PUSHING THE BOUNDARIES OF INFORMED CONSENT:
ETHICS IN THE REPRESENTATION OF LEGALLY
SOPHISTICATED CLIENTS

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I. INTRODUCTION

SUSAN Martyn’s 1980 article on informed consent in the practice of law
was a game changer.1 Informed consent is now a workhorse concept, as
central to the law of lawyering as reasonable care is to torts or the business
judgment rule to corporate law. It is, therefore, surprising not to find it
mentioned anywhere in the Model Code, although traces of what would later
develop into informed consent doctrine can be found in a few places.2 The Kutak
Commission’s considerably modernized set of rules, the 1983 Model Rules, used
the term “consents after consultation” in several places to emphasize the
importance of full disclosure to clients but still did not call it informed consent.3
Charles Wolfram’s influential 1986 treatise discusses “full-disclosure consent”
and lists elements of effective consent to conflicts of interest.4 The treatise does
not, however, link this requirement to the idea of informed consent in medical
malpractice law or biomedical ethics.5 Informed consent finally entered the
lexicon of professional responsibility in 2002 with the adoption of the Ethics
2000 amendments to the Model Rules.6 The Ethics 2000 Commission used
informed consent extensively throughout the rules, intending to incorporate by
reference the meaning it had acquired in other contexts, such as medical
malpractice law.7 In particular, the Commission believed the term “consultation”

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   (1980).
disclosure of confidential information “with the consent of the client or clients affected, but only
after a full disclosure to them”); id. at DR 5-105(C) (permitting multiple representation where each
client “consents … after full disclosure of the possible effect of such representation” on the
lawyer’s professional judgment).
3. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2), (b)(2) (1983) (consent to
   concurrent conflicts of interest); id. at R. 1.9(a) (consent to successive conflicts of interest).
4. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.2.4, at 343-49 (1986).
5. See id.
7. See ABA CTR. FOR PROF’L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT
   1.0(e)); id. at 56 (regarding Rule 1.2(c) and indicating no substantive change in meaning was
did not convey “the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions.”

Informed consent is also featured prominently in the 2000 Restatement of the Law Governing Lawyers. Its citation history suggests Martyn’s article and its analysis played an important role in establishing informed consent as one of the key concepts in professional responsibility law.

One might ask why it matters what language we use to describe the idea of waiving a right that otherwise belongs to the client after full disclosure by the lawyer of the risks and alternatives. Even fairly early, rudimentary conflicts of interest doctrine recognized that although the rules of professional conduct generally protect clients against a lawyer’s divided loyalties, a client might decide to proceed with the representation, notwithstanding the lawyer’s representation of another client whose interests might arguably have some effect on the lawyer’s independent judgment. The lawyer might reasonably believe, and the client might reasonably agree, that the other representation would not really have an adverse effect. In such a situation, why maintain a rigid, *per se* prohibition on the concurrent representation if a fully informed client was willing to let it slide? This does not seem like a huge conceptual advance for the law to make.

Informed consent is a much richer idea than this, as Martyn recognized. It goes to the heart of our understanding of the lawyer-client relationship and to the characterization of the legal profession as a public-spirited, but also profit-making, occupation. It recognizes that the client has the authority to determine, in broad terms, the scope of the representation but that the lawyer may have specialized knowledge or access to information that affects the client’s interests. This information asymmetry tends to aggrivate what is already a disparity in power between the lawyer and client. Informed-consent doctrine allows the lawyer and client to haggle over the terms of their relationship but crucially not in a truly arms-length bargaining situation. The lawyer-client relationship is fundamentally a matter of contract, but this relationship is always subject to fiduciary duties owed by the lawyer to the client. The parties may allocate risks

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8. Id. at 30.
12. Id. at 313 (“By shifting the decision-making function to the client, informed consent counterbalances the tendency of lawyers to dominate the relationship.”).
13. Collins v. Reynard, 607 N.E.2d 1185, 1189 (Ill. 1992) (noting malpractice actions against attorneys go beyond applying an economic loss doctrine since the purpose of forming an attorney-
among themselves, like any other contracting parties, but there are certain risks a lawyer may never require a client to bear. Certainly, in business transactions with clients, lawyers may never “g[et] the better of the bargain.”14 In connection with other agreements, however, lawyers have heightened disclosure obligations when compared with ordinary parties to a commercial relationship. When a lawyer seeks a waiver of a right that a client would otherwise have with respect to the lawyer, the accompanying disclosure must be rigorously impartial—as it is frequently stated, the kind of advice that would be given by a lawyer who is a stranger to the transaction.15

In theoretical terms, the doctrine of informed consent sits at the intersection of two conceptions of the attorney-client relationship, both of which have deep historical and doctrinal roots.16 The first can be called the market-contractarian model and understands the attorney-client relationship, as well as its attendant duties, as arising from an agreement of the parties. Like any commercial relationship, that between attorney and client is presumed to be freely entered into for the mutual benefit of both. Moreover, since it is the parties themselves who know best what furthers their ends, they should be permitted to define their respective rights and duties by contract, rather than by having them imposed by an external regulator. Most rules governing the relationship should, therefore, be in the form of default rules that can be contracted around.17

The market-contractarian model rests on several assumptions, the most important of which are that the parties are relatively comparable in terms of bargaining power and access to information and that the client is in a position to monitor the attorney’s provision of legal services. Those assumptions do not hold in many professional relationships, particularly those involving individual clients who are inexperienced in hiring and evaluating the performance of lawyers.18 A frequent finding of legal sociologists is that lawyers dominate the professional relationship with unsophisticated clients.19 In economic terms,
agency costs are too high for clients to monitor lawyers effectively. 20 Something else, beyond bargained-for terms and monitoring by the client, is necessary to ensure the faithful performance of professional obligations. For this reason, courts and disciplinary agencies have traditionally imposed stringent fiduciary duties upon lawyers, notwithstanding what the parties might agree to as a matter of contract.

The fiduciary model begins with the assumption that the lawyer and client have unequal bargaining power. This inequality arises largely from the nature of professional services, which rely on specialized knowledge and training and, therefore, are difficult for non-professionals to evaluate. 21 Most clients are not in a position to serve as monitors to ensure their lawyer provides loyal, competent, and diligent services. It is inherent in the nature of legal services, however, that lawyers have considerable discretion within the representation, which gives them opportunities to serve their own interests, not those of their clients. This discretion results from both the expertise of lawyers and the opacity of professional services. A lawyer may use this discretion to benefit the client, but the lawyer may also act in ways that privilege his or her own financial, reputational, or other interests. 22 While an economist may simply see this as yet another agency-cost problem, 23 the ethical perspective would question why clients should have to expend effort and resources to monitor their lawyers. Legal services often touch on areas of great vulnerability for clients. Clients should be able to trust that their lawyers will not act self-interestedly, and it is inconsistent with a relationship of trust and confidence to require the client to check up on the lawyer’s compliance with her obligations of loyalty, confidentiality, and diligence. Rules of professional conduct are an important means of minimizing the agency costs inherent in the attorney-client relationship, but because they are imperfectly aligned with client interests, they may not fully constrain self-interested behavior by lawyers. Similarly, a sense of professionalism may not be sufficient to prevent self-interested behavior in the face of strong countervailing incentives. Thus, the fiduciary model seeks to harness other legal constraints, including common law claims for breach of fiduciary duty, to rectify the deficiencies in the market-contractarian model and

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22. See John F. Sutton, Jr., The Lawyer’s Fiduciary Liabilities to Third Parties, 37 S. Tex. L. Rev. 1033, 1035 (1996) (“Courts are adamant in requiring that a lawyer’s loyalty to each client be unswayed by the lawyer’s self-interest or other extraneous influences.”).

to backstop the disciplinary rules and the obligations the parties have contractually agreed to among themselves.24

This brief Article uses informed consent as a case study of the phenomenon that might be called the fragmentation of legal ethics.25 At the level of both formal expression of legal rules and the empirical and normative assumptions underlying the rules, the regulation of lawyers has traditionally presupposed a one-size-fits-all model of the lawyer and of the attorney-client relationship. One of the most important findings of legal sociology, however, is that the practice of law is divided by area of specialization, size of law firm, and client type, with the most important division being between individual and entity “hemispheres.”26 As a general matter, lawyers practice in one hemisphere or the other.27 Either they represent corporations and other entity clients in matters such as securities, antitrust, corporate law, commercial litigation, and tax, or they represent individual clients in matters such as personal injury, matrimonial, probate, criminal, and personal bankruptcy.28 At the formal level, lawyers are subject to unified licensing and regulation by state courts.29 In the world of “professionalism-in-fact,” however, the norms of professional ethics are remarkably pluralistic.30 While some values and approaches to professional regulation are shared by all lawyers, in most respects the profession is differentiated by workplace setting (e.g. large firms vs. small or solo practices), client identity, and area of practice. “Taking trial lawyers, corporate counsel, legal services lawyers, code enforcers, judges, private practitioners in large and small firms, law professors, and others properly into account … one is struck by the heterogeneity of ethical views in today’s profession.”31

Thus, the doctrine of informed consent should not be considered in the abstract but, instead, in the context of the identity of the lawyer who is seeking, and the client who is providing, informed consent. Previous theoretical treatments of informed consent have tended to talk in terms of the interests of “the lawyer” and “the client” as if they were invariant across types of lawyers and clients.32 This Article will consider a particular subset of lawyers and clients: the representation by outside law firms of organizational clients with in-

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27. Id.
28. Id. at 32-33.
29. Id. at 51-54 (discussing forces that might integrate practicing lawyers).
31. Id. at 140.
32. See, e.g., Spiegel, supra note 20, at 113 (describing the legitimate interests of “the lawyer”).
house legal departments, which I will refer to as “legally sophisticated clients.” Outside law firms serving legally sophisticated clients are still fiduciaries, and certain breaches of loyalty will still subject lawyers to discipline and potential civil liability. In these representations, however, basic contract law policies come to the fore; that is, the organizing normative principle is that autonomous parties are presumed capable of voluntarily establishing the scheme of rights and duties they believe will make both better off.33 It is true that, as a prominent scholar of contract law notes, “the law of lawyers’ contracts is different,”34 but it is probably as close to ordinary contract law where lawyers are dealing with legally sophisticated clients. The law governing lawyers is generally hostile to perceiving rules of professional conduct as default rules that can be contracted around, but informed consent provides a way to characterize the cases in which ex ante contracting around the rules should be permitted.35 Thus, after briefly summarizing in Section II the development of informed consent in the law governing lawyers, Section III will use two recent cases on advance waivers of conflicts of interest to illustrate the uncertainty that still exists regarding the status of advance waiver rules in the representation of legally sophisticated clients.

II. THE IDEA OF INFORMED CONSENT

The doctrine of informed consent developed in the context of medical malpractice law. It now plays a central role in biomedical ethics, both in clinical and research settings.36 The development of the concept reflects increasing awareness by courts and the medical and legal professions of the centrality of autonomy as an ethical value. Early cases raising issues of informed consent were actually pled as claims for battery.37 The idea was that the patient’s consent was a defense to what would otherwise be a battery by the surgeon—a harmful contact with the patient’s body.38 If the surgeon exceeded the scope of consent, however, the contact would be actionable as a battery. The wrong is not that the doctor goofed up in performing the surgical procedure but, rather, that the doctor did something the patient had not expressly given permission to do.39 Even if the doctor performed in compliance with the relevant standard of care, the essence of the claim would be the patient urging, “I told you not to do that!” The cause of action, therefore, protects the patient’s agency, not just her health. Not

34. Perillo, supra note 14, at 443-44.
37. Spiegel, supra note 20, at 44.
39. See Kennedy, 90 S.E.2d at 758; Schloendorff, 105 N.E. at 93.
surprisingly, patients sometimes disputed the scope of consent they had provided or their understanding of the explanation given by the physician for performing the operation.\textsuperscript{40} Courts then had to grapple with the issue of how much information a patient was entitled and whether the adequacy of the required disclosure should be evaluated from the perspective of the physician or the patient.\textsuperscript{41} Over time, the emphasis on the reasonableness of disclosure tended to blur the boundaries between battery and negligence theories of medical malpractice, and in modern cases, the physician’s failure to obtain informed consent is generally, though not inevitably, treated as a species of negligence.\textsuperscript{42} While some courts continue to give priority to the patient’s perspective—evaluating the adequacy of the doctor’s explanation with reference to what would be material to a patient in making health care decisions—\textsuperscript{43} the standard still focuses on the reasonable patient, not the subjective desires of the particular plaintiff.\textsuperscript{44}

Informed consent is a bit different in the law governing lawyers. For most of its development, it has been closer to the root of the doctrine in the theory of battery. That means the focus is not really on the reasonableness of the disclosure but on the client’s absolute authority to insist on the attorney’s compliance with some duty owed to the client.\textsuperscript{45} The client may elect to waive compliance with that duty, but the waiver will be effective only if the lawyer has given a thorough explanation of the risks and benefits of the waiver.\textsuperscript{46} As Martyn rightly notes: “[T]he client’s right to control the course of his representation imposes a fiduciary duty on the attorney to inform his client of all relevant facts and potential consequences and to obtain the full understanding consent of the client to the legal solution proposed.”\textsuperscript{47} Martyn’s article belongs to an important

\textsuperscript{40} Spiegel, \textit{supra} note 20, at 45.


\textsuperscript{43} See, e.g., \textit{Canterbury v. Spence}, 464 F.2d 772, 787 (D.C. Cir. 1972) (still the leading case on the “reasonable patient” perspective); \textit{Largey}, 540 A.2d at 508.

\textsuperscript{44} \textit{Cobbs v. Grant}, 502 P.2d 1, 11-12 (Cal. 1972).

\textsuperscript{45} Spiegel, \textit{supra} note 20, at 42.

\textsuperscript{46} The terms waiver and informed consent are generally used interchangeably in the law of lawyering to refer to the same idea of a “knowing relinquishment of a right, a conscious willingness to [incur a] risk.” 2 \textsc{Ronald E. Mallen \& Jeffrey M. Smith}, \textsc{Legal Malpractice} § 18.25, at 1195 (2009) (“The defense of waiver is similar to the doctrine of informed consent.”). \textit{See also id.} § 18.31, at 1221 (stating that criteria for informed consent and waiver are similar).

\textsuperscript{47} Martyn, \textit{supra} note 1, at 310. \textit{See also Susan R. Martyn, Are We Moving in the Right Dimension? Sadducees, Two Kingdoms, Lawyers, and the Revised Model Rules of Professional
tradition in legal ethics scholarship, emphasizing “client-centered” representation and cautioning lawyers not to reduce their clients’ interests to good legal outcomes. As Martyn identifies, lawyers may disparage some aspects of their clients’ expressed interests as mere feelings or irrational projects, but if they are important to the client, they deserve respect. A client who feels disrespected is less likely to trust the lawyer and to be forthcoming with all of the facts the lawyer needs to know.

More generally, as David Luban argues, protecting the client’s dignity may be seen as the whole point of the attorney-client relationship. Dignity consists not only of making one’s decisions without external constraints, but also of “having a story of one’s own” and having it taken seriously by those in a position of power. Dignity is about being, not just willing. In other words, subjectivity is at the heart “of our concern for human dignity.” For example, when Ted Kaczynski, accused of committing murders as the “Unabomer,” insisted his lawyers not present an insanity defense, he was expressing his own subjective moral commitments to a vision of society uncorrupted by technology. His lawyers “made nonsense of his deepest commitments, of what mattered to him and made him who he was” when they manipulated him into pleading guilty by proposing to introduce mental status evidence. Domination of Kaczynski by his lawyers, which professional ethics should rightly seek to prevent, occurred when the lawyers substituted their view of his best interests, avoiding the death penalty, for his own belief that it would be better to die than to give up the cause to which he had dedicated his life. Martyn agrees with the priority of client perspectives. She reminds lawyers they do not know what value clients will place on available alternative courses of action. Clients’ subjective weighing of economic, social, psychological, and moral considerations is just as “factual,” and, thus, just as much entitled to respect, as lawyers’ assessment of the legal


49. Martyn, supra note 1, at 315-16.

50. Id. at 316.

51. See DAVID LUBAN, Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It), in LEGAL ETHICS AND HUMAN DIGNITY 65 (2007).

52. Id. at 70-73.

53. Id. at 76.

54. Id. at 71.

55. Id. at 79.

56. Martyn, supra note 1, at 315.
merits of their clients’ positions. Lawyers breach the trust that is essential to the attorney-client relationship when they fail to maintain an atmosphere in which clients can exercise their dignity.

There is something interesting in the relationship between the moral value of dignity and the legal duties of the lawyer. To the extent the doctrine of informed consent is animated by concerns about client dignity and to the extent the value of dignity is rooted in subjectivity—having a story of one’s own, no matter how nutty it may seem to the lawyer—the doctrine fits more comfortably with the contractarian model of the attorney-client relationship than it does with the fiduciary model. Contract law, in a deep sense, is all about subjectivity. Tort duties are imposed “as a matter of law,” as courts say. Reasonable care requires actors to do whatever a hypothetical objective and reasonable person would do under the same circumstances. Apart from a few interesting “contorts” areas in which agreements of the parties are honored (one example being express waivers of liability), tort law mostly deals with duties that arise independently of voluntary agreements. As a result, the duties sometimes fit uncomfortably with the preferences of the parties. A frequently raised criticism of products liability law, for example, is that it forces consumers to accept a unitary level of product safety, even in situations in which a consumer might be willing to forego a measure of safety in exchange for increased performance or decreased cost.

It is possible to account for the subjective interests or preferences of a particular consumer (or at least a defined subset of consumers), but it requires a fair bit of

57. Id. at 315-16.
58. Id. at 316.
59. See, e.g., Douglas A. Kysar, The Expectations of Consumers, 103 COLUM. L. REV. 1700, 1789-90 (2003). A principled risk-utility test does not require the manufacturer to offer only the safest possible design; alternatives that emphasize non-safety utility features may also be deemed non-defective. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1988); id. § 2 reporters’ note cmt. f(1). For example, a manufacturer may offer a more stable, but slower, sailboat for beginners as well as a faster, but less stable, model for experienced boaters. The faster version should not be deemed defective in design merely because there is a safer, albeit slower, model available. Ironically, one of the drafters of the Third Restatement, Jim Henderson, was an early and influential critic of products liability law for committing these “polycentric” design decisions to an adjudication process that is inherently unsuited to making them. See James A. Henderson, Jr., Process Constraints in Tort, 67 CORNELL L. REV. 901, 922 (1982); James A. Henderson, Jr., Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L.J. 467, 484-91 (1976); James A. Henderson, Jr., Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication, 73 COLUM. L. REV. 1531, 1539-42 (1973). As the allusion in the title of his 1973 article suggests, Henderson borrowed the term “polycentric” from Lon Fuller to describe open-ended problems that are ill-suited to the process of adjudication. See Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 394 (1978). Even a humdrum problem like selecting a rug for the living room can be polycentric in this sense. Polycentric problems are best solved by the exercise of discretion, reflective, intuitive styles of judgment, and by contract negotiation between parties. See Henderson, Process Constraints in Tort, supra, at 907 & n.30. Henderson emphasizes that contract law is better suited to solving polycentric problems, a point made by Fuller in his classic article on consideration. See James A. Henderson, Jr., Contract’s Constitutive Core: Solving Problems by Making Deals, 2012 U. ILL. L. REV. 89, 97 (citing Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 810 (1941)). That insight, coupled with Martyn’s observation of the polycentricity of client interests, is the inspiration for this Article.
subtle tinkering with the design standards that ordinarily apply. The default approach of tort law is to rely on objective norms, which are relatively insensitive to the characteristics of the parties. One might argue torts prioritize collective values, such as efficiency, over individual dignity.

The fiduciary model of the attorney-client relationship may invite this kind of imposition of one unitary set of rights and duties, regardless of the interests of clients and, hence, their dignity. Martyn’s point is worth bearing in mind: A range of subjective, unquantifiable, and sometimes emotive factors comprise the “interests” of a client. Because the core value in fiduciary relationships is loyalty, the fiduciary model of the attorney-client relationship correctly instructs lawyers to put the interests of their clients first. The model does not do as well at identifying the interests of clients that lawyers are to respect, however. The literature on representing subordinated clients is a valuable reminder that many clients face barriers such as race, sex, and class to participating effectively in the adjudication process. Requiring these clients to assert their own interests in their interaction with a lawyer, who may have institutional loyalties to other actors in the legal system, will only serve to reproduce the substantive inequalities of the legal system within the attorney-client relationship. Lawyers representing socially disadvantaged clients must exercise the utmost care to avoid substituting their own conceptions of the client’s interests for their client’s authentic values.

Legally sophisticated clients are a different matter altogether. In-house legal departments now employ graduates of top law schools, often with extensive law firm experience; the general counsel of a large corporation is frequently the member of the top leadership team, privy to high-level discussions of corporate strategy and policy. Inside counsel, particularly at the senior level, are, therefore, well-positioned to understand the client’s interests, and because in-house lawyers force outside law firms to compete for business, they have the

60. See, e.g., Scarangella v. Thomas Built Buses, Inc., 717 N.E.2d 679, 681-82 (N.Y. 1999) (setting out a multi-factor test to determine when a consumer is highly knowledgeable about safety vs. usefulness tradeoffs and, therefore, may opt for a design that lacks a specific safety feature).

61. Martyn, supra note 1, at 315, 341.


63. See, e.g., White, supra note 22.

64. See Abraham S. Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, 1 LAW & SOC’Y REV. 15, 19-21 (1967).

65. See, e.g., Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470, 476-77 (1976) (recounting the difficulties experienced by lawyers from the NAACP Legal Defense Fund, whose representation of clients in civil rights cases presented a tension between the goal of integration, toward which the organization was committed, and the interests of clients in having better schools, which may have remained segregated).

economic leverage necessary to concentrate the attention of lawyers. As a result, large corporations have access to the independent professional judgment of a lawyer when dealing with the outside world, including other lawyers. Legally sophisticated clients are, therefore, in a position to assert and protect their own, potentially idiosyncratic, interests in the context of a relationship with outside counsel. All lawyer-client relationships are essentially fiduciary, but the relationship between a legally sophisticated client and outside counsel is as close to an ordinary arms-length negotiation as any professional relationship can be. The reason is not that the elite bar deserves some kind of special protection but that all clients would be better off if they could have a frank conversation with their lawyer about their interests, risk preferences, and what protections they would be willing to give up in exchange for benefits, like reduced fees.Respecting the dignity of clients requires permitting clients to engage in bargaining over their interests, unless there is a reason to believe the client is unable to do so effectively. Loyalty to clients is undeniably a core principle of legal ethics, but loyalty requires respecting the client’s actual interests, not a hypothetical construct of reasonable-client interests. This is an important implication of Martyn’s position on the subjectivity of values. It is an extremely tricky process to ascertain the subjective values of a disempowered client who is inexperienced in dealing with lawyers, but as shown above, the representation of legally sophisticated clients is a different matter altogether.

It is well-settled law that informed consent requires the client be aware of the material respects in which there is a risk the client will be giving up some right or protection provided by the rules of professional conduct. Materiality is often defined in a circular fashion—albeit in a virtuous circle—in terms of any reservations a disinterested lawyer would have. Advice of independent counsel is not necessary for consent to be deemed informed, but the adequacy of the attorney’s disclosure will be evaluated from the perspective of the advice a genuinely independent attorney would have. Note that this perspective differs from the “reasonable patient” standpoint used in many jurisdictions in medical informed consent cases, but it is nevertheless essential to provide the required disclosure in terms the client can readily understand. Actually obtaining independent legal advice makes it more likely a reviewing court will

67. Wilkins, Going Global, supra note 66, at 259.
68. Id. at 261.
69. See, e.g., Lawrence J. Fox, All’s O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics, 29 Hofstra L. Rev. 701, 720-21 (2001).
70. See MODEL RULES OF PROF’L CONDUCT R. 1.0 cmt. 6 (2003).
find informed consent,\textsuperscript{75} but if a lawyer provides candid advice about material from an independent standpoint, the client’s consent will be effective.

The law of informed consent is understandably focused on the client’s knowledge of the risk of providing consent. No rational client would ever give consent, however, unless there was some benefit to the client of doing so. Consider conflicts of interest, in which a significant number of informed consent issues arise. Some lawyers may try to arm-twist a client into giving informed consent to a representation that would otherwise create a conflict of interest because the lawyer does not want to lose the economic upside of the concurrent representation.\textsuperscript{76} Yet, the question is whether a fully informed, legally sophisticated client would ever give informed consent to a representation that carries a risk of dividing the lawyer’s loyalties. There are many reasons for an affirmative answer to this question, most having to do with the right to retain counsel of one’s choice.\textsuperscript{77} The client may believe her chosen lawyer is “especially trustworthy and loyal and will not permit her judgment to be skewed.”\textsuperscript{78} The client may be unconcerned about representation by other lawyers in the firm of clients whose interests are adverse in unrelated matters. (Indeed, concurrent representation in unrelated matters does not constitute a conflict of interest at all for solicitors in the United Kingdom,\textsuperscript{79} and arguably, the law of lawyering in the United States took a wrong turn when it prohibited all “directly adverse” representation.\textsuperscript{80}) The client may perceive a risk but be willing to incur it given the benefit the client perceives, arising from considerations such as the specialized expertise of the law firm or the urgency of the matter. The point is: fully informed, legally sophisticated clients should be permitted to make the judgment call and not be stuck with a context-insensitive rule of professional conduct that is aimed at protecting the most vulnerable clients.

### III. ADVANCE CONSENT

As a test case for the argument that lawyers should be permitted to bargain with legally sophisticated clients and obtain effective informed consent, consider

\textsuperscript{75} 2 M\textsc{allen} & SM\textsc{ith}, \textit{supra} note 46, \S\ 18.31, at 1222.

\textsuperscript{76} See Fox, \textit{supra} note 69, at 704 (noting some clients are “hoodwinked by unsavory lawyers” into agreeing to onerous contract terms).

\textsuperscript{77} See, e.g., Jonathan J. L\textsc{erner}, \textit{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 (2001). See also \textsc{restate}ment (\textsc{third}) of the Law Governing Lawyers \S\ 122 cmt. b (2000).

\textsuperscript{78} 1 H\textsc{azard}, \textit{supra} note 74, at 10-22.1.

\textsuperscript{79} See ANDREW BOON & JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 199-200 (2d ed. 2008); SRA CODE OF CONDUCT Outcome 3.5 (Solicitors Regulation Auth. 2011); SRA Handbook Glossary pt. 2, r. 2 (Solicitors Regulation Auth. 2012) (defining “conflict of interests”).

a hypothetical example of a prospective waiver of conflicts of interest\textsuperscript{81}. Law Firm is a large, multi-office general practice firm with particular expertise in antitrust, securities, and intellectual property law. It has represented Corporation for many years, defending antitrust lawsuits brought by competitors in its industry. Subsidiary, a biotechnology company, is an affiliated entity of Corporation. Startup is a rapidly growing company in the biotechnology industry. Its general counsel joined Startup after serving for 20 years in the legal department of a huge multinational pharmaceutical company and, before that, working as a litigation partner at a large law firm in Chicago. Startup’s general counsel is experienced in many aspects of the industry, including finance, mergers and acquisitions, and intellectual property. Senior management of Startup is considering an initial public offering (“IPO”) of securities, and they would like the New York office of Law Firm to handle the IPO. The general counsel for Startup and a securities partner in Law Firm meet to discuss the potential representation. The securities partner says:

We represent many large corporations with multiple subsidiaries, and some of them may be active in the biotechnology space. Our Palo Alto office handles the intellectual property work for our clients. We have run a conflicts check and have not found any open matters in which Startup is an opposing party. Of course, we have no way of knowing what kind of technology Startup is working on and if anything you might bring to market might become the subject of infringement litigation. We are confident we would still be able to handle your IPO effectively even if our partners in Palo Alto are representing the opposing party in the infringement litigation, although, of course, we may have to disclose the pending litigation in your filings with the Securities Exchange Commission. There is no conceivable reason why we would do anything less than a stellar job handling the securities offering; there is no incentive to “take a dive” to favor the client of the Palo Alto partners.

Now what? Notice that Law Firm is already in a bit of a bind because any information it may possess about its clients’ matters, including patent infringement claims they may wish to assert against Startup or potential vulnerabilities of their own intellectual property portfolios to infringement claims asserted by Startup, is protected as confidential client information and may not be disclosed to Startup.\textsuperscript{82} Informed consent ordinarily requires full disclosure of all material information, and the inability to convey confidential information of other firm clients may prevent Law Firm from obtaining the informed consent of Startup to the representation of other clients in patent cases.\textsuperscript{83} It seems likely, however, that firm lawyers do not possess any confidential information that affects the interests of Startup. One result of the rise of in-house legal

\textsuperscript{81.} See Lerner, supra note 77, at 975-76.
\textsuperscript{82.} See Love, supra note 6, at 447-48.
\textsuperscript{83.} See Restatement (Third) of the Law Governing Lawyers § 122 cmt. c(i) (2000) (“Disclosing information about one client or prospective client to another is precluded if information necessary to be conveyed is confidential…..”).
departments has been to break up legal work into discrete matters, which are then placed with a number of different outside law firms based on some combination of price and expertise. Corporation is using Law Firm for its antitrust work, but it may not be using Law Firm for intellectual property matters, or, perhaps, it decides on a matter-by-matter basis which firm will handle patent infringement cases. The lawyers representing Corporation in antitrust matters probably have no idea what its subsidiaries are up to and whether they have potential patent infringement claims against competitors or potential liability for infringement. To make things more complicated, imagine Startup itself is considering a capital structure in which it has several affiliated entities, one of which will hold most of its patent portfolio. A good conflicts-checking system would presumably catch the conflict if a lawyer in Palo Alto tried to open a new matter on behalf of Subsidiary against Startup, also a firm client, but there is a risk that the affiliated entities of Startup may not be entered into the conflicts database. Unless the general counsel of Startup is extremely forthcoming about her own company’s plans, there is no way Law Firm can protect its clients against lawsuits filed by Startup or its subsidiaries.

Further permutations can be imagined, but the point is simply that taking on a new client always presents risks of creating a conflict of interest that complicates the representation of existing clients. The risk may be slight if the new client’s business activities do not in any way potentially create legal intersections with the business of existing clients. This situation is unusual, however, given the reality of law firm specialization. Firms compete to establish a reputation for representing particular types of clients in particular matters. Clients look for experienced antitrust, securities, patent, etc., lawyers. Because the distribution of types of matters in the population of prospective clients is not

84. See Wilkins, Team of Rivals, supra note 66, at 2082.

random, there is generally some risk of conflict whenever a new client retains a law firm. This risk can be reduced by careful conflicts-checking procedures, but many factors complicate conflicts checking. In particular, information costs can be significant if the crucial “is there a conflict?” question depends on knowing something like the scope of intellectual property of a client in California and forecasting the likelihood that it will be affected by the activities of a new client in New York. Thus, Law Firm has to consider the possibility that Startup, using separate outside counsel, will file a claim for patent infringement against one of its existing clients and then claim Law Firm has a conflict of interest because “the representation of one client [Corporation] will be directly adverse to another client [Startup].” If the representation of Startup is worth it, economically speaking, Law Firm may be willing to incur this risk. If, on the other hand, in the context of the firm’s overall practice, the representation of Startup is not particularly valuable and the risk of losing other clients is serious enough, Law Firm may decline the representation. Varying the facts of the hypothetical, one can imagine types of clients that systematically may have difficulty obtaining counsel of their choice. A first mover in an industry with a small number of players might be able to use conflicts rules strategically to “lock up” the expertise of a law firm, thereby denying effective legal representation to competitors. In other words, an inflexible approach toward conflicts rules, treating them not as default rules but as immutable rules that cannot be contracted around, imposes costs on prospective clients.

Startup might be able to offer something to Law Firm as a means of mitigating its risk. Taking a cue from Judge Learned Hand’s famous formula, Law Firm performs a risk-utility calculation before deciding to take on a new client. The disutility of turning away Startup is represented by the “B” term of the inequality and must be balanced against the downside loss, “L,” of being disqualified from the representation of Corporation, discounted by the probability, “P,” of that occurrence. Suppose the general counsel of Startup can significantly reduce the “P” term of the inequality. Then, it would be worth it for Law Firm to accept the representation even if Startup is not paying higher fees—that is, even if “B” remains constant. The general counsel could do this by agreeing to waive specified conflicts of interest, all present and future conflicts of interest, or all but a specified subset of conflicts (such as those arising out of

86. See generally Kevin McMunigal, Rethinking Attorney Conflict of Interest Doctrine, 5 GEO. J. LEGAL ETHICS 823 (1992).
88. One district court recognized that unless broad, open-ended advance waivers are enforceable, “[l]arge firms would never be able to take on small, specialized matters for a client unless the firms could reasonably protect against … abuse.” Galderma Labs., L.P. v. Actavis Mid Atl. LLC, 927 F. Supp. 2d 390, 395 (N.D. Tex. 2013).
89. See, e.g., Mylan, Inc. v. Kirkland & Ellis LLP, No. 2:15-cv-00581, 2015 BL 186120, at *17 (W.D. Pa. June 9, 2015) (“[T]he commonly acknowledged intent of … prospective waivers … is to enable competitor clients to retain the services of a limited, select group of counsel with particular qualifications, expertise, and valuable accouterments ….”).
90. See Lerner, supra note 77, at 1000-01.
91. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
simultaneous representation by the firm of another client in a related matter). The scope of the waiver would be proportional to the reduction in the “P” term. For a very simple illustration, suppose the representation of Startup offers the firm $500,000 in legal fees, but the loss of the representation of Corporation would be $2.5 million. If there is a 25% likelihood of a conflict arising that would result in disqualification or withdrawal from the representation of Corporation, Law Firm will not accept the representation of Startup ($500,000 < (.25)($2,500,000)). If, however, the likelihood of disqualification due to a conflict drops to 10%, it is worth it for Law Firm to accept the representation ($500,000 > (.10)($2,500,000)). Startup would be willing to make the offer to waive conflicts because it desires Law Firm’s services and, critically, because it can decide for itself whether the risk it is incurring is worth it. Remember, values are subjective. Management of Startup may place a high value on the services of the securities lawyers at Law Firm and, therefore, may be willing to accept the risk that Law Firm will appear as counsel on the other side of a dispute at some point in the future. It is not irrational to believe the securities lawyers in New York will not be influenced by the interests of their partners and associates in Palo Alto.

For the offer by Startup to be valuable in a case like this, the proposed waiver of conflicts must be broad and, almost by definition, it must encompass unknown and unforeseen future conflicts. The risk to Law Firm is almost entirely a function of information costs. If it knew of a pending or threatened patent dispute between Corporation and Startup, it could seek the informed consent of Corporation to disclose this information, discuss the issue with the general counsel of Startup, and obtain the informed consent of both parties to the conflict. At relatively low cost, Law Firm could bring its risk down to a manageable amount. However, information costs are significantly increased by the decentralized nature of a national law firm’s practice, the complexity of its clients’ business and legal entanglements, and the transactional nature of the relationship between corporate clients and law firms, all of which render it difficult for lawyers and clients to discuss existing or reasonably foreseeable, specific future conflicts. Knowing this, a prospective client in the position of Startup may rationally elect to make an offer of a “blanket” advance waiver. The trouble is if there are doubts about the enforceability of blanket advance waivers, conflicts rules do not function as default rules; rather, the risk of unenforceability in effect transforms conflict rules into immutable rules. This

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92. The conflict would be consentable because Law Firm is representing Startup only in connection with the IPO and not the patent litigation. See Model Rules of Prof’l Conduct R. 1.7(b) (1983) (setting out three categories of non-consentable conflicts). In all of these examples and the discussion of the enforceability of blanket advance waivers, the assumption is that the conflict would be, in principle, consentable given adequate disclosure.


95. See Painter, supra note 35, at 294.
may be the intent of critics of advance waivers, but immutable rules impose costs on parties who would prefer to contract around them.\textsuperscript{96} Giving effect to the autonomy and dignitary interests of clients in the position of our hypothetical Startup requires clarity regarding the enforceability of agreements between law firms and prospective clients, including blanket advance waivers.

The American Bar Association ("ABA") has changed its position on the enforceability of blanket advance waivers.\textsuperscript{97} In Formal Opinion 93-372, the Committee on Ethics and Professional Responsibility gave at most a half-hearted endorsement of advance waivers.\textsuperscript{98} It accepted them in theory but lay considerable emphasis on the requirement of informed consent.\textsuperscript{99} In order for the client’s consent to be informed, the Committee opined, the lawyer must ordinarily be able to identify the party or class of parties whose interests will be adverse in the future and, in most cases, should also provide details about the nature of the future matters giving rise to the conflict:

[I]t 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. Even that information might not be enough if the nature of the likely matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought.\textsuperscript{100}

The opinion contemplates that, if future developments clarify the identity of the other party and the nature of the matter creating the conflict, the lawyer must resolicit the client’s informed consent.\textsuperscript{101} “The fact that the lawyer at an earlier date secured a prospective waiver does not render inapplicable the requirement that the lawyer make an independent judgment whether undertaking the new representation will adversely affect the original client’s representation.”\textsuperscript{102} This requirement effectively gives the client the power to hold out by refusing this second consent.\textsuperscript{103} It is hard to see how blanket advance waivers could ever be enforceable under this standard. Larry Fox, and other critics of advance waivers, had the better of the interpretive argument at the time,\textsuperscript{104} although, of course, whether the rules should be changed to permit blanket advance waivers was still an open normative question.

The ABA Committee subsequently withdrew its 1993 opinion.\textsuperscript{105} In its 2005 Opinion 05-436, the Committee cited developments since 1993, including

\begin{itemize}
  \item \textsuperscript{96} See Crystal, supra note 94, at 880.
  \item \textsuperscript{97} ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-372 (1993).
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} See Painter, supra note 35, at 294-95 (discussing opportunistic refusals by clients to give consent and option of \textit{ex ante} consent to avoid strategic behavior).
  \item \textsuperscript{104} See generally Fox, supra note 72.
  \item \textsuperscript{105} ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005) [hereinafter ABA Op. 05-436].
\end{itemize}
the addition by the Ethics 2000 Commission of a new comment to the concurrent conflict of interest rule.\footnote{106} The comment appears to apply the same principle of informed consent—the client has to understand the material risks it is agreeing to incur:

The effectiveness of [advance] 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… 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.\footnote{107}

So far, so good. That is the same position as taken by the 1993 opinion. But the comment also suggests a sliding scale for the specificity of the required disclosure based on the sophistication of the client.\footnote{108} The ABA Ethics Committee picked up on this suggestion and, in effect, created a presumption of the enforceability of advance waivers entered into by certain clients:

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…. [I]f 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.\footnote{109}

The opinion does not use the term “legally sophisticated client,” but that is what it is talking about when it refers to a client who is an experienced user of legal services, familiar with matters that give rise to the type of conflict covered by the waiver, and independently represented by counsel.\footnote{110} In the hypothetical here, Startup’s general counsel is a former big-firm litigator and in-house lawyer for a large, multinational company; that was simply a way of highlighting the experience factors listed in the new comment. Other authorities have similarly focused on the client’s experience and representation by in-house counsel.\footnote{111}
Until recently, the trend appeared to be clearly in favor of enforcing blanket advance waivers entered into by legally sophisticated clients, with the most aggressive position being taken by a New York City Bar opinion. Perhaps reflecting the city’s concentration of clients in the financial services industry and the conflicts that frequently arise among them, the New York City Bar opinion permits advance waivers even for conflicts arising from concurrent representation in substantially related matters.\textsuperscript{112}

Some judicial skepticism remains, however, and two recent district court opinions from California seem to turn back the clock to 1993, when the ABA opinion required identification of the opposing party and nature of the matter giving rise to the conflict.\textsuperscript{113} In one case, a large, multinational food products company had signed an engagement agreement with a large law firm, which included the following advance waiver provision:

It is possible that some of our current or future clients will have disputes with you during the time we are representing you. We therefore also ask each of our clients to agree that we may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for you, even if the interest of such clients in those unrelated matters are directly adverse to yours.\textsuperscript{114}

The law firm subsequently merged with another firm, and the newly merged firm found itself with two multinational food products companies as clients who were suing each other in federal court.\textsuperscript{115} (The firm’s work for Client A was unrelated to its representation of Client B in the lawsuit.) Although the language of the waiver is clear, its significance would be apparent to any in-house lawyer—the matters were unrelated, the conflict is in principle consentable, and the company’s in-house counsel agreed to it—the district court nevertheless declined to enforce it because it “did not identify potential adverse clients or the nature of any potential conflicts covered by the waiver.”\textsuperscript{116} Just as the 1993 ABA opinion had mandated, the district court believed “[a] second more specific waiver was required.”\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{112} ABCNY Op. 2006-1, supra note 111 (concluding an advance waiver that includes substantially related matters is enforceable if, \textit{inter alia}, the client is sophisticated).
  \item \textsuperscript{114} \textit{Id.} at *5.
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.} at *6.
  \item \textsuperscript{117} \textit{Id.} at *7.
\end{itemize}
The second district court case involved an extremely well drafted advance waiver provision:

Hogan & Hartson is a large law firm with multiple offices around the world. Because of the firm’s size and geographic scope, as well as the breadth and diversity of our practice, other present or future clients of the firm inevitably will have contacts with you. Accordingly, to prevent any future misunderstanding and to preserve the firm’s ability to represent you and our other clients, we confirm the following understanding about certain conflicts of interest issues:

a) Unless we have your specific agreement that we may do so, we will not represent another client in a matter which is substantially related to a matter in which we represent you and in which the other client is adverse to you. We understand the term “matter” to refer to transactions, negotiations, proceedings or other representations involving specific parties.

b) In the absence of a conflict as described in subparagraph (a) above, you acknowledge that we will be free to represent any other client either generally or in any matter in which you may have an interest.

c) The effect of subparagraph (b) above is that we may represent another client on any issue or matter in which you might have an interest, including, but not limited to: … (iii) Litigation matters brought by or against you as long as such matters are not the same as or substantially related to matters in which we are, or have been, representing you.\footnote{Lennar Mare Island, LLC v. Steadfast Ins. Co., No. 2:12-cv-02182-KJM-KJN, 2015 WL 1540638, at *12 (E.D. Cal. Apr. 7, 2015).}

The waiver did not go as far as permitted by the New York City Bar with regard to asserting the right to represent another client concurrently in a substantially related matter. The scope of the waiver is well within the modern line of authority permitting blanket advance waivers. Nevertheless, the court disqualified the law firm from representing an insurer in a coverage dispute with a real estate developer.\footnote{Id. at *15.} The insurer’s lawyer had moved from another firm to the law firm representing the developer, creating the conflict.\footnote{Id.} Despite the clarity of the waiver language and the fact that the developer “is a large corporation with international operations and was represented by its own in-house counsel at the time it entered the agreement,”\footnote{Id. at *14.} the court found the waiver overbroad and insufficiently specific with respect to the conflict that eventually arose.\footnote{Id.} Going back to the 1993 ABA position, the court admonished the firm for not revisiting the previous waiver when the firm’s relationship with the parties changed.\footnote{Id.}

\footnote{119. Id. at *15.}
\footnote{120. Id.}
\footnote{121. Id. at *14.}
\footnote{122. Id.}
\footnote{123. Id.}
Both of these cases curiously undervalue the expertise of in-house counsel and the economic clout of clients in the modern market for legal services. The court in the insurance coverage dispute said, “the price of hiring a large and capable firm should not be powerlessness in the face of unanticipated future adverse representations, especially when, as here, the attorney-client relationship is dynamic over time.”\textsuperscript{124} The court in the lawsuit between the food products companies actually accepted the representation of the client’s general counsel who stated he did not understand the waiver language “was meant to waive actual future conflicts.”\textsuperscript{125} What good is an in-house lawyer who does not understand the effect of language in a contract he is signing for the client? In both of these cases, not only were the clients legally sophisticated, but also they were bringing economically significant engagements to the firms. The district courts seem to have missed the dramatic shift of power from law firms to clients. As David Wilkins has shown, law firms who once had the power to deter their clients from engaging in socially harmful conduct lost that power when their corporate clients set up in-house legal departments to do legal services that had previously been provided by outside law firms and also began to exercise greater control over the hiring of outside counsel.\textsuperscript{126} Wilkins summarizes the sea change in the attorney-client relationship from the Golden Age to the modern period:

[The in-house counsel movement] substantially altered the value proposition that law firms made to their corporate clients. Rather than being “wise counselors” capable of guiding clients through the complex intersection of business strategy and legal rules, outside lawyers increasingly marketed (and I use the word advisedly) themselves as specialists capable of deploying large numbers of highly skilled experts at a moment’s notice to handle the kind of emergencies that remain difficult for in-house lawyers to handle effectively.\textsuperscript{127}

General counsel [also] argued that they were now better situated than outside counsel to play the wise-counselor and gatekeeping roles that law firms, because of the episodic and distant nature of their dealings with companies, were no longer in a position to play.\textsuperscript{127}

Legally sophisticated clients are not only able to look after their own interests, to a very great extent, but are truly in the driver’s seat when it comes to formulating legal strategy. The need for blanket advance waivers comes from the recognition by law firms that they do not know all of the facts that affect their relationship with clients and that, in fact, the clients may have a “long game” that involves attempting to deprive competitors of counsel of their choice.\textsuperscript{128}

\textsuperscript{124} Id. at *15.
\textsuperscript{126} Wilkins, Team of Rivals, supra note 66, at 2079-82.
\textsuperscript{127} Id. at 2083.
Advance waivers do not reflect a retreat from the core value of loyalty so much as they represent an attempt to specify by contract what the duty of loyalty requires. In-house counsel are perfectly capable of refusing to sign an advance waiver or requesting its terms be modified. They should not be able to have it both ways by offering to reduce the costs arising from uncertainty and then exploiting ambiguity regarding the enforceability of advance waivers.

IV. A CONCLUDING THOUGHT ABOUT LOYALTY AND FIDUCIARY DUTIES

Some critics of broad advance waivers essentially argue that whatever happens in the market for legal services, lawyers are still professionals, and there are some things professionals should not do, even if there is an economic rationale for doing so. The essence of professionalism is, among other things, that clients should be able to trust their lawyers and, indeed, must be able to do so because legal work is specialized and legal expertise is opaque to non-lawyers. Larry Fox picks up on this conception of professionalism when he writes:

The Author has always been shocked by the chutzpah of a law firm greeting a new client and saying, “We would love to represent you, we are lawyers, we are professionals, but let us remind you that we have this little clause buried on page three of our five-page, single-spaced letter of retention.”

Rhetorically, the argument trades on the tacit breakdown in trust symbolized by the lawyer shoving a five-page contract full of CYA provisions at the client when the lawyer should be acting unstintingly in the best interests of the client. What could be more disloyal than attempting to contract around the fiduciary duties that are owed as part of every professional relationship?

The concept of informed consent, with its roots in medical malpractice cases, gives a partial answer to this question. The ethical ideal underlying informed consent is the patient’s autonomy to make health-care decisions. Imagine the patient’s condition can be treated medically, with potential side effects (expected disutility) of X and potential benefits (expected utility) of Y. Also available is a surgical treatment with expected disutility of X’ and expected utility of Y’. The values assigned to X, X’, Y, and Y’ are subjective, depending on whether the particular patient is able to live with her current condition, how she feels about risk, what types of side effects she is willing to tolerate, and so on. One may rightly insist that a doctor is a professional and must always act in the patient’s best interest, but the content of “the best interests of the patient” is still an open question. There is no universally valid answer to resolve the question of what should a doctor do in that case. Similarly, Fox’s law firm

129. Crystal, supra note 94, at 890.
130. See, e.g., Rayman L. Solomon, Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES, supra note 30, at 144.
131. See, e.g., id. at 146.
132. Fox, supra note 69, at 703.
133. Munneke & Loscalzo, supra note 72, at 401.
example can be made a bit less upsetting by imagining the lawyer saying to the
prospective client, “We would love to represent you, but given the complexity of
the businesses our existing clients are engaged in, there is simply too much risk.
You’ll have to find another law firm.” There is no reason to assume the firm is
behaving strategically here; it may simply be risk-averse. The client may be able
to search for another law firm, but maybe the client’s best option, given its own
subjective values and risk preferences, would be to accept some undefined future
likelihood that the firm may represent another client adversely in an unrelated
matter. In one sense, the firm would be behaving disloyally but only if loyalty is
understood with reference to a snapshot perspective, looking at the client’s
interests at some future point in time. If, on the other hand, the client’s interests
are understood dynamically, considering its preference at the outset regarding an
uncertain future, there is nothing disloyal about the firm offering the advance
waiver.

As suggested at the beginning of this Article, a fuller answer must grapple
with the tension within the ideal of professionalism, between ideals of client and
public service and the inconvenient fact that lawyers make their living providing
services in a market. In that market, not only do clients have increasing power,
but also regulatory and technological changes are threatening the traditional
monopoly that lawyers have had over the provision of legal services.134 The
fiduciary model and the contractarian model of the attorney-client relationship
are not necessarily in tension. In the case of advance waivers, these models may
be different ways of expressing the same idea. That idea is that when clients are
empowered, respecting their autonomy may require something other than
adhering to immutable rules that cannot be modified by contract. Lawyers still
have robust duties of candor and communication and must disclose to clients any
material facts of which they are aware.135 Yet, the kind of confusion created by
the recent district court cases in California is ultimately not beneficial to legally
sophisticated clients who, as much as their lawyers, value predictability and the
capacity to establish a framework of rights and duties by agreement.136

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134. See W. Bradley Wendel, Foreword to The Profession’s Monopoly and Its Core Values, 82
135. Vincent R. Johnson, “Absolute and Perfect Candor” to Clients, 34 St. Mary’s L.J. 737,
782 (2003).
136. See generally W. Sugar Coop. v. Archer-Daniels-Midland Co., No. CV 11-3473 CBM