knowing the importance of the future matter, how closely related the matters are, and the extent to which the client has imparted confidential information to

164. See, e.g., Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2004-02 (2004), http://www.nycbar.org/Publications/reports/print_report.php?rid=240&searchterm=2004-02 (last visited Mar. 23, 2007) (explaining that prospective waivers are most commonly sought in cases "from an employee client regarding the ability of corporate counsel to continue representing the corporate client in the event an actual or potential conflict develops") (on file with the *St. Mary's Law Journal*).

165. See *id.* (discussing the advantages and disadvantages to corporate employees of agreeing to such a waiver).

166. See *id.* (suggesting structuring options when "contemplating multiple representation"). For example, "[s]uch structuring may include obtaining prospective waivers of conflict, contractually limiting representation to minimize the possibility of conflicts, having a written understanding with regard to confidential information learned during the representations, and providing for co-counsel or shadow counsel." *Id.*

167. See Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 MICH. L. REV. 1074, 1082 (1981) (discussing that a client who issues a prospective waiver "cannot know what confidences he will in the future disclose").

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the firm.¹⁶⁸ The situation is different with regard to specific waivers of conflicts arising from joint representation. Here, the possible adverse party and the nature of the matter are known and limited. The client is in a much better position to evaluate the risk that any information imparted to the attorney will be used against the waiving client. Moreover, in the joint client setting, the waiving client has a diminished expectation of confidentiality.¹⁶⁹ The joint client exception to the attorney-client privilege is well established.¹⁷⁰ Thus, any information that either client gives to the attorney is the subject to discovery by the other.

Case law¹⁷¹ and ethics opinions¹⁷² are in agreement that lawyers may ethically seek advance consent to represent a co-client if a future conflict develops between jointly-represented clients. Consent to such representation, however, would not be sufficient to allow the firm to actually use confidential information against the former co-client.¹⁷³ In order to be able to use information received from

168. See *id.* (detailing the future unknown matters a client cannot foresee when executing an advance waiver).

169. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 30 (2006) (recognizing the joint client exception to the attorney-client privilege); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(2) (2000) (discussing that the attorney-client privilege for co-clients does not extend to "subsequent adverse proceedings between them").

170. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 30 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(2) (2000); see *Zador Corp. v. Kwan*, 37 Cal. Rptr. 2d 754, 759 (Cal. Ct. App. 1995) (relying on the joint client exception to the privilege in upholding the client's consent to firm's representation of the other codefendant in real estate litigation).

171. See, e.g., *In re Rite Aid Corp. Secs. Litig. v. Grass*, 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001) (mem.) (upholding consent that allowed firm to continue to represent corporation after conflict developed with corporate executive, who was a co-client); *Zador Corp. v. Kwan*, 37 Cal. Rptr. 2d 754, 763-64 (Cal. Ct. App. 1995) (finding waiver where party consented to representation of co-client "notwithstanding any adversity" that developed").

172. See Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Comm., Formal Op. 471 (1992) (ruling that a firm may ethically seek consent to represent single codefendant if a conflict develops); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2004-02 (2004), http://www.nycbar.org/Publications/reports/print_report.php?rid=240&searchterm=2004-02 (last visited Feb. 22, 2007) (permitting firm that represents corporation and constituents in government investigation to seek advance waiver allowing firm to continue to represent corporation only if conflict develops) (on file with the *St. Mary's Law Journal*).

173. See *Elliott v. McFarland Unified Sch. Dist.*, 165 Cal. App. 3d 562, 568 (Cal. Ct. App. 1985) (refusing to disqualify firm where party gave written consent to continued representation of co-client if conflict arose). The court stated that the consent only waived the presumption of disqualification based on a substantial relationship between the matters, but not the client's right to seek disqualification based on actual receipt of confidential

one co-client against the other after a dispute develops, the lawyer would need to disclose in the advance waiver that any communications between co-clients and their counsel are not privileged because of the joint client exception to the attorney-client privilege,¹⁷⁴ and the lawyer would need to obtain specific consent from the co-client to use any information received from the client in any dispute between the co-clients.¹⁷⁵

Conflicts involving co-clients represent the major exception to the principle that advance waivers should not apply to substantially related matters. However, it is possible that other situations could also justify such an exception.¹⁷⁶

information that was relevant to the current representation. *Id.* at 573. However, the client “offered no substantial evidence that it had imparted confidential information to [the firm] on this case.” *Id.* at 573.

174. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. 18 & 30-31 (2006) (discussing the need for disclosure to co-clients of the joint client exception to the attorney-client privilege).

175. See MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (2006) (prohibiting a lawyer from using or disclosing confidential information “except as these Rules would permit or require,” which would include the client’s informed consent to use or disclosure pursuant to Rule 1.6(a)).

176. Two other situations present possible candidates for allowing advance waivers of conflicts involving substantially related matters—“beauty contests” and representation by local counsel. Beauty contests involving prospective clients are now covered by Model Rule 1.18(d). In jurisdictions that have not adopted the Model Rules, it is reasonable as a matter of policy to allow law firms to use advance waivers that substantially follow the provisions of Model Rule 1.18. See Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-02 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=480&searchterm=2006 (last visited Mar. 4, 2007) (describing “beauty contest” scenarios and discussing circumstances under which attorney or firm may represent a party adverse to a prospective client in a beauty contest) (on file with the *St. Mary's Law Journal*). Conflicts involving local counsel present a less convincing case for allowing an advance waiver of substantially related conflicts. Local counsel could reasonably seek an advance waiver of any unrelated conflict arising from the representation by local counsel, but extending the waiver to substantially related matters seems unnecessary as a matter of policy. See generally The State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1989-115 (1989), http://calbar.ca.gov/calbar/html_unclassified/ca89-115.html. (last visited Feb. 20, 2007) (discussing propriety of an advance waiver executed in favor of local counsel, but warning against improprieties where local counsel's involvement increases and consent becomes less informed) (on file with the *St. Mary's Law Journal*).

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C. *Informed Consent to a Waiver Requires That Lawyers Seeking Advance Waivers Should Provide More Than De Minimis Disclosures*

Under the ABA Model Rules, any prospective waiver of conflicts of interest must be based on the informed consent of the client¹⁷⁷ and must be confirmed in writing.¹⁷⁸ In fact, however, when seeking prospective waivers of conflicts of interest, it appears that lawyers typically give the requirement of informed consent little more than lip service. The evidence to support this observation comes from the recommended waiver forms that have been issued by some ethics advisory committees.¹⁷⁹ Appendix A contains

177. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) & cmt. 22 (2006) (stating that "[w]hether 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 Rule 1.7]"). The Restatement also requires informed consent by a client to a conflict of interest, but does not impose a writing requirement. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122(1) & cmt. d (2000). Jurisdictions that have not adopted the Model Rules have largely similar requirements. See, e.g., CAL. RULES OF PROF'L CONDUCT R. 3-310(C) (1992) (requiring informed written consent of clients to avoid potential or actual adverse interests); N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-105(C) (2002) (allowing simultaneous representation following full disclosure of advantages and risks, as well as the consent of the clients). Ethics opinions on advance waivers affirm the need for informed consent by the client. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005) (discussing informed consent of clients to potential future conflicts of interest and citing Comment 22 from Model Rule 1.7); D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (commenting that although advance waivers are not prohibited, they must still meet the overriding requirement of informed consent) (on file with the *St. Mary's Law Journal*); Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Comm., Formal Op. 471 (1992) (noting that firms may seek advance consent from two clients given that the firm can competently represent both clients and both clients provide informed written consent); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Feb. 22, 2007) (permitting advance waivers provided the lawyer makes appropriate disclosures and the client is able to give informed consent) (on file with the *St. Mary's Law Journal*).

178. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2006) (requiring that informed consent given by clients must be confirmed in writing). *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122(1) (2000) (failing to adopt the requirement of a writing confirming client consent).

179. D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (on file with the *St. Mary's Law Journal*); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Feb. 22, 2007) (on file with the *St. Mary's Law Journal*).

waiver forms suggested by the New York City Bar Association in Opinion 2006-01. Appendix B contains the waiver form recommended by the District of Columbia Bar. These waivers discuss with reasonable thoroughness the scope of the waiver—the types of clients covered by the waiver, whether the waiver applies to litigation, and whether the waiver applies to substantially related matters. However, informed consent ordinarily requires lawyers to discuss with the clients the advantages, disadvantages, and alternatives to the proposed course of conduct.¹⁸⁰ The typical waiver does not provide such information.

It is possible that lawyers have personal discussions with their clients in which they explain in depth various aspects of prospective waivers. If such discussions occur, waivers like the ones recommended by the New York City and District of Columbia bar associations represent only part of the consent process, memorializing personal discussions that have already occurred. In many situations, however, lawyers probably have minimal or no discussion with their clients about proposed waivers.¹⁸¹ The waiver may simply be presented to the client as part of the engagement agreement with a cover letter inviting the client to inquire if the client has any questions. It is important to note that Model Rule 1.0 Comment 6 indicates that absence of personal discussion between lawyer and client about the ramifications of consent to a conflict of interest poses the risk that the waiver will be invalid:

A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person

180. See MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2006) (noting that informed consent denotes discussion of both "material risks of and reasonably available alternatives to the proposed course of conduct"); see also *id.* 1.0 cmt. 6 (discussing the concept of informed consent in greater detail); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. c(i) (2000) (commenting that the information provided should normally address many issues, including material risks and alternative courses of action).

181. See, e.g., *IBM v. Levin*, 579 F.2d 271, 282-83 (3d Cir. 1978) (holding that the law firm failed to prove that its client consented to a conflict after full disclosure when the alleged consent occurred during a telephone call that took no more than three minutes); *Fla. Ins. Guar. Ass'n, Inc. v. Carey Canada, Inc.*, 749 F. Supp. 255 (S.D. Fla. 1990) (holding that a letter notifying the firm's client of a conflict in general terms was insufficient to meet the requirement of consultation).

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assumes the risk that the client or other person is inadequately informed and the consent is invalid.¹⁸²

Suppose the lawyer seeking the waiver advises the client to seek independent advice about the implications of the waiver. In some instances the client may take the advice and actually receive such advice, particularly where the client is an entity that has in-house counsel. Whether the client is independently represented by counsel with regard to the waiver is a significant factor in determining whether the client has given informed consent.¹⁸³ Comment 6 to Model Rule 1.0(k) provides:

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.¹⁸⁴

In preparing waiver forms, however, lawyers cannot assume that clients will be independently represented, so the forms should include full disclosure of relevant information. Moreover, some courts have held the fact the client is sophisticated and is independently represented does not relieve the lawyer of the obligation to make the disclosures necessary to obtain informed consent.¹⁸⁵ In

182. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2006).

183. *See id.* 1.7 cmt. 22 (determining that if the client is sophisticated, general consent may be effective if "the client is independently represented by other counsel in giving consent"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000) (determining that general consent to all conflicts is ineffective unless the client "had the opportunity to receive independent legal advice about the consent").

184. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2006) (emphasis added).

185. *See Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356, 1358 (N.D. Ga. 1998) (noting that although the language used in a letter is important to determine the scope of consent, it "does not definitively circumscribe the scope of the lawyer's professional responsibility"); *see also Woolley v. Sweeney*, No. 3:01-CV-1331-BF, 2003 U.S. Dist. LEXIS 8110, at *34 (N.D. Tex. May 13, 2003) (noting that the Fifth Circuit does not "allow different levels of disclosure depending on the sophistication of the client"). *But see Fisons Corp. v. Atochem N. Am., Inc.*, No. 90 Civ. 1080, 1990 WL 180551, at *5 (S.D.N.Y. Nov. 14, 1990) (holding that where a client is sophisticated, notification of a potential conflict is sufficient to meet the requirement of disclosure necessary to obtain informed consent).

addition, in some instances a lawyer would have an obligation of disclosure to a client from whom a waiver was sought even if the client were represented by counsel. For example, advance waivers state or clearly imply that conflicts with other clients have not yet arisen, but may arise in the future. If the lawyer were aware of a looming conflict with an existing client, the lawyer would have an obligation to disclose this conflict to the client from whom a waiver was sought, and could not simply rely on the client's consent to an advance waiver. The District of Columbia Ethics Committee addressed this issue in Opinion 309:

[T]he 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.¹⁸⁶

Representation by independent counsel in this situation would not cure the problem because independent counsel would be unaware of the specific looming conflict.

In some instances, it may be impossible for the lawyer to make this disclosure because the lawyer owes a duty of confidentiality to the other client involved in the conflict, and that client is unwilling to consent to disclosure of the information necessary to obtain the informed consent of the client from whom a waiver is sought.¹⁸⁷

Even when a lawyer knows that a prospective client from whom a waiver is sought is independently represented, prudent lawyers will go beyond the bare-bones forms promulgated by bar associations and make appropriate disclosures of the advantages, disadvantages, and alternatives available to the waiving client. Such disclosures will further support the validity of the waiver. What specific disclosures should lawyers make in order to obtain the informed consent of their clients to prospective waivers? The disclosures fall into five categories: (1) reasons and advantages; (2)

186. D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbarethics.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (on file with the *St. Mary's Law Journal*); see also *City of El Paso v. Salas-Porras Soule*, 6 F. Supp. 2d 616, 625 (W.D. Tex. 1998) (finding a general waiver letter invalid when the individual from whom the waiver was sought was not informed that he, members of his family, and his family-owned corporations would be subject to litigation). The court stated in *Salas-Porras Soule* that it "does not accept that a sophisticated businessman . . . would knowingly and willingly do such a thing." *Id.* at 625.

187. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 19 (2006).

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scope; (3) disadvantages; (4) alternatives; and (5) advice of independent counsel.

First, a lawyer seeking an advance waiver should explain to the client both the reasons for the waiver and any advantages to the client from agreeing to the waiver.¹⁸⁸ The reason the lawyer is seeking the waiver is to prevent disqualification of the lawyer's firm from representing other clients—existing, future, or both—should a conflict arise with any matter the firm is handling for the client from whom the waiver is sought. This reason, however, is a disadvantage rather than a benefit to the waiving client. The waiver protects the interests of existing or future clients, but not those of the waiving client. Nonetheless, the lawyer could point out at least two potential advantages to the waiving client.

The first advantage is that the client may be the beneficiary of waivers signed by other clients, should the waiving client ask the firm to represent it in a matter in which another client of the firm is the adverse party. The second advantage is that the use of waivers should reduce the number and scope of disqualification motions, thereby diminishing legal fees associated with such motions; all clients benefit when legal fees for disqualification motions are minimized.

Finally, in some situations the firm may be unwilling to represent a prospective client unless the client agrees to an advance waiver. Whether the firm can honestly claim that this advantage exists depends on the firm's policies regarding new engagements and the scope of the waiver. For example, if the firm has a policy requiring advance waivers from prospective clients of any conflicts with major clients of the firm listed on the firm's website, the disclosure to the waiving client could point out that the firm will not be available to represent the client unless it agrees to a waiver of conflicts as to major clients of the firm. If the firm has no such policy but simply presents waivers to prospective clients as part of its engagement agreement hoping the clients will agree, but with the willingness to strike or eliminate the waiver if the client objects, then the firm

188. *See id.* 1.0 cmt. 6 (explaining that informed consent ordinarily requires “a disclosure of the facts and circumstances giving rise to the situation . . . [and] the material advantages and disadvantages of the proposed course of conduct.”); *see also* 1.7 cmt. 18 (providing that “each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client”).

cannot truthfully represent to the client that it will not accept the representation unless the client agrees to the waiver.¹⁸⁹

Second, the lawyer should disclose the scope of the waiver.¹⁹⁰ In broad terms, the scope of the waiver turns on the description of the clients protected by the waiver and the matters that are covered by the waiver. The broadest form of waiver, a general advance waiver, protects (1) all clients of the firm, both existing and those that the firm agrees to represent in the future, along with the affiliates of any such clients as to (2) conflicts arising from any matter in which the firm has represented, is representing, or will represent the waiving client or any of its affiliates, including matters that are substantially related to any such matter. The narrowest form of advance waiver would protect a named client of the firm from disqualification of the firm because the firm is representing the waiving client in a specific matter. If the waiver applies to litigation, it should clearly disclose that fact.¹⁹¹ A mere statement that the waiver applies to a situation in which there is adversity may not be sufficient.¹⁹²

189. Suppose the waiver form states that the firm's engagement is "conditioned" on the client's agreement to the waiver. Such a statement does not constitute a representation that the firm will only accept the engagement if the client agrees to the waiver. The waiver is a condition of representation presented to the client along with the other terms of the engagement, all of which are subject to negotiation. While a lawyer who is seeking a waiver has an obligation to obtain the informed consent of the client, that obligation does not reasonably include a duty to inform a client whether the firm would be willing to forego or renegotiate a waiver, just as a lawyer who would be willing to reduce his hourly rate to attract a new client would not be required to disclose this fact to the client when presenting the client with the engagement agreement. Matters such as the amount of fees or the scope of advance waivers are subject to negotiation. A client who is presented with a broad advance waiver, particularly one who is independently represented, could make further inquiries about the meaning of the condition. Does the firm require all prospective clients to agree to this condition? If the client refuses to agree to an advance waiver, will the firm accept the engagement? Is there a more limited form of advance waiver that the firm might accept, for example, the matter-specific advance waiver of conflicts discussed in Part IV above.

190. *E.g.*, *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356, 1359-60 (N.D. Ga. 1998) (determining that an agreement that permitted "future directly adverse litigation against one's present client . . . must identify that possibility . . . at least by . . . including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information").

191. *See id.* (refusing to enforce the waiver because the waiver simply mentioned adverse matters, not adverse litigation).

192. *See id.* (interpreting waiver not to apply to litigation because it referred to "adverse matter" without specifically mentioning litigation). *But see Zador Corp. v. Kwan*, 37

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Between these poles, firms face a wide range of choices about the scope of waivers that they present to their clients. Generally, the more specific the waiver, the greater the likelihood that the waiver will be upheld.¹⁹³ For example, the broadest form of waiver described above would probably be invalid because it would allow adverse representation in any substantially related litigation matter. Even the New York City Opinion 2006-01, which is quite generous in its approval of advance waivers, only permits advance waivers of conflicts involving substantially related matters in negotiated transactions that are not “starkly disputed.”¹⁹⁴ If the waiver applies to substantially related matters, the waiver should provide for screening procedures to protect the confidentiality of client information.¹⁹⁵

Cal. Rptr. 2d 754, 763 (Cal. Ct. App. 1995) (holding that waiver of any conflict arising from “any adversity” between two clients included litigation).

193. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006) (noting that the effectiveness of advanced waiver is more likely where the client consents to a waiver involving “a particular type of conflict with which the client is already familiar”).

194. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Apr. 17, 2007) (on file with the *St. Mary's Law Journal*).

195. See MODEL RULES OF PROF'L CONDUCT R. 1.0(k) (2006) (defining the term “screened” for purposes of the ABA Model Rules); *id.* 1.0 cmt. 9 (explaining the purpose of screening and providing several suggestions for law firms to follow in screening lawyers who have been personally disqualified due to conflicts of interest); see also Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-02 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Feb. 20, 2007) (describing screening procedures for beauty contests) (on file with the *St. Mary's Law Journal*). A distinction exists between an advance waiver that allows the firm to represent another client in a matter that is substantially related to the representation of the waiving client, with protection of the waiving client's confidential information through screening, and an advance waiver that allows the firm to actually use or disclose information. See D.C. Bar Ethics Committee, Op. 309 n.10 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (noting that “[w]aivers permitting the adverse use or disclosure of confidential information” are disfavored “[b]ecause of their considerable potential for mischief”) (on file with the *St. Mary's Law Journal*). The latter is a much more extreme form of waiver. If the waiver is unclear with regard to the use or disclosure of confidential information, it should be construed to prohibit such actions. See *Westinghouse Elec. Corp. v. Gulf Oil.*, 588 F.2d 221, 229 (7th Cir. 1978) (observing that a general form of advanced waiver was unlikely to be held effective with regard to the potential for the use of confidential information). In some limited situations, however, such as conflicts involving co-clients, a clear waiver that allows use of information obtained during the joint representation should be permitted. See Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Comm., Formal Op. 471 (1992) (noting that the attorney-client privilege does not prevent disclosure of otherwise privileged information to a former

Third, the lawyer should disclose the disadvantages of the waiver to the client.¹⁹⁶ The major disadvantage is that a significant conflict of interest involving the firm's representation of another client against the waiving client may develop in the future, and the waiving client may feel uncomfortable with the continued loyalty of the firm to the waiving client.¹⁹⁷ A client has the right to revoke a waiver as to future matters, but whether the revocation will be effective as to a matter which the firm has undertaken depends on a number of factors.¹⁹⁸ If there has been substantial reliance on the waiver, the likelihood that revocation will be effective as to a matter that the firm has undertaken is substantially diminished.¹⁹⁹ Thus, the waiving client may face a difficult choice of either discharging the firm from any representation that is ongoing or continuing the representation with diminished confidence in the firm's loyalty to the client. If the waiver applies to a substantially related matter, a risk exists that client confidences could be used against the client, although this risk can be significantly reduced through the institution of appropriate screening procedures.

Fourth, if the client is unwilling to agree to the waiver and if the firm requires the waiver before undertaking representation, the only alternative available to the client is to seek representation from another firm.²⁰⁰ While many firms may have the talent and

jointly represented client if the information was exchanged between the attorney and another former jointly represented client during the existence of the joint representation); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2004-02 (2004), http://www.nycbar.org/Publications/reports/print_report.php?rid=240&search_term=2004-02 (last visited Feb. 20, 2007) (requiring attorneys to have a clear understanding with jointly represented clients with regard to privileged and confidential information) (on file with the *St. Mary's Law Journal*).

196. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18 (2006) (referring to the need for disclosure of the "risks involved" in consent to a conflict of interest); see also *id.* 1.7 cmt 22 (discussing the need for disclosure of "material risks").

197. See *id.* 1.7 cmt. 1 (maintaining that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client").

198. See *id.* 1.7 cmt. 21 (explaining a client's right to revoke a waiver).

199. See *id.* (stating that a client's right to revoke an advanced waiver may not be exercised when the revocation would result in "material detriment" to other clients or the attorney); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. f (2000) (determining that the right to revoke an advanced waiver depends on "whether material detriment to the other client or lawyer would result").

200. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 19 (2006) (explaining that "the alternative to common representation can be that each party may have to obtain separate representation").

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capacity to handle the client's matter, by refusing to agree to the waiver the client is unable to retain counsel of its choice. In addition, other firms may also require waivers similar to the one used by the firm.

Fifth, the lawyer should inform the client that the client should consider obtaining the advice of independent counsel with regard to any aspects of the waiver.²⁰¹ If the prospective client is a corporation with in-house counsel, the firm could require in-house counsel to review the waiver and to provide written consent.

V. THE JUDICIAL ROLE IN EVALUATING THE ENFORCEABILITY OF GENERAL ADVANCE WAIVERS

A. *Courts Have Rarely Encountered General Advance Waivers and No Decision Has Clearly Ruled on Their Enforceability. Client or Matter-Specific Advance Waivers, However, Are Likely to be Upheld by Courts*

A number of cases have considered the validity of advance waivers.²⁰² Courts very rarely encounter general advance waivers, and it appears that no decision has either clearly upheld or clearly invalidated a general advance waiver.²⁰³ One of the leading cases

201. See, e.g., *id.* 1.7 cmt. 22 (suggesting that if the client is a sophisticated user of the legal matter involved, open ended consent is effective if "the client is independently represented by other counsel in giving consent"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000) (indicating that open-ended consent is ineffective unless the client "has had the opportunity to receive independent legal advice about the consent").

202. See WILLIAM FREIVOGEL, FREIVOGEL ON CONFLICTS, http://www.freivogelonconflicts.com/new_page_38.htm (last visited Feb. 24, 2007) (discussing several relevant cases under the "Advance Waivers" link on the web site) (on file with the *St. Mary's Law Journal*).

203. Almost all cases involve client-specific or matter-specific advance waivers or both. See, e.g., *Unified Sewerage Agency of Washington County v. Jelco Inc.*, 646 F.2d 1339, 1346, 1352 (9th Cir. 1981) (upholding client-specific consent by defendant Jelco that allowed the firm to represent named subcontractor in identified dispute with Jelco); *Fisons Corp. v. Atochem N. Am., Inc.*, No. 90 Civ. 1080, 1990 WL 180551, at *4 (S.D.N.Y. Nov. 14, 1990) (holding that client-specific consent by defendant to firm's representation of plaintiff Fisons in any disputes with defendant prevented firm's disqualification); *Interstate Props. v. Pyramid Co.*, 547 F. Supp. 178, 181-82 (S.D.N.Y. 1982) (approving client-specific consent by defendant and allowing firm's representation of plaintiff Interstate in any disputes with defendant over joint venture agreement); *St. Barnabas Hosp. v. New York City Health & Hosps. Corp.*, 775 N.Y.S.2d 9, 16 (N.Y. App. Div. 2004) (ruling that client-specific consent by St. Barnabas allowing law firm to represent Health & Hospitals Corpora-

dealing with advance waivers is *Worldspan, L.P. v. Sabre Group Holdings, Inc.*,²⁰⁴ but the case does not decide the validity of such waivers.²⁰⁵ Worldspan operated a computer airline reservation system.²⁰⁶ Sabre Group ran a competing system.²⁰⁷ Sabre Group was owned 80% by AMR; American Airlines is also a subsidiary of AMR.²⁰⁸ The law firm of Alston & Bird represented Worldspan off and on for six years in various state tax matters in Georgia and Tennessee regarding Worldspan's computer airline reservation system.²⁰⁹ At the time of the initial engagement in 1992, the firm sent Worldspan its standard engagement agreement under which Worldspan prospectively waived any future conflicts of interest.²¹⁰ The waiver provided as follows:

“As we have discussed, because of the relatively large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between another client and WORLDSPAN, or a transaction in which WORLDSPAN's interests do not coincide with those of another client. In order to distinguish those instances in which WORLDSPAN consents to our representing such other clients from those instances in which such consent is not given, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be

tion if conflict developed with St. Barnabas in connection with negotiation of certain agreement prevented firm's disqualification). In a case that was widely discussed by ethics experts, Judge Thelma Moore of the Georgia Fulton County Superior Court issued an injunction prohibiting the law firm of Duane Morris, L.L.P. from representing two individuals in an arbitration proceeding against McKesson Information Solutions, Inc. Order of Disqualification, *McKesson Information Solutions, Inc. v. Duane Morris, L.L.P.*, No. 2006CV121110, Fulton County Superior Court (November 7, 2006) (on file with the *St. Mary's Law Journal*). Judge Moore rejected Duane Morris's argument that McKesson had waived any conflict in a general advance waiver; she found that the “waiver is inadequate and thus invalid as a matter of Georgia law because it is not a knowing waiver that identifies the specific adverse clients and details of adverse representation.” *Id.* at 11. In a subsequent order, Judge Moore vacated the injunction, finding that the case was moot because Duane Morris was no longer representing McKesson in the bankruptcy matter that generated the conflict. *McKesson Information Solutions, Inc. v. Duane Morris, L.L.P.*, No. 2006CV121110, Fulton County Superior Court (Mar. 6, 2007).

204. 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

205. *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

206. *Id.* at 1357.

207. *Id.*

208. *Id.* at 1360.

209. *Id.* at 1357.

210. *Worldspan*, 5 F. Supp. 2d at 1358.

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precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN we have obtained as a result of representing WORLDSPAN.[”]

“We have advised you that we have served as special counsel to Delta Air Lines for certain types of matters, including state and local tax matters. We do not view our work for Delta to be in conflict with our representation of WORLDSPAN, and Delta . . . has consented to our representation of WORLDSPAN. We have also advised you that we have represented American Airlines. We do not believe our representation of American Airlines is in conflict with our representation of WORLDSPAN. We have also represented various other airlines from time-to-time on limited matters . . . we do not view our representation of any of these carriers to be in conflict with our proposed representation of WORLDSPAN.”

. . . .

“If any of the foregoing is not consistent with your understanding of the terms of our engagement, I would appreciate your advising me in writing as soon as possible so that we may resolve any misunderstanding. If you have any questions or wish to discuss any of these points, please give me a call.”²¹¹

In 1998, Alston & Bird agreed to serve as local counsel for Sabre Group in the litigation brought by Worldspan.²¹² Sabre Group was a new client that Alston & Bird had never represented before.²¹³ Worldspan moved to disqualify Alston & Bird, and the court granted the motion.²¹⁴

A factual dispute existed between the parties as to whether Worldspan agreed to the waiver.²¹⁵ Alston & Bird claimed that it sent the engagement agreement to Worldspan and did not receive any objection.²¹⁶ The firm then commenced and continued the representation without objection by Worldspan.²¹⁷ Worldspan claimed

211. *Id.* at 1359.

212. *Id.* at 1358.

213. *Id.* at 1360.

214. *Id.*

215. *Worldspan*, 5 F. Supp. 2d at 1359.

216. *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356, 1359 (N.D. Ga. 1998).

217. *Id.*

that its in-house counsel immediately notified Alston & Bird both in writing by fax and by personal telephone communication that it objected to the waiver and insisted upon immediate written notice of any intended adverse litigation.²¹⁸ According to Worldspan's evidence, Alston & Bird stated that there would be no change in the engagement and the representation simply continued.²¹⁹

The court concluded that it was unnecessary for it to resolve this factual dispute because the waiver was ambiguous.²²⁰ The waiver stated that it applied to an "adverse matter."²²¹ The court concluded that this was not sufficiently explicit to cover adverse litigation:

It is the opinion of this Court that 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.²²²

218. *Id.*

219. *Id.*

220. *Id.* at 1359.

221. *Worldspan*, 5 F. Supp. 2d at 1359.

222. *Id.* at 1360. Richard Painter has criticized the *Worldspan* decision on two grounds. Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 307 (2000). First, he argues that the court was wrong to conclude that the waiver was ambiguous simply because the waiver did not specifically refer to litigation. *Id.* Painter contends that "hardly any advance waiver would meet the criteria for specificity that Judge Moye demanded." *Id.* On the other hand, it does not seem overly demanding that a firm specifically inform a client that a waiver covers litigation against the client, particularly where the firm's work for the client has been transactional. Second, Painter contends that the "case could have been decided on narrower grounds," that Alston & Bird's representation of Sabre Group was substantially related to the work it had done for Worldspan, and therefore presented the likelihood that Alston & Bird could use confidential information against Worldspan. *Id.* at 307 n.101. The waiver specifically excluded representations that were substantially related to the firm's prior representation of Worldspan or that involved the use of confidential information. *Worldspan*, 5 F. Supp. 2d at 1359. While the case might have been decided on this basis, Judge Moye concluded that the plaintiff presented insufficient evidence for the court to make a finding of a probable breach of confidentiality. *Id.* at 1358.

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In addition, the court decided that the ambiguity of the waiver carried greater weight because Sabre Group was a new “client with whom the law firm ha[d] no present relationship”:²²³

There was no suggestion that the Law Firm had ever represented AMR, or the Sabre Group, and no suggestion that it considered it had a standing obligation to represent any entity owned by or connected to either AMR or American Airlines, or, indeed, that it had the expectation of being so requested.²²⁴

Thus, the case does not decide whether a general advance waiver is valid.²²⁵ Instead, the decision turns on the court’s finding that the waiver was ambiguous as applied to litigation.²²⁶ Several other aspects of the court’s opinion are of interest. First, the court noted that the relationship between lawyer and client was not simply contractual:

The client-lawyer relationship is *sui generis*; it is based on mutual trust; it has important public implications beyond the mere relationship between the parties; it is not a mere contractual arrangement such that contract law relating to releases and waivers forms very persuasive precedent, nor does the court find such precedent helpful here. The requirements of this court’s rules governing the conduct of lawyers practicing before it, and, of course, of the Georgia Code of Professional Responsibility, transcend mere contract law.²²⁷

Second, even though Worldspan was represented by experienced lawyers in connection with the engagement letter and even though it was a sophisticated client, these facts did not relieve Alston & Bird of its obligation to obtain Worldspan’s informed consent to the waiver.²²⁸

223. *Id.* at 1360.

224. *Id.*

225. *See* Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359-60 (N.D. Ga. 1998) (finding this particular waiver to be invalid because it was ambiguous).

226. *Id.*

227. *Id.* at 1358.

228. *Id.* The court also pointed out that in the normal case where the client is not represented by counsel, a disparity of information and understanding exists:

[I]n the more normal situation, the lawyer, presumably possessing superior legal knowledge and experience, is presenting the prospective client with a document with legal implications prepared by the lawyer having possibly adverse effects on the client seeking his legal advice and to repose trust in him.

Id.

Third, *Worldspan* was decided under Disciplinary Rule 5-105 of the Georgia Code of Professional Responsibility, which allowed lawyers to represent multiple clients who had conflicting interests if it was obvious the lawyer could adequately represent the interests of each client, and each client gave informed consent to the conflict after full disclosure from the lawyer of the possible impact of the representation on the lawyer's independent professional judgment.²²⁹ The ABA's 2002 revision to the Model Rules changes the terminology from consent after full disclosure to informed consent and requires such consent to be confirmed in writing,²³⁰ but the substance of the court's analysis in *Worldspan* remains applicable under the Model Rules.²³¹

Another significant case dealing with advance waivers is the unreported decision in *Kennecott Copper Corp. v. Curtiss-Wright Corp.*²³² “[I]n the fall of 1973, [Curtiss-Wright] retained Skadden, Arps, Slate, Meagher & Flom in connection with a tender offer for Airco Inc.”²³³ Skadden Arps was willing to undertake the engagement “only if Curtiss-Wright agreed that Skadden would remain free to represent other target corporations which Curtiss-Wright might seek to acquire.”²³⁴ The engagement agreement signed by Curtis-Wright provided: “Should your corporation or any person affiliated with it seek to acquire or invest in any company which is a client of our office, we will be free to represent that client and the same shall not result in a reduction of the retainer.”²³⁵ Almost four years later, “Kennecott Copper retained Skadden in connection with a divestiture.”²³⁶ Subsequently, Curtiss-Wright started buying a large stake in Kennecott Copper on the open market, and publicly announced that it would be making a tender offer for control of

229. *Worldspan*, 5 F. Supp. 2d at 1357.

230. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (1983) (amended 2002).

231. See *Snapping Shoals Elec. Membership. Corp. v. RLI Ins. Corp.*, No. 1:05-cv-1714-GET, 2006 U.S. Dist. LEXIS 45226, at *11 (N.D. Ga. July 5, 2006) (citing the holding in *Worldspan*, despite the new language of the 2002 amendment).

232. See Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297-98 (2000) (citing the unpublished case of *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, (S.D.N.Y.) (MacMahon, J.) (Memorandum and Order, Apr. 10, 1978)).

233. *Id.* at 297.

234. *Id.*

235. *Id.*

236. *Id.*

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Kennecott.²³⁷ In March 1977 Kennecott sued Curtiss-Wright for securities and antitrust violations.²³⁸ Curtiss-Wright attempted to remove Skadden under Canons 4 and 5 of the Code of Professional Responsibility, because at the time Skadden was still representing Curtiss-Wright with regard to the Airco matter.²³⁹ Judge MacMahon refused to disqualify Skadden.²⁴⁰ He emphasized two factors in his decision.²⁴¹ First, Curtiss-Wright knew at the time it signed the waiver that Skadden had an extensive practice in take-over matters and that a conflict might some day arise.²⁴² Second, Curtiss-Wright was a one-shot client, not a regular client or one that Skadden represented under a general retainer.²⁴³

It is important to note that *Kennecott Copper* involved a matter-specific rather than a general advance waiver.²⁴⁴ The language of the waiver only applied to conflicts arising from acquisitions by Curtiss-Wright.²⁴⁵ It did not apply to conflicts arising from any other type of matter that the firm might handle for Curtiss-Wright.²⁴⁶ Moreover, the firm had only agreed to represent Curtiss-Wright in the Airco matter, so the waiver was limited to conflicts arising from that representation.²⁴⁷ Thus, a fair statement of the holding in the case is that an advance waiver of conflicts arising from representation in a particular type of matter by a sophisticated, one-time client is valid.²⁴⁸

237. Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297 (2000).

238. *Id.*

239. *Id.*

240. *Id.* at 297-98.

241. *Id.*

242. Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297 (2000).

243. *Id.* at 297-98.

244. *See id.* at 297 (providing in the agreement that should the client purchase or invest in a company that is a client of the firm, the firm is not precluded from representing that client).

245. *Id.*

246. *See id.* (noting the agreement was matter-specific).

247. Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297 (2000).

248. *See id.* at 297-98 (providing a summary and holding of the *Kennecott Copper* case).

Visa U.S.A., Inc. v. First Data Corp.,²⁴⁹ involves but ultimately does not decide the validity of a general advance waiver.²⁵⁰ In 2001, First Data asked the Heller law firm to represent it in a patent infringement action.²⁵¹ The Heller firm represented Visa in many matters.²⁵² Heller told First Data of this “long-standing relationship with Visa.”²⁵³ The firm also informed First Data that it did not presently foresee conflicts between the companies, but it could not undertake the representation unless First Data waived any conflicts that might arise in the future.²⁵⁴ First Data agreed and signed the following waiver:

Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in “transactions,” including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed [Heller’s] past and on-going representation of Visa U.S.A. and Visa International (the latter mainly with respect to trademarks) (collectively, “Visa”) in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from [sic] each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances.²⁵⁵

249. 241 F. Supp. 2d 1100 (N.D. Cal. 2003).

250. *See* *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1102-10 (N.D. Cal. 2003) (focusing instead on the client-specific waiver as opposed to the general waiver).

251. *Id.* at 1102.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Visa*, 241 F. Supp. 2d at 1102-03.

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A few months later, First Data announced a new business initiative, and Visa claimed the initiative violated First Data's contractual obligations to Visa.²⁵⁶ Visa, represented by the Heller firm, brought suit against First Data; First Data then moved to disqualify the firm.²⁵⁷ First Data claimed that the Heller firm failed to adequately inform it that Visa would bring such a major lawsuit against it.²⁵⁸ The court denied the motion to disqualify, upholding the waiver against various arguments made by First Data, especially the argument that the Heller firm had not adequately informed it of the conflict.²⁵⁹

While *Visa* contains a general advance waiver provision, the case does not deal with that provision. Rather, the case deals with a client-specific advance waiver applicable to disputes with Visa.²⁶⁰ Moreover, First Data knew at the time it signed the waiver that it was planning its new business initiative, and that the launch of this project was likely to cause litigation with Visa.²⁶¹ The waiver excluded substantially related matters and required the Heller firm to institute an ethical screen when a conflict arose to protect First Data's confidences.²⁶²

Concat LP v. Unilever, PLC,²⁶³ was an intellectual property dispute.²⁶⁴ Dr. H.S. Winchell and his family owned the intellectual property rights to certain chemical compounds used in deodorants.²⁶⁵ Defendant Unilever filed patent applications that plaintiffs claimed were based on information used in violation of a confidentiality agreement.²⁶⁶ Before this lawsuit was filed, Dr. Winchell retained the law firm of Morgan, Lewis & Bockius for estate planning work.²⁶⁷ Morgan Lewis represented Unilever, but its conflicts check produced a negative result because no dispute existed

256. *Id.* at 1103.

257. *Id.*

258. *Id.*

259. *Id.* at 1104-10.

260. *Id.* at 1102-03.

261. *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1108-09 (N.D. Cal. 2003).

262. *Id.* at 1110.

263. 350 F. Supp. 2d 796 (N.D. Cal. 2004).

264. *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 800 (N.D. Cal. 2004).

265. *Id.*

266. *Id.* at 801.

267. *Id.*

at that time.²⁶⁸ The engagement agreement signed by Dr. Winchell included the following general advance waiver:

Morgan, Lewis & Bockius is a large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you. Further, you agree in light of its general consent to such unrelated conflicting representations, Morgan, Lewis & Bockius will not be required to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations contained in the preceding sentence shall not apply in any instance where, as the result of our representation of you, we have obtained confidential information of a non-public nature that, if known to another client of ours, could be used to your material disadvantage in a matter in which we represent, or in the future are asked to undertake representation of, that client.²⁶⁹

After suit was filed, plaintiffs moved to disqualify Morgan Lewis because of a conflict of interest.²⁷⁰ Morgan Lewis relied on the advance waiver, but the court rejected the argument.²⁷¹ Without analysis, the court held that under California law when a waiver “insufficiently disclose[s] the nature of [a] conflict that subsequently [arises] between the parties,” a second waiver must be obtained.²⁷² Under this reasoning any general advance waiver would be unenforceable.

Based on these cases, it is fair to conclude that court decisions have not established or rejected the validity of general advance waivers. The more specific an advance waiver, either as to type of matter (*Kennecott Copper*) or adverse party (*Visa U.S.A.*), the more likely the waiver will be upheld. Finally, no court decision

268. *Id.*

269. *Concat*, 350 F. Supp. 2d at 801-02.

270. *Id.* at 803.

271. *Id.* at 819-21.

272. *Id.* at 821.

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has established a clear framework for analysis of general advance waivers.²⁷³

B. *Developing a Judicial Framework for Analyzing the Enforceability of General Advance Waivers*

Courts face a difficult task in developing a framework for analysis of the validity of general advance waivers. Three considerations are in tension with each other: maintenance of *the inherent judicial power* over proceedings; creation of *reasonable certainty* regarding the enforceability of advance waivers; and establishment of *proper incentives* for lawyers to draft waivers that meet legitimate choice-of-counsel interests without being broader than necessary.

Courts are presented with issues involving advance waivers after a conflict has arisen. Even if an advance waiver complied with ethical standards when the waiver was executed, courts retain the power to determine whether the waiver should be enforced as to the particular conflict before the court.²⁷⁴ Determination of the effectiveness of the waiver requires a court to decide whether application of the waiver undermines the integrity of the proceeding.²⁷⁵ Additionally, a court could refuse to enforce the waiver because the waiver did not encompass the particular conflict that has

273. See *Visa U.S.A. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003) (providing the closest statement of a general framework). The court listed the following factors used in deciding whether a prospective client has given informed consent to a waiver:

Factors that may be examined include the breadth of the waiver, the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future), the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice.

Id. The court rejected prejudice to Visa as a relevant factor unless First Data delayed bringing the disqualification motion for tactical reasons. *Id.* at 1106 n.6.

274. See, e.g., The State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-115 (1989), http://calbar.ca.gov/calbar/html_unclassified/ca89-115.html. (last visited Feb. 20, 2007) (determining that even if an advance waiver has been executed, the court still has the right to disqualify counsel) (on file with the *St. Mary's Law Journal*).

275. *Id.* “[I]n the context of a litigated matter, the court retains the right to disqualify counsel, despite an advance blanket waiver, if continued representation would seriously compromise the integrity of the judicial process and the fairness of the particular proceeding.” *Id.*

arisen.²⁷⁶ The waiver will be ineffective if the conflict to which it is applied is nonconsentable.²⁷⁷ Finally, if the client revokes the waiver, the court must decide whether the revocation is effective as to the client who benefits from the waiver.²⁷⁸

Exercise of the inherent judicial power to determine the enforceability of waivers on a case-by-case basis has costs. There are, of course, the direct litigation costs associated with the proceeding to determine the validity of the waiver. In addition, when a court engages in a wide ranging inquiry into the validity of the waiver, the court creates uncertainty about the enforceability of advance waivers. Uncertainty creates unfairness to lawyers, existing clients, and prospective clients, all of whom need to be able to determine and rely on the enforceability of advance waivers with a reasonable degree of certainty. If substantial uncertainty about the enforceability of advance waivers exists, prospective clients may be unable to retain counsel of their choice, or some existing clients may lose their regular counsel as a result of a disqualification order, or a combination of these consequences may occur.

When deciding the enforceability of advance waivers, courts should consider the incentives that their decisions give to lawyers. Courts should strive to establish incentives for lawyers to draft advance waivers that are sound as a matter of policy.

In summary, courts should develop an approach for determining the enforceability of advance waivers that preserves the court's inherent power to review advance waivers, that provides lawyers and their clients with a reasonable degree of certainty regarding their

276. See *Schwartz v. Indus. Valley Title Ins. Co.*, No. CIV. A. 96-5677, 1997 WL 330366, at *6-7 (E.D. Pa. June 5, 1997) (holding a waiver signed by one of codefendants in connection with 1993 action did not apply to a separate, but related, action filed by the other codefendant against the codefendants in 1996).

277. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006) (providing that consent is not "effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. g. (2000) (listing nonconsentable conflicts of interest).

278. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 21 (2006) (basing the ability of the lawyer to represent other clients after consent is revoked on factors such as the conflict itself, whether revocation occurred because of changed circumstances, expectations of other clients, and whether revocation would be a detriment to the lawyer or other clients); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. f. (2000) (determining that whether the lawyer can continue representation is contingent upon "whether the client was justified in revoking the consent . . . and whether material detriment to the other client or lawyer would result").

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enforceability, and that gives proper incentives to lawyers to draft waivers that are sound as a matter of policy.

To achieve these goals, courts should employ a rebuttable presumption of the enforceability of an advance waiver if the waiver meets three requirements outlined below. If the waiver meets these requirements, then the waiver will be enforceable unless the party attacking the waiver carries the burden of showing that the waiver is ineffective.²⁷⁹ Courts should apply the rebuttable presumption that a waiver is enforceable when the following three requirements are met.

First, the waiver is not a general advance waiver, but is limited to protection of existing clients or future clients of the firm from conflicts arising either from the specific matter²⁸⁰ or type of matter²⁸¹ for which the waiver was sought. Second, the waiver must be limited to matters that are not substantially related to the matter for which the waiver is sought, unless the waiver applies to representation of one co-client against the other in the event a conflict develops between jointly represented clients.²⁸² Finally, the attorney seeking the waiver must have made appropriate disclosures to the client about the reasons and advantages of the waiver, the scope of the waiver, disadvantages of the waiver, alternatives to the waiver,

279. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006) (referring to factors that may make a general advance waiver ineffective). A party could attempt to establish that a waiver is ineffective on a number of grounds: The waiver does not apply to the current dispute; the application of the waiver threatens the integrity of the pending proceeding; the conflict that has arisen is nonconsentable; the waiving client has revoked the waiver and the circumstances justify making the revocation effective as to the opposing party.

280. See Part IV(A) (discussing the policy justification for this limitation).

281. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d., illus. 2 & 3 (2000) (providing examples of matter-specific advance waivers); see also Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 297-98 (2000) (discussing the matter-specific advance waiver executed by the parties) (citing the unpublished case of *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, (S.D.N.Y.) (MacMahon, J.) (Memorandum and Order, Apr. 10, 1978)).

282. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000). See Part IV(B) (analyzing the policy issues involved in the application of advance waivers to substantially related matters).

advice of independent counsel,²⁸³ and must have confirmed the client's consent in writing.²⁸⁴

If a waiver meets these requirements, the court should presume the waiver is enforceable. The party moving for disqualification would then have the burden to show the conflict was not within the scope of the waiver, application of the waiver would threaten the integrity of the proceeding, the conflict was nonconsentable, or the waiving client revoked the waiver and the revocation should be applied to the opposing party. If the waiver did not meet the requirements for a rebuttable presumption of validity, the waiver might still be enforceable, but the lawyer would need to justify the deviation from the requirements for the presumption. For example, a lawyer might be able to justify the use of a general advance waiver if the lawyer establishes the client had the option of a specific advance waiver or a general advance waiver, but chose the general advance waiver with the advice of independent counsel. If a lawyer failed to make the necessary disclosures for informed consent, the lawyer might still convince a court to uphold the waiver if the client was independently represented with regard to the waiver and received the disclosures through independent counsel.

The framework outlined above provides reasonable certainty to lawyers and clients about the enforceability of advance waivers. If the waiver meets these three requirements, a lawyer can inform his client it is likely that the waiver would be enforced. In addition, the suggested approach gives lawyers an incentive to submit waivers to clients that are sound as a matter of policy rather than seeking the broadest possible waiver. At the same time, the proposed

283. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18, 19, 20 & 22 (2006) (addressing the purpose and advantages of the waiver, scope of the waiver, disadvantages of the waiver, alternatives to the waiver, and advice of independent counsel).

284. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2006). The ethics rules of some jurisdictions may not require the lawyer to confirm the client's consent in writing. For example, current New York ethics rules do not require a writing. See Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Apr. 17, 2007) (stating that an advance waiver can be found circumstantially where it is not in writing) (on file with the *St. Mary's Law Journal*). While a lawyer would not act unethically in obtaining an oral waiver under New York rules, it would be appropriate and sound as a matter of policy for a court to require a written confirmation of the client's consent in order for the presumption of enforceability of the waiver to apply. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122(1) (2000) (failing to require that consent to a conflict be in writing).

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framework preserves the judicial role in invalidating waivers in situations where the party attacking the waiver carries its burden of proof.

VI. CONCLUSION

The growth of law firms and changes in the relationships between firms and their clients have increased the likelihood firms will face conflicts of interest. Advance waivers present one way in which firms can control the risk of disqualification as a result of such conflicts. While advance waivers serve an important and justifiable purpose in protecting the interests of prospective, existing, and future clients in retaining counsel of their choice, advance waivers can be abused because firms have an economic interest to minimize disqualifying conflicts, regardless of whether such limitations are beneficial to clients.

This Article argues that current standards governing advance waivers are inconsistent, incomplete, and vague. In addition, the Article contends that as a matter of policy, advance waivers should meet three requirements. First, the waiver should be limited to conflicts arising from the specific matter or type of matter for which a client sought representation. Second, the waiver should not apply to conflicts involving substantially related matters, except if the conflict arises from jointly represented clients. Finally, any waiver should be preceded by disclosure of the reasons and advantages of the waiver, the scope of the waiver, disadvantages of the waiver, alternatives to the waiver, and advice of independent counsel; the client's consent should be confirmed in writing. If the waiver meets these requirements, courts should adopt a rebuttable presumption that the waiver is valid.

APPENDIX A
 WAIVER FORMS SUGGESTED BY THE NEW YORK
 CITY BAR ASSOCIATION
 IN OPINION #2006-01²⁸⁵
 CONFLICTS WAIVER: EXAMPLE A

Other lawyers in the Firm currently do [XXX] work for [existing client] and its affiliates, and expect to continue to do such work. In order to avoid any misunderstanding in the future, we ask that you confirm that the Company agrees to waive any conflict of interest which may be deemed to arise as a result of such representation. Please also confirm that neither the Company nor any of its affiliates will seek to disqualify our Firm from representing [existing client] or its affiliates in existing or future [XXX] or other matters.

Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliate in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects, to a large number of clients both in the United States and internationally, some of whom are or may in the future operate in the same area(s) of business in which you are operating or may operate. (A summary of our current practice areas and the industries in which we represent clients can be found on our web site at www.XXX.com.) You acknowledge that you have had the opportunity to consult with your company's counsel [if client does not have in-house counsel, substitute: "with other counsel"] about the consequences of this waiver. In this regard, we have discussed with you and you are aware that we render services to others in the area(s) of business in which you currently engage.

285. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-01 (2006), http://www.nycbar.org/Publications/reports/print_report.php?rid=442&searchterm=2006 (last visited Apr. 1, 2007) (on file with the *St. Mary's Law Journal*).

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CONFLICTS WAIVER: EXAMPLE B
(SAME TYPE OF ADVANCE WAIVER AS A)

This firm is a general service law firm that [insert client name here] recognizes has represented, now represents, and will continue to represent numerous clients (including without limitation [the client's] or its affiliates' debtors, creditors, and direct competitors), nationally and internationally, over a wide range of industries and businesses and in a wide variety of matters. Given this, without a binding conflicts waiver, conflicts of interest might arise that could deprive [the client] or other clients of the right to select this firm as their counsel.

Thus, as an integral part of the engagement, [the client] agrees that this firm may, now or in the future, represent other entities or persons, including in litigation, adversely to [the client] or any affiliate on matters that are not substantially related to (a) the legal services that [this firm] has rendered, is rendering, or in the future will render to [the client] under the engagement and (b) other legal services that this firm has rendered, is rendering, or in the future will render to [the client] or any affiliate (an "Allowed Adverse Representation").

[The client] also agrees that it will not, for itself or any other entity or person, assert that either (a) this firm's representation of [the client] or any affiliate in any past, present, or future matter or (b) this firm's actual, or possible, possession of confidential information belonging to [the client] or any affiliate is a basis to disqualify this firm from representing another entity or person in any Allowed Adverse Representation. [The client] further agrees that any Allowed Adverse Representation does not breach any duty that this firm owes to [the client] or any affiliate.

CONFLICTS WAIVER: EXAMPLE C
(ADVANCE WAIVER INCLUDING SUBSTANTIALLY
RELATED MATTERS)

You also agree that this firm may now or in the future represent another client or clients with actually or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without waiving the generality of the previous sentence, you agree that we may represent [to the extent practicable, describe the particular adverse representations that are

envisioned, such as “other bidders for the same asset” or “the lenders or parties providing financing to the eventual buyer of the asset”].

This waiver is effective only if this firm concludes in our professional judgment that the tests of DR 5-105 are satisfied. In performing our analysis, we will also consider the factors articulated in ABCNY Formal Opinion 2001-2, including (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.

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APPENDIX B
WAIVER FORM RECOMMENDED BY THE DISTRICT OF COLUMBIA
BAR IN OPINION #309²⁸⁶

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.”

286. D.C. Bar Ethics Committee, Op. 309 (2001), Advance Waivers of Conflicts of Interest, http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm (last visited Feb. 22, 2007) (on file with the *St. Mary's Law Journal*).