UNIVERSITY OF PITTSBURGH LAW REVIEW

Vol. 86 ● Fall 2024

THE UNINTENDED COSTS OF ADVANCE WAIVERS OF FUTURE CONFLICTS

Ashley M. London

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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THE UNINTENDED COSTS OF ADVANCE WAIVERS OF FUTURE CONFLICTS

Ashley M. London[*]

ABSTRACT

The American Bar Association ("ABA") unenthusiastically recognized advance waivers of future conflicts for the first time in a 1993 formal opinion. These allow lawyers to take on prospective clients whose interests will be adverse to current clients at some point in the future. They also sidestep the ethics rule requirement of obtaining true informed consent from a client to waive a conflict of interest because, at the time of signing, the conflict is not yet ripe.

After a full-court press by its own Business Law Section Ad Hoc Committee during the Ethics 2000 Commission's review of the Model Rules of Professional Conduct, the ABA repealed its limited approval in favor of a broader acceptance of advance waivers in 2005. After all, advance waivers mean lawyers and law firms can grow profits by not having to turn down clients with conflicting interests.

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ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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The intended consequences of such waivers are to allow larger law firms to keep as much business as possible, while also permitting large and sophisticated clients an unfettered choice of legal representation. They also come with some unintended consequences: keeping large clients condensed in a small number of large firms, thereby creating industry oligopolies where diversity among partners is staggeringly low; increasing the opportunity to exercise confirmation bias in Big Law; and placing the burden on courts to police these agreements in what has proven to be a disorderly fashion.

This Article asserts that advance waivers of conflicts should be carefully scrutinized and perhaps disallowed because they exist primarily to permit Mega Big Law firms to monopolize business and crowd out competition. The use of advance waivers by industry lawyers may also have a dampening effect on diversity efforts by increasing confirmation bias, and can prevent smaller and mid-sized law firms from establishing additional areas of expertise. Inconsistent opinions by courts across the country and the lack of guidance from ethics policymakers make crafting reliable rules about drafting enforceable advance waivers nearly impossible. Instead, Mega Big Law firms could simply seek informed consent from sophisticated clients at the time a potential conflict arises, but not before.

Delaying informed consent to the point at which there is a conflict could satisfy increasingly chaotic courts, as well as allow policymakers to show the rules of professional conduct apply to all law firms regardless of size or wealth.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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INTRODUCTION

A wave of law firm consolidation across the United States and globally, which has been building in intensity since 2018, is leading analysts to admit size does matter when it comes to Big Law mergers and acquisitions.[1] These mergers have created Mega Big Law firms leading to larger and more complex legal ethics problems.[2] This trend culminated in at least as many law firm mergers in the first quarter of 2023 than in all of 2022 because bigger firms post higher gross revenues and mergers increase firm footprints and market influence.[3] The creation and maintenance of Mega Big Law firms comes with sizeable client conflict issues, however, which can put enormous sums of money at stake.[4] For example, in early 2022, Dentons U.S. LLP lost an appeal to reverse a $32.3 million legal malpractice verdict in the Eighth Appellate District of Ohio.[5] A party, which Dentons had sued on behalf of its U.S.

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[1] *See* Phillip Bantz, *The Rise of the Mega Firm: Legal Departments Face Difficult Questions Amid Law Firm Mergers*, LAW.COM (Apr. 20, 2020, 10:00 AM), https://www.law.com/corpcounsel/2020/04/20/the-rise-of-the-mega-firm-legal-departments-face-difficult-questions-amid-law-firm-mergers/ [https://perma.cc/P2DR-A8X2]; *see also* Roy Strom, *For Growth's Sake, That's What Law Firm Mergers Are All About*, BLOOMBERG L. (Jan. 26, 2023, 5:00 AM), https://news.bloomberglaw.com/business-and-practice/for-growths-sake-thats-what-law-firm-mergers-are-all-about [https://perma.cc/2PZW-SX7G].

[2] The author uses the term "Mega Big Law" here and throughout to describe the top 100 or so law firms recently listed by Law360. *See* Sam Bell & Pamela Wilkinson, *The Law360 400: Tracking the Largest US Law Firms*, LAW360 (June 26, 2023, 2:02 PM), https://www.law360.com/pulse/articles/1690943?site-menu=1 [https://perma.cc/8B8Z-VLRS]. For example, the top three law firms on this list—Kirkland, Latham, and Greenberg Traurig—boast 2,943, 2,574, and 2,113 lawyers respectively. *Id.* "Mega Big Law" is colloquially used to describe the status of Big Law firms after they have merged with other Big Law firms. *See also* Anthony Lin, *The Rise of the Megafirm*, A.B.A. J., Sept. 2015, at 54, 55 (coining the term "megafirm").

[3] Sara Merken, *Big Law Firms Quicker to Merge in 2023 So Far, Report Shows*, REUTERS (Apr. 4, 2023, 9:23 AM), https://www.reuters.com/legal/transactional/big-law-firms-quicker-merge-2023-so-far-report-shows-2023-04-03/ [https://perma.cc/ZW27-SKHY]; Strom, *supra* note 1 (explaining that law firms in the United States "took an outsize[d] share of revenue and profitability growth from 2020 to 2021."); *see also* David Thomas & Sara Merken, *Law Firm Mergers Gained Steam in 2022, with More on the Way in 2023*, REUTERS (Jan. 3, 2023, 6:33 PM), https://www.reuters.com/legal/legalindustry/law-firm-mergers-gained-steam-2022-with-more-way-2023-2023-01-03/ [https://perma.cc/PE7H-TKBS] (noting that there were forty-six law firm mergers in all of 2022 and six in the first week alone of 2023).

[4] *See* RevoLaze LLC v. Dentons U.S. LLP, 191 N.E.3d 475 (Ohio Ct. App. 2022).

[5] *Id.* Dentons U.S. LLP is a global law firm operating under a Swiss verein, or a formal legal structure that is comparable to a voluntary association. *See* Michael E. McCabe, Jr., *Mega-Firm Swiss Verein Law Firm Structure Provides More Access to Legal Services (Good) and More Conflicts of Interest (Bad)*, MCCABE ALI LLP: IPETHICS & INSIGHTS, https://ipethicslaw.com/the-mega-firm-swiss-verein-law-firm-structure-provides-more-access-to-legal-services-good-and-more-conflicts-of-interest-bad/ [https://perma.cc/6233-CWJK] (last visited Sept. 29, 2024). Other mega law firms such as Baker & McKenzie, DLA Piper, Hogan Lovells, King & Wood Mallesons, Norton Rose Fulbright, and Squire Patton Boggs all operate

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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client, successfully moved to disqualify the firm due to a conflict of interest.[6] In that case, no advance waiver of conflict was sought.[7] But would it have made a difference if an advance waiver had been sought? Based on recent court decisions, it depends.[8]

One tool lawyers may employ to circumvent conflicts of interest—but, more critically, to avoid affecting law firms' bottom lines in the case of disqualification or loss of a client's book of business—is advance waivers of conflicts. Advance waivers of conflicts, sometimes known as prospective waivers, are instruments or communications between the lawyer and the client purporting to provide the informed consent necessary to allow the lawyer to continue representing the client in the event an unknown or unforeseen conflict of interest in representation arises in the future.[9] It is like a plenary indulgence for absolving law firms of the ethical duty

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under the Swiss Verein structure. *Id.* However, such organizations are criticized as raising exposure to ethical issues because more lawyers under one brand can equate to more potential conflicts of interest. *Id.* Dentons itself has "approximately 125 offices in more than 74 countries, and over 6,600 attorneys." *RevoLaze LLC*, 191 N.E.3d at 479.

[6] *RevoLaze LLC*, 191 N.E.3d at 482. Opposing counsel filed a motion to disqualify Dentons based on an alleged direct violation of Ohio Rule of Professional Conduct 1.7. *Id.* Ohio Rule of Professional Conduct 1.7 prohibits a lawyer's acceptance or continued representation of a client if:

> (1) the representation of that client will be directly adverse to another current client; (2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

OHIO RULES OF PRO. CONDUCT 1.7.

[7] *RevoLaze LLC*, 191 N.E.3d at 481. GAP alleged that Dentons never sought to obtain a conflict waiver from GAP prior to accepting the representation of RevoLaze, and that the firm had ongoing access to confidential and privileged information relating to claims and defenses in the matter. *Id.* Dentons Canada LLP represented GAP, while Dentons U.S. LLP represented RevoLaze. *Id.* Dentons asserted that the Canadian office did not have access to its U.S. law firm files and information, did not share profits, and were financially and operationally separate. *Id.* In this assertion of an effective ethical screen, the court nonetheless determined, "Dentons U.S.' membership in a verein, with a common conflicts base, that shares client confidential information throughout the organization, is irreconcilable with Dentons U.S.' contention that it was separate from Dentons Canada." *Id.* at 488.

[8] *See* SuperCooler Techs. Inc. v. Coca Cola Co., 682 F. Supp. 3d 1071 (M.D. Fla. 2023); Mylan, Inc. v. Kirkland & Ellis LLP, No. 15-581, 2015 U.S. Dist. LEXIS 194338 (W.D. Pa. June 9, 2015).

[9] *See generally* Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701 (2001); HENRY S. DRINKER, LEGAL ETHICS 103–09 (1953); MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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of loyalty.[10] Without an advance waiver or other form of informed written consent, the rules of professional conduct provide that a lawyer shall not accept representation if there is a concurrent conflict of interest.[11] A concurrent conflict of interest exists if one client will be directly adverse to another client, or if there is a significant risk that the lawyer's responsibilities to another client, a former client, a third party, or the personal interest of the lawyer will impose a material limitation.[12] Conflicts can also be imputed from one lawyer to the lawyer's entire firm,[13] and the general remedy for this ethical conundrum is the application of informed consent.

The promulgation and use of advance waivers is not without ongoing controversy, and different parties have diametrically opposed viewpoints.[14] The use of advance waivers of conflicts of interest was first formally recognized in 1993 by ABA Formal Ethics Opinion 93-372.[15] This opinion allowed lawyers to seek advance consent from a client regarding future representations of potentially adverse clients where imputed conflicts of interest might arise on future matters unrelated to the lawyer's legal work for the first client.[16] It stopped short, however, of offering bright line directives as to when and how such an agreement could be enforceable, much to the dismay of its supporters.[17] While the model rules, and specifically ABA Model Rule of Professional Conduct 1.7, have been modified to permit a broader

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[10] A plenary indulgence is a special way to achieve forgiveness of sin, according to the Catholic Diocese of Pittsburgh. *See What Are Plenary Indulgences?*, CATH. DIOCESE OF PITTSBURGH, https://diopitt.org/what-are-plenary-indulgences [https://perma.cc/GB3L-YX8M] (last visited Sept. 29, 2024). The author thanks Professor Mark Yochum for this delightful term of art.

[11] MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

[12] *Id.* at r. 1.7(a).

[13] *See* MODEL RULES OF PRO. CONDUCT r. 1.10(a) (AM. BAR ASS'N 1983) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . . .").

[14] *See Ethics Opinion 309: Advance Waivers of Conflicts of Interest*, DC BAR (Dec. 2001), https://dcbar.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-309 [https://perma.cc/U76T-7UDF].

[15] *See* Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 308 (2000) (detailing the history of ABA Formal Opinion 93-372). This opinion was later withdrawn by the ABA Standing Committee on Ethics and Professional Responsibility upon the promulgation of Formal Opinion 05-436 on May 11, 2005. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 05-436 (2005).

[16] Arthur D. Berger, *Advance Waivers: Be Specific or Don't Count on Them*, 31 LAWS. MAN. ON PROF. CONDUCT (ABA/BLAW) 441, 441–42 (2015).

[17] *See id.* at 442.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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range of informed consent for future conflicts,[18] inconsistent enforcement by courts, in addition to other limitations and requirements, make the use of advance waivers largely unpredictable.

Today, advance waivers of conflicts are used primarily by large and Mega Big Law firms and not by smaller practitioners who do not routinely engage in cross-selling to represent one client in as many matters as possible.[19]

The use of advance conflict of interest waivers facilitates the rise and dominance of industry-based lawyering because these tools can keep specialized businesses and so-called sophisticated clients in the books of business of large law firms across the country.[20] Advance waivers of conflict allow lawyers and clients to contract on their own terms, create their own rules for how to handle future conflicts of interest, and avoid potential disciplinary hearings.[21] They promote niche specialization, endorse client choice in representation, and feed the confirmation bias myth of the "industry lawyer" from a Mega Big Law firm as the only advocate who can grasp complex, large corporate transactional matters such as a proposed $40 billion hostile takeover involving pharmaceutical companies, for example.[22] That is,

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[18] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 05-436 (2005). Additionally, the author's own experience and interviews with small local law firms further corroborates this proposition.

[19] *See* Carolyn Elefant, *Conflict over Conflicts Waiver = Opportunities for Solo & Small Firms*, MY SHINGLE (Dec. 21, 2016), https://myshingle.com/2016/12/articles/operations/conflicts-conflicts-waivers-opportunities-solo-small-firms/ [https://perma.cc/MSF7-T9XH].

[20] *See* Lauren Nicole Morgan, *Finding Their Niche: Advance Conflicts Waivers Facilitate Industry-Based Lawyering*, 21 GEO. J. LEGAL ETHICS 963 (2008) (arguing that advance waivers are worth the potential ethics risk in spite of potential for abuse because savvy industry clients demand the services of specialized niche lawyers at large or mega law firms). According to Morgan, the focus should be more on the client's wants and needs, not from the perspective of the lawyer, but from the perspective of a new breed of clientele "who prefer loyalty with a dose of attorney experience." *Id.* at 990. *See also* Bantz, *supra* note 1 (noting that, according to Faegre Drinker co-chair Andrew Kassner, clients "'appreciate a high level of expertise in their sector and having a really coordinated approach across regulatory, business and litigation services.'"). Faegre Daniels merged with Drinker, Biddle & Reath to form Faegre, Drinker, Biddle & Reath in 2020. *Id.*

[21] *See* Painter, *supra* note 15, at 289.

[22] *See generally* Mylan, Inc. v. Kirkland & Ellis LLP, No. 15-581, 2015 U.S. Dist. LEXIS 194338 (W.D. Pa. June 9, 2015). Plaintiffs Mylan, Inc., Mylan Pharmaceuticals Inc., Mylan Technologies Inc., and Mylan Specialty LP, affiliated entities and current clients of mega firm Kirkland & Ellis LLP, filed a complaint against defendant alleging the law firm was in violation of its fiduciary duties under the Pennsylvania Rule of Professional Conduct Rule 1.7. *Id.* at *2. Specifically, the plaintiffs asserted Kirkland represented competitor Teva Pharmaceutical Industries, Ltd., in Teva's attempted hostile takeover of a Mylan holding company. *Id.* Kirkland & Ellis had agreed to represent Teva in the deal without informing Mylan because Kirkland & Ellis believed it had a valid advanced waiver of conflict in place. *Id.* at *11. The court found the existing waiver language too broad such that true informed consent

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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until a client reaches a breaking point and files for disqualification. The court can strike down an advance waiver on the grounds that informed consent was not obtained, or by ruling that a company reorganization does not sever the lawyer's existing fiduciary duty, or perhaps more poetically, "the client who confides in his counsel this afternoon is entitled to rest tonight knowing that s/he will not face that counsel on the opposite side of the table tomorrow."[23]

This Article suggests that an increase in the use of advance waivers of conflict should be disfavored by clients and courts, and perhaps the practice should be disallowed. These waivers allow Mega Big Law firms to monopolize business by crowding out competition. This Article also argues that these waivers will damage diversity efforts and stymy benefits from a revitalized ethical concept of professionalism. For the past two years in a row, law firms of all sizes have finally reported growth in the area of diversity in race and ethnicity, but Big Law continues to lag behind with a lower percentage of diverse equity partners.[24] Diversifying the profession remains such a concern that the ABA House of Delegates at its 2023 Annual Meeting passed a resolution urging employers to "evaluate law students holistically during the On-Campus Interview process by considering more than a student's grade point average and class rank."[25] Additionally, the use of advance waivers reinforces confirmation bias. Large corporations believe Mega Big Law firms are the best to represent industry because they always have, thus creating an echo chamber that precludes mid-tier and small law firms from expanding their areas of expertise.

This Article explains that neither the ABA, nor the American Legal Institute ("ALI"), will promulgate more specific rules for the enforcement of advance waivers

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could not exist. *Id.* at *44. A preliminary injunction enjoining the firm from representing Teva was granted. *Id.* at *68.

[23] *Id.* at *34.

[24] Dan Roe, *Diversity Improving at Law Firms, but Forces Are Working Against Those Efforts*, LAW.COM (May 31, 2023, 10:01 AM), https://www.law.com/americanlawyer/2023/05/31/diversity-improving-at-law-firms-but-forces-are-working-against-those-efforts/ [https://perma.cc/S34X-E8UT].

[25] AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 523, at 1 (2023). The resolution reports that "[e]quity partners in multi-tier law firms continue to be disproportionately white men." *Id.* at 2. Additionally, "an undue focus on GPA and class rank fails to consider the full range of skills and experiences that candidates may bring to a firm." *Id.* The ABA proposes that "[a] more holistic approach, one that considers a broader range of attributes and experiences, would likely yield a more diverse and dynamic workforce, better equipped to meet the challenges and opportunities of the legal profession." *Id.* at 3.

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of conflicts because such action will affirmatively limit so-called industry lawyering by Mega Big Law firms. As a result, profitable opportunities to small and mid-sized law firms, which still comprise the majority of the legal profession, will be foreclosed. Finally, this Article will demonstrate how little precedent is set in this area, leading to unpredictability, as enforcement of advance waivers varies from case-to-case and jurisdiction-to-jurisdiction.

I. THE DEVELOPMENT OF ADVANCE WAIVERS OF CONFLICT

Attempts at employing advance waivers of conflict have probably existed as long as lawyers have sought to represent more than one client, either simultaneously or in succession. The tension between law as a business and as a profession remains fertile ground for legal ethicists and scholars to explore, and nowhere is this more apparent than the area of conflicts of interest. It is also impossible to calculate just how often advance waivers of conflict are employed today due to the stringent rules covering lawyer-client confidentiality and attorney-client privilege.[26] These advance waivers only become public when they are litigated in a court of law and enter the public domain.

Loyalty, fidelity, competence, and protection of client confidences have formed the bedrock of the core duties of legal ethics and professionalism in the law for over 800 years.[27] One of the earliest directives against representing clients on both sides of a case appears in the London Ordinance of 1280.[28] These concepts have been

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[26] *See generally* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983) (governing the ethical duty of confidentiality); FED. R. EVID. 501 (establishing general guidance on the attorney-client privilege); FED. R. EVID. 502 (noting specific requirements for the attorney-client privilege, the work product doctrine, and limitations on the waiver of privilege).

[27] *See* Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1458 (2004). In fact, "[w]hen viewed in isolation, any one of these historical sets of standards may seem quite different than a set from another era, but when viewed in context of their broader 800-year evolution, the standards are remarkably similar over time." *Id.* at 1386. Andrews states further, "[t]he core concepts—litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service—have remained surprisingly constant." *Id.* Indeed, "modern codes have made significant advances, but the primary changes have come in the degree of detail and the regulatory effect of the standards of conduct, not in the core duties." *Id.*

[28] *See* DRINKER, *supra* note 9, at 103 (citing HERMAN A. COHEN, HISTORY OF THE ENGLISH BAR AND *ATTORNATUS* TO 1450, at 233 (London: Sweet & Maxwell, Ltd. 1929)). Drinker also references the second and third paragraphs of Canon 6 of the Canons of Professional Ethics, adopted by the American Bar Association in 1908. *Id.* Canon 6 provides,

> [i]t is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. . . . [A]

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codified in common law, which sets forth a cause of action for clients and imposes subsequent penalties on lawyers who transgress these obligations of loyalty and fiduciary duty.[29] Additionally, trial and appellate courts reiterate the importance of these duties, as do prominent modern legal ethicists.[30]

A historic example of an attempted, but ultimately failed, advance waiver of client conflict in the United States occurred in California in 1897 in the case of *In re Boone*, where the lawyer was disbarred for attempting to represent a party adverse to his former client.[31] However, with the notable exception of *Westinghouse Electric*

> lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

MODEL CODE OF PRO. RESP. Canon 6 (AM. BAR ASS'N 1908). Canon 6 continues, "[t]he obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." *Id.*

[29] *See* Richard Bridgman, *Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Case*, 30 S.C. L. REV. 213, 221 (1979) ("[T]he basic elements of legal malpractice are: (1) a duty owed to the injured party arising out of the contract for professional services, (2) a breach of that duty by failure to exercise professional skill, and (3) damage caused by the failure to exercise the requisite skill.").

[30] *See* Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567, 570 (2012) (citing Williams v. Reed, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,733)). In *Reed*, then-Judge Joseph Story wrote,

> When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.

29 F. Cas. at 1390. *See also* Blough v. Wellman, 974 P.2d 70, 72 (Idaho 1999) (citing Beal v. Mars Inc., 586 P.2d 1378, 1383 (1978)) ("The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity."). Highly regarded legal ethicist Lawrence Fox was particularly perturbed by the sanctioning of the advanced waiver by general counsels and the American Bar Association, stating at the outset of his essay, "[t]he attempts by some in the Bar to compromise client loyalty on the altar of law firm profits per partner is both unceasing and depressing." Fox, *supra* at 567.

[31] *See In re* Boone, 83 F. 944 (N.D. Cal. 1897). California-based lawyer John L. Boone sought to withdraw from representing a long-time former client in a patent matter, and did withdraw using a "mutual contract of release," then sought the employment of a party adverse to his former client. *Id.* at 950–52. The mutual contract of release was written by Boone and stated, "Bowers releases me from all obligations rights, and privileges, and consents that I may take employment contra, so that I am perfectly free to take employment from Mr. Bates or from anyone else without in any way violating my professional honor." *Id.* at 951. The court in that case took a dim view of what Boone had attempted and disbarred him for acting in an unprofessional manner. *Id.* at 964. The court stated:

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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Corp. v. Gulf Oil in 1978,[32] courts across the country throughout the 1970s, 1980s, and 1990s appeared to adopt a more permissive approach to the enforceability of advance waivers of conflict.[33] The result was implicit support of their use by Big Law firms and even bigger clients on various grounds ranging from theories of estoppel, the substantial relationship analysis, and informed consent.[34] These

> It is the general and well-settled rule that an attorney who has acted as such for one side cannot render services professionally in the same case to the other side, nor, in any event, whether it be in the same case or not, can he assume a position hostile to his client, and one inimical to the very interests he was engaged to protect; and it makes no difference, in this respect, whether the relation itself has been terminated, for the obligation of fidelity and loyalty still continues.

Id. at 952 (citation omitted).

[32] 588 F.2d 221 (7th Cir. 1978). The Seventh Circuit declined to enforce an alleged advance waiver of conflict between Gulf Oil and the Bigbee law firm regarding the representation of a longstanding client and potentially adverse party. *Id.* at 229. The court "[held] that a simple consent by a client to the representation of an adverse party is not a defense to that former client's motion for disqualification . . . based on the possibility that confidential information will be used against the former client" in subsequent litigation. *Id.* at 229. *See also id.* at 229 n.9.

[33] *See, e.g.*, Painter, *supra* note 15, at 297 (enforcement in the 1970s); Unified Sewerage Agency v. Jelco Corp., 646 F. 2d 1339 (9th Cir. 1981) (enforcement in the 1980s); Fisons Corp. v. Atochem N. Am., Inc., No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284 (S.D. Cal. Nov. 14, 1990) (enforcement in the 1990s).

[34] In contrast to *Westinghouse*, a 1978 Memorandum and Order by Judge MacMahon in the Southern District of New York ruled that, given the formalized retainer agreement by Boston-based law firm Skadden, Arps, Slate, Meagher & Flom and its client's knowledge that Skadden's "specialized practice might someday lead to a collision," the conflict between the client Curtiss-Wright and the target company of its acquisition, Airco Inc., had been waived. Painter, *supra* note 15, at 297. *See also Unified Sewerage Agency*, 646 F.2d at 1346. Jelco asked Portland-based firm Kobin & Meyer to represent it in litigation over a claim by Ace Electric, a subcontractor for Jelco. *Id.* at 1342. The firm informed Jelco that it was simultaneously representing another subcontractor (Teeples & Thatcher, a long-time firm client), and Jelco nevertheless decided to retain the firm for the litigation. *Id.* After the *Ace* litigation was lost, Jelco discharged Kobin & Meyer from further work on the case and moved to disqualify the firm from representing Teeples & Thatcher. *Id.* Now a former client of the firm, the Court ruled against Jelco saying the consent requirement was met when the firm continued to warn Jelco of the conflict and continued to keep the firm on retainer regardless. *Id.* at 1346. The narrow issue focused on the issue of estoppel due to the warnings and continued reliance on the permission given, but the Ninth Circuit also found it "obvious" that the law firm could represent both companies because there was "no substantial or close relationship between the subject matter of the *Ace* litigation and the subject matter of the Teeples & Thatcher litigation." *Id.* at 1351. *See also Fisons Corp.*, 1990 U.S. Dist. LEXIS 15284. In that case, Fisons acquired a pharmaceutical division from Atochem, formerly known as Pennwalt Corp., represented by Philadelphia-based multinational law firm Dechert Price & Rhoads (now Dechert LLP), which represented Pennwalt for more than three decades, including in the sale of the group to Fisons and in pending trademark disputes. *Id.* at *2. Fisons requested that Dechert continue to represent it in the trademark disputes, but the firm was concerned about future conflicts. *Id.* Pennwalt sought the consent of

decisions supported a latitudinarian approach to the historical expression of a rigorous ethical duty of loyalty with its strictures against conflicts of interest. The legal profession's ethics watchdogs and guardians were thus poised to weigh in on the issue.

A. ABA Attempts to Circumscribe Advance Waivers Using Informed Consent

In light of decisions supporting the use of advance waivers and the growing influence of Big Law firms and industry clients, both the ABA and the ALI addressed the issue in the early 1990s. The first approach provided by the ABA in 1993 was a comparatively limiting factor in that, while providing an acknowledgment that under some circumstances advance consent to conflict might be obtained by a lawyer, the enforceability of such an agreement remained in doubt.[35] The ABA Committee on Ethics and Professional Responsibility introduced its Formal Opinion 93-372 thirty years ago for the purpose of clarifying how lawyers may address the issue of waivers of future conflicts of interest, and it provided guidelines focused on the informed consent of the client for enforceability.[36] It turned out to be a short-lived opinion, withdrawn just a dozen years later and replaced with Big Law friendly text and an increasingly louche attitude toward the concept of a sophisticated client's informed consent.[37]

Fisons for the continued representation, and in a series of letters between company officials, the consent was given for the representation to continue. *Id.* at *2–3. In 1990, Fisons sued Atochem, claiming Pennwalt committed fraud and breach of warranty, and Fisons moved to disqualify Dechert on the grounds of conflict of interest. *Id.* at *5. The court concluded that the disclosure of the dual representation was made to Fisons, and that Fisons had consented to the representation regardless of a lack of exact knowledge of the nature of the future conflict, holding that "[s]uch disclosure is adequate in view of the fact that Fisons is a knowledgeable and sophisticated client." *Id.* at *16.

[35] *See* Painter, *supra* note 15, at 308 (asserting that ABA Formal Opinion 93-373 provided criteria that was, in effect, "depriving the advance consent of much of its significance" because the criterial for deciding validity was too similar to that which determined whether a conflict existed in the first place—something that might not be fully-informed at the outset).

[36] ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-372 (1993) ("[I]f [a] waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so [that] the client's consent can reasonably be viewed as having been fully informed when it was given.").

[37] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 05-436 (2005).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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The 1993 ABA opinion's analysis begins "with a review of the requirements for contemporaneous waivers."[38] This issue is more easily explained by taking a look at the language contained in ABA Model Rule 1.7,[39] and the terminology found in Model Rule 1.0,[40] defining informed consent. In the cases of successful contemporaneous waivers, the lawyer possesses the facts of both the subject matter of the current conflict and potential issues regarding confidential information, which cannot be disclosed under the mandatory prohibitions contained in ABA Model Rule 1.6.[41] Informed consent, then, under ABA Formal Opinion 93-372 is the key to a successful contemporaneous waiver of conflict because "the client's right to control the course of his representation imposes a fiduciary duty on the attorney to inform his clients of all relevant facts and potential consequences and to obtain the full understanding consent of the client to the legal solution proposed."[42] However, the ABA clearly contemplated that these tools would primarily be used by Big Law firms due to the rise of the so-called "national law firm" in the early 1990s.[43] Regulators

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[38] Fox, *supra* note 9, at 704–05 (citing ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-372 (1993)). Fox, an author of this ABA opinion and member of the later ABA Ethics 2000 Committee, demonstrates a personal stake and very strong opinion about the use of advanced waivers. *See id.* at 704 n.11.

[39] *See* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

[40] *See id.* r. 1.0(e) (defining informed consent). Rule 1.0(e) "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." *Id.*; *see also* Fox, *supra* note 9, at 704–05.

[41] *See* Fox, *supra* note 9, at 705; *see also* MODEL RULES OF PRO. CONDUCT. r. 1.6 (AM. BAR ASS'N 1983) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).").

[42] Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 310 (1980). *See id.* at 352 ("Informed consent by the client will serve to protect the client's constitutional rights of autonomy and human dignity and will also spur the attorney to investigate and relate more information that is relevant to his client's choice."); *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-372 (1993); *Susan Martyn*, U. TOL., https://www.utoledo.edu/law/faculty/fulltime/martyn.html [https://perma.cc/R5HU-9RVL] (last visited Sept. 29, 2024).

[43] ABA Comm. on Ethics & Prof. Resp., Formal Op. 93-372 (1993).

> The impetus for seeking prospective waivers has grown as the nature of both law firms and clients has changed. In an era when law firms operated in just one location, when there were few mega-conglomerate 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. However, 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

seemed keen to support the position that without the ability to execute such contracts, it would be seen as "placing unreasonable limitations on the opportunities of both clients and lawyers."[44] The implication, however, is that only certain clients and large law firms would benefit.[45]

As a doctrine, informed consent exists somewhat uneasily on two hotly debated theoretical planes, particularly in the context of advance waivers of conflict.[46] The first and more traditional view, espoused by the ABA Formal Opinion 93-372, sees informed consent as a set of fiduciary duties owed by the lawyer to the client first and a contractual relationship second.[47] The fiduciary duty model assumes the lawyer and client are not on equal footing; therefore, outside evaluation of the relationship offers additional protections beyond the four corners of a document.[48] The second, and the more modern view that would emerge victorious after the ABA's Ethics 2000 Commission, views the lawyer-client relationship as arising from an agreement of the parties, or from the market-contractarian model.[49] Under this model, the lawyer-client relationship is viewed through the lens of rational-choice, information-based decision making, with everything being negotiable between more sophisticated consenting parties.[50] For this concept to work, everyone bound to the contract has comparable bargaining power and must recognize that

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> 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. While the Model Rules quite correctly treat such a situation as presenting a conflict, the conflict is also clearly one that can be waived.

Id.

[44] *Id.*

[45] *Id.*

[46] W. Bradley Wendel, *Pushing the Boundaries of Informed Consent: Ethics in the Representation of Legally Sophisticated Clients*, 47 U. TOL. L. REV. 39, 41 (2015).

[47] *Id.* at 42; *see also* ABA Comm. on Ethics & Prof. Resp., Formal Op. 93-972 (1993) ("[N]o lawyer can rely with ethical certainty on a prospective waiver of objection to future adverse representations simply because the client has executed a written document to that effect.").

[48] Wendel, *supra* note 46, at 42, 47–48.

[49] *Id.* at 41, 44.

[50] *Id.* at 41 (detailing the major tenets of the market-contractarian model).

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mutual interests are best served by abiding by the agreed-upon terms.[51] This view proved anathema to some legal ethicists who believe ethics should not be negotiable,[52] but not to the business interests representing Big Law firms who continued promoting the use of advance waivers of conflict.[53]

Informed consent now has the power to cure many ethical conundrums, and indeed has become a "workhorse concept,"[54] first introduced by the ABA in its Ethics 2000 Commission and formally adopted in 2002.[55] The fundamental problem, however, resides in the details. How much informed consent can be bestowed in the case of the prospective, or advance, waiver of conflict when adverse parties may be unknown, and issues of relevant fact and law not immediately apparent? Here, the 1993 Opinion says informed consent is not the only protection for clients under the Model Rules; instead, clients can be divided into sophisticated and unsophisticated buckets, with both still owed ethical duties of confidentiality, protection from unanticipated conflicts, and protection from any material limitations on representation from their lawyers.[56]

At the end of its analysis, the ABA decided to take a "guarded view of prospective waivers," without fully denying their utility so long as lawyers used good

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[51] *See* Wendel, *supra* note 46, at 41; *see generally* Peter Vanderschraaf, *Contractarianisms and Markets*, 181 J. OF ECON. BEHAV. & ORG. 270 (2021).

[52] *See* Fox, *supra* note 9, at 721 ("[I]t introduces the concept of 'the consenting adult exception' that abandons the minimum standards that ethics rules have always provided for all clients, regardless of their station in life.").

[53] *Id.* at 728–31 (establishing that the "real goal" in permitting prospective waivers is to "abolish imputation," thus allowing Big Law firms to continue expanding their reach).

[54] *See* Wendel, *supra* note 46, at 39.

[55] *Id.* at 39.

[56] ABA Comm. on Ethics & Prof. Resp., Formal Op. 93-372 (1993).

> The Model Rules do not give blessing to such arrangements solely on the basis that they are consensual. Protections are provided even for clients who are otherwise willing to enter into such arrangements. While these protections are particularly important for clients who are unsophisticated, even the most worldly-wise client is entitled to some protection from waivers whose result may be (i) adversely to affect or materially to limit the ongoing representation of the client, (ii) an adverse representation which may result in the loss of confidentiality, or (iii) an adverse representation that was totally unanticipated.

Id.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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judgment, received client consent, and did not reveal confidential information.[57] The ABA Formal Opinion 93-372 stated that a prospective waiver "which did not identify either the potential party [i.e., the other client for whom the law firm planned to take on a matter in the future] or at least a class of potentially conflicting clients" was not likely to be effective or enforceable.[58] Still, the ABA and the case law of the late 1990s did not completely preclude the idea that an advance waiver of conflict could be utilized, but rather provided that the waiver at issue must show highly-detailed information being shared between lawyer and client, and that the informed consent was given in a timely fashion, preferably in writing.[59]

ABA Formal Opinion 93-372 reads like a cautious and judicious recognition of advance waivers of conflict, acknowledging their utility but narrowing their use to an influential subset of practicing lawyers, while not fully guaranteeing enforceability.[60] The opinion set forth several conditions under which the requirements of the ABA Formal Opinion 93-372 could be met and such waivers allowed.[61] All interested parties across the country were off and running to explore,

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[57] *Id.*

[58] *See* Fox, *supra* note 9, at 706 (citing ABA Comm. on Ethics & Prof. Resp., Formal Op. 93-372 (1993)). In Formal Opinion 93-372, the ABA observed that:

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

ABA Comm. on Ethics & Prof. Resp., Formal Op. 93-372 (1993).

[59] *See* Schwartz v. Indus. Valley Title Ins. Co., No. CIV.A.96-5677, 1997 WL 330366, at *1 (E.D. Pa. June 5, 1997) (holding that a prospective waiver given in 1993 in a separate but related action was not sufficient for a 1996 action, because conflicts cannot be waived so easily); *see also* Worldspan, L.P. v. Sabre Grp. Holdings, Inc., 5 F. Supp. 2d 1356, 1358 (N.D. Ga. 1998) (holding that a six-year-old waiver did not constitute informed prospective consent for current representation due to the lapse of time).

[60] *See generally* ABA Comm. on Ethics & Prof. Resp., Formal Op. 93-372 (1993).

[61] *Waiver of Objection to a Possible Future Conflict of Interest*, N.C. STATE BAR, https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-168/?opinionSearchTerm=use%20of%20partner [https://perma.cc/Q35W-63CY] (last visited Sept. 29, 2024). The North Carolina State Bar observed that waiver of future conflicts of interest is permissible provided that the following conditions, which are set forth in ABA Formal Opinion 93-372, are met. *Id.* First, the prospective waiver must be in writing. *Id.* Second, the writing must demonstrate that the future conflict, though unknown at the time of the waiver, was within the contemplation of the parties at the time of the writing. *Id.* Third, "[i]t must be patently clear that the existing representation will not be adversely affected by the subsequent representation." *Id.* And fourth, "[t]he subsequent representation [must] not result in disclosure or use of

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test, and potentially exploit this new wave of seemingly permissible ex-ante contracting around the fusty rules that viewed conflicts as a terminus, and not as just another problem to be solved.[62]

B. The ALI Policy Benefitting Big Law Firms

In 1996, the ALI would accommodate advance consents to a greater degree than the ABA, but again stopped short of completely eliminating all ambiguity as to enforcement.[63] Where the 1993 ABA Opinion allowed contracting around conflicts only after they arose, the ALI restatement defined conditions where lawyers and their clients could consent to contract around the rules governing conflicts of interest based on forecasts and the future anticipation of a conflict arising.[64] This document provided a template for how law firms currently use, or attempt to use, advance waivers of conflicts today.[65]

The ALI was formed in 1923 by some of the most well-known, respected, and homogenous lawyers, judges, and law professors of that century.[66] The goal of the group was "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work."[67] The ALI and the ABA

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information imparted by the client in the representation existing at the time of the waiver, or any subsequent representation of that client." *Id.*

[62] Wendel, *supra* note 46, at 57 (discussing how the trend until recently has been in favor of continual expansion of the doctrine of waivers of conflicts of interest).

[63] *See* Painter, *supra* note 15, at 309.

[64] *Id.*

[65] *Id.*

[66] *See* Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 698 (1998). Among the founding members and earliest leaders were Elihu Root, George Wickersham, Learned Hand, William Draper Lewis, Benjamin Cardozo, Charles Evans Hughes, and William Howard Taft. *See The Story of the ALI*, AM. L. INST., https://www.ali.org/about-ali/story-line/ [https://perma.cc/K5MU-ZEB8] (last visited Sept. 29, 2024). Noting this lack of diversity is important because it still exists across many Big Law firms today, Sybil Dunlop & Jenny Gassman-Pines, *Why the Legal Profession Is the Nation's Least Diverse (and How to Fix It)*, 47 MITCHELL HAMLINE L. REV. 129, 130 (2020) (noting that "law firms' lack of diversity remains persistent."), and Big Law firms are leading the charge in the use of advance waivers of conflict. *See* Michael J. DiLernia, *Advance Waivers of Conflict of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 97 (2009).

[67] *See The Story of the ALI*, *supra* note 66. One of the Committee's suggestions was for a Restatement of the Law that "should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life." *Id.*

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have long worked hand in glove to improve, promote, and enhance the legal profession. For example, in 1947, the ABA and the ALI joined forces to develop a program for continuing legal education, which became the American Law Institute-American Bar Association Committee on Continuing Professional Education.[68]

In its proposed final draft of Section 202, Comment D, of the Restatement of the Law Governing Lawyers, the ALI expanded on specific circumstances under which lawyers and their clients might attempt to contract around conflict rules after a conflict has arisen, and also introduced the still-ambiguous concept of the "sophisticated client."[69] Going further, the ALI explained why the use of advance waivers of conflict would benefit lawyers and their clients, particularly in terms of keeping a long-term client without foreclosing other business opportunities for the lawyer.[70] However, the ALI couched this point in more client-focused, terms: "Such an agreement could effectively protect the client's interests while assuring that the lawyer did not undertake a potentially disqualifying representation."[71] The factual illustration provided in Section 202, Comment D, establishes that the ALI contemplated endorsing these advance waivers of future conflicts to protect large law firms and big corporate clients. The example provided is based in New York, but the hypothetical firm also operates an office in Chicago and services large corporate clients with extensive commercial interests.[72] Today, the exact language

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> A Restatement should be critical and constructive, and although largely based on statutes and decisions, "it should not be confined to examining and setting forth the law applicable to those situations which have been the subject of court action or statutory regulation, but should also take account of situations not yet discussed by courts or dealt with by legislatures."

Id. Author's Note: The ALI has done much to increase its diversity in both ethnicity and gender over the decades, and now reflects a more diverse legal profession.

[68] *See id.*

[69] *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS., § 202 cmt. D (AM. L. INST., Proposed Final Draft No. 1, 1996). The Restatement's criteria for whether an advanced waiver is enforceable include: the client's level of sophistication; the client's opportunity to receive independent legal advice on the consent issue; and the client's familiarity with the matter in question. *Id.*

[70] *See id.*

[71] *Id.*

[72] *Id.*

> 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 sizeable business corporation that is sophisticated in commercial matters generally and specifically in dealing with lawyers. Law Firm also has a

of the 1996 version of the ALI's restatement covering client consent to a conflict can be found in Section 122, along with the same factual illustration.[73] The guidance for the use of advance waivers of conflict was extended to pre- and post-conflict contracting scenarios, and the ABA and individual state jurisdictions would take it even further.[74]

C. The Business Law Section Sways ABA and Its Ethics 2000 Commission

The ABA's 1993 Opinion was formally withdrawn in 2005 after the ALI Restatement release,[75] the findings of the ABA's own Ethics 2000 Committee,[76] and a full court press from the ABA's Business Law Section Ad Hoc Committee.[77] The guidance that formerly appeared to protect clients from less rigorous, and perhaps less certain, attempts at advance waivers of conflict now would place the emphasis

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> Chicago office that gives tax advice to many companies with which Client has commercial dealings. 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 (see § 128). 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.

Id.

[73] RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS., § 122 (AM. L. INST. 2000).

[74] *Id.* (defining "scope and cross references"); *see also* ABA Comm. on Ethics & Prof. Resp., Formal Op. 05-436 (2005) (revising the model rules on conflicts of interests, providing guidelines for similar rules undertaken by many states).

[75] *See* ABA Comm. on Ethics & Prof. Resp., Formal Op. 05-436 (2005).

[76] *See* Margaret Cole Love, *Final Report—Summary of Recommendations*, ABA ETHICS 2000 COMM. (Mar. 8, 2021), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_mlove_article/ [https://perma.cc/V6E2-QF5W]. The ABA's "Ethics 2000 Commission" was formed in 1997 and charged with reviewing and revising the Model Rules of Professional Conduct. *Id.*

[77] *See* Fox, *supra* note 9, at 708–13; *see also* Larry P. Scriggins, *Re: Proposed Rule 1.10 & #150; Public Discussion Draft—Center for Professional Responsibility*, AM. BAR ASS'N (Oct. 5, 1999), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/scriggins30/ [https://perma.cc/JX8X-EP46] (detailing the make-up of the Ad Hoc Committee, which was a section of Business Law of the ABA). Today, the ABA's Business Law section boasts over 30,000 members worldwide, representing lawyers from global law firms, small boutique firms, the government, and legal education. *See About the Business Law Section*, AM. BAR ASS'N, https://www.americanbar.org/groups/business_law/about/ [https://perma.cc/AP6Q-JDKM] (last visited Sept. 29, 2024).

on the client that is an "experienced user of legal services."[78] This change would usher in a gentle presumption of viability for even more open-ended advance waivers, so long as clients met this amorphous and near mythical standard that appears to be a veiled code for large corporate client interests.[79]

It was clear the big business interests of the legal profession would adamantly promote the use of these tools, presenting the arguments against utilizing advance waivers of conflict as potentially "depriving" clients of legal services.[80] The Ad Hoc Committee attempted to push the envelope as far as it could to encourage the ABA to adopt a more lenient rule toward advance waivers, including a suggestion that if a client later decided the conflict waiver previously agreed to was no longer in effect, then the lawyer would have grounds to terminate the relationship.[81] Among other asks, the Ad Hoc Committee also explicitly suggested that upon receiving an advance waiver of conflict from a sophisticated client, the lawyer might also then seek a waiver of the use of confidential information, even if at the time of execution that confidential information was unknown by all parties.[82] Opponents of this view, like Lawrence Fox, decried the economic dominance and attacks on loyalty such attempted changes to the Rules of Professional Conduct represented.[83] The ABA Ethics 2000 Commission nevertheless attempted to satisfy the Big Law economic interests in adjusting Model Rule 1.7 and repealing its Formal Opinion 93-372, replacing it with Formal Opinion 05-436 in May 2005.[84]

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[78] ABA Comm. on Ethics & Prof. Resp., Formal Op. 05-436 (2005) ("ABA Model Rule of Professional Conduct 1.7 permits effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.").

[79] *Id.* Formal Opinion 05-436 further provided that a lawyer "may obtain the effective informed consent of a client to future conflicts of interest" if certain conditions are considered. *Id.* For example, the relative sophistication of the client is an important factor in determining whether "[g]eneral and [more] open-ended consent" is likely to be effective. *Id.* Similarly, independent representation in giving consent and limiting the consent to "future conflicts unrelated to the subject of the representation" are additional factors to be analyzed. *Id.*; *see also* Fox, *supra* note 30, at 574 (describing the myth of the sophisticated client, which is a code for large organizations, or the kinds of clients who may be sophisticated in areas of expertise like drug manufacturing or high-tech software, but naïve when it comes to the operation of the legal profession and legal system).

[80] *See* Fox, *supra* note 9, at 708–13; *see also* Scriggins, *supra* note 77.

[81] *See* Fox, *supra* note 9, at 712.

[82] *Id.* at 713.

[83] *See* Fox, *supra* note 30, at 568.

[84] *See* ABA Comm. on Ethics & Prof. Resp., Formal Op. 05-436 (2005).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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In the revised formal opinion, the ABA gave its blessing to a wider range of effective advance waivers of conflicts of interest by sophisticated clients, especially when independently represented by counsel.[85] Consequently, consent is now limited to a narrow band of potential future conflicts.[86] Comment 22 to the rule sets forth this reasoning and further explains that the effectiveness of such waivers will generally be determined by the extent to which the client reasonably understands the material risks entailed.[87] The more comprehensive the explanation of the types of future representations, the more likely the client will have an understanding to support a finding of a valid waiver.[88] Supporters of the amendments believe the rule does not go far enough.[89] They argue that public policy favors the use of advance waivers because sophisticated clients hire sophisticated industry lawyers "whose success virtually requires that they maintain their own set of tangled loyalties"; as expertise grows, so does the client base, thereby creating more conflicts and a greater need to waive them.[90] This position raises an important question: Do financially sophisticated clients deserve different sets of ethical rules?

Today, ABA Model Rule 1.7 and Comment 22 provide the framework for the analysis of advance waivers of concurrent client conflicts.[91] The formal acknowledgment and enforcement of advance waivers of conflict after less than twenty-five years of existence represents a substantial change in a profession that still struggles with increasing the diversity, equity, and inclusion of its ranks.[92] It is worth asking how this change in the fabric of lawyer ethics was made so quickly. The logical answer, however, is that it was motivated by the promise of financial gain.[93]

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[85] *See id.*

[86] *See id.*

[87] *Id.*

[88] *Id.*

[89] *See, e.g.*, Morgan, *supra* note 20, at 980.

[90] *See id.*

[91] *See* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983); *see also id.* at cmt. 22.

[92] *See* Dunlop & Gassman-Pines, *supra* note 66.

[93] *See* Sarah Garvey, *Law Firm Mergers: Why Law Firms Join Forces*, BCG ATTORNEY SEARCH, https://www.bcgsearch.com/article/900045274/Law-Firm-Mergers-Why-Law-Firms-Join-Forces/ [https://perma.cc/BX6Z-UVDA] (last visited Sept. 29, 2024).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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II. BIG LAW FIRM MERGERS NEED ADVANCE WAIVERS TO GROW AND PROFIT, BUT AT WHAT UNINTENTIONAL COSTS?

Law firms merge for profits, growth, and geographic expansion.[94] Often the biggest law firms merge because they seek to expand into international markets to capitalize on the globalization of big business and corporate industrial interests.[95] In fact, the revenue of Big Law firms grew an average of ten percent per year from 1972 to 1987 with receipts from corporate clients beating the revenue from individual clients beginning in the 1980s and accelerating thereafter.[96] The top 200 global law firms generated more than $185.6 billion in revenue in 2022, which led to profits per equity partner rising to more than $1.9 million.[97] The top ten law firms of the 2022 Global 200 include Kirkland & Ellis, Latham & Watkins, DLA Piper, Baker McKenzie, Skadden Arps, Dentons, and Ropes & Gray.[98]

The American Lawyer Magazine's "Am Law 100," which is an annual ranking of the one hundred largest law firms in the United States, also creates a ranking for what it terms the legal profession's so-called "Super Rich."[99] To make this list, firms must report revenue per lawyer of at least $1.1 million and profits per lawyer of at least $550,000.[100] In 2022, this elite club contained more members than ever from forty top firms due to a year of incredible financial success for Big Law.[101] Size matters for the legal aristocracy; bigger firms equate to larger profits and greater

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[94] *See id.*

[95] *See id.*

[96] *See* MICHAEL S. ARIENS, THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS 250 (2023). It was also at this time that *The American Lawyer* magazine began publishing its annual AmLaw 100 list measuring, among other things, profits per equity partner. *Id.*

[97] *See* Staci Zaretsky, *The Global 200: The Richest Law Firms in the World (2022)*, ABOVE THE L. (Sept. 20, 2022, 12:46 PM), https://abovethelaw.com/2022/09/the-global-200-the-richest-law-firms-in-the-world-2022/ [https://perma.cc/ND6V-PZAS].

[98] *Id.* In addition, almost all of these top ten law firms have most of their lawyers located here in the United States. *Id.* Revenues range from Kirkland & Ellis with $6.04 billion, to Ropes & Gray with $2.67 billion. *Id.*

[99] *See* Ben Seal, *The Once-Exclusive Super Rich Club Welcomed More Members Than Ever for 2022*, LAW.COM (Apr. 26, 2022, 10:05 AM), https://www.law.com/americanlawyer/2022/04/26/the-once-exclusive-super-rich-club-welcomed-more-members-than-ever-for-2022/ [https://perma.cc/QYG6-4DZ3].

[100] *Id.*

[101] *See id.*

reach. The average gross revenue for the "Super Rich" firms in 2022 was almost $1.7 billion, which is higher than the $994,000 average of the other sixty law firms that make up the Am Law 100.[102] Equity partners cashed in by averaging $4.4 million in profits per partner, a 19.7% year-over-year growth spurt.[103]

With such enormous sums of money at issue, it is little wonder that a ripple of small contractions occurring in the spring of 2023 due to job cuts after mergers, rising interest rates, recession fears, and the delay of start dates for some new associates sent many Mega Big Law firm observers into a frenzy.[104] Some Mega Big Law firms like Reed Smith and Orrick Herrington & Sutcliff cited a slowdown in demand for services and announced layoffs adding up to approximately 2% and 6% respectively of their workforces.[105] Even the so-called "Super Rich" from the Am Law 100 saw a small contraction in size, with the list contracting forty firms to thirty-four firms, and a small dip in the profits per lawyer from $994,000 in 2022 to $830,912 in 2023.[106]

Legal scholars have opined for several decades that the whole concept of Big Law firms, created to service primarily big corporate clients, teeters on the brink of destruction.[107] But even after the relatively minor modern market correction and the looming threat of digital technology (such as the rise of the use of artificial

[102] *See id.*

[103] *Id.* ("The Super Rich average $4.4 million in profits per equity partner (and 19.7% year-over-year growth); everyone else averages $1.6 million (on 15.1% growth). The gap in profit margin (52% vs. 34%, on average) is similarly stark.").

[104] *See* Zack Needles, *Law.com Trendspotter: Mergers and Rate Hikes Are Poised to Create a Whole New Crop of Law Firms*, LAW.COM (Jan. 31, 2023, 10:31 PM), https://www.law.com/2023/01/31/law-com-trendspotter-mergers-and-rate-hikes-are-poised-to-create-a-whole-new-crop-of-law-firms/ [https://perma.cc/57VT-CYGL]; *see also* Debra Cassens Weiss, *BigLaw Firm Confirms 'Small Number' of Layoffs, Pushes Back Start Dates for Some Associates*, ABA J. (Aug. 2, 2023, 8:11 AM), https://www.abajournal.com/news/article/biglaw-firm-confirms-small-number-of-layoffs-pushes-back-start-dates-for-some-associates [https://perma.cc/4223-2D3W].

[105] *See* Meghan Tribe, *Reed Smith Cuts 50 Lawyers, Staff as Firms See Lower Demand (1)*, BLOOMBERG L., https://news.bloomberglaw.com/business-and-practice/reed-smith-cuts-50-lawyers-and-staff-as-big-law-layoffs-continue [https://perma.cc/TVN7-NBX7] (June 14, 2023, 02:07 PM).

[106] *See* Justin Henry, *Back to Reality: The 2023 Am Law 100 Super Rich*, LAW.COM (Apr. 18, 2023, 10:03 AM), https://www.law.com/americanlawyer/2023/04/18/back-to-reality-the-2023-am-law-100-super-rich/ [https://perma.cc/X4TZ-WERQ]; *see also* Seal, *supra* note 99.

[107] *See* W. Bradley Wendel, *Rumors of the Death of BigLaw Are Greatly Exaggerated*, 36 GEO. J. LEGAL ETHICS 177, 179 (2023) (reviewing MITT REGAN & LISA H. ROHRER, BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM (2021)).

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intelligence tools), there are no real signs of that occurring.[108] Big Law firms remain the "apex predators of the law firm world."[109] Tools like advance waivers of conflict can help keep what might otherwise be conflicted corporate business clients alive in the same shark tank. While this is good for profits, what is the cost to the ethical code that binds the legal profession?

A. *Confirmation Bias Nurtures Big Law Mergers and Creates Silos*

One of the most pernicious and problematic phenomena in human reasoning is confirmation bias. Psychologists typically refer to this as a "less-consciously one-sided case-building process."[110] Simply put, once a human has taken a position on something, evidence will be gathered to support, defend, and justify that position to the point where the position itself can become highly biased.[111] Unexamined confirmation bias can lead to flawed decision-making and the creation of echo chambers,[112] among a host of additional workplace issues such as stereotyping, misjudgments, and an inability to accurately interpret the world around us.[113] Law firm mergers may begin fairly obviously as a strategy to gain economic advantage, but can quickly become growth for growth's sake, or a bigger is better mentality.[114] This may lead to silos, monopolies, and ethics conflicts, which may not best serve the client or the public to whom a lawyer owes considerable duties. When everyone else in the legal industry is doing it, it becomes easier and easier to believe these

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[108] *See id.*

[109] *See* Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 919–20, 925–27 (1993).

[110] *See* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

[111] *See id.* at 177.

[112] *See* Patrick Healy, *Confirmation Bias: How It Affects Your Organization and How to Overcome It*, HARV. BUS. SCH. ONLINE (Aug. 18, 2016), https://online.hbs.edu/blog/post/confirmation-bias-how-it-affects-your-organization-and-how-to-overcome-it [https://perma.cc/2827-XFB6].

[113] *See Confirmation Bias and the Power of Disconfirming Evidence*, FS, https://fs.blog/confirmation-bias/ [https://perma.cc/4WPJ-E64A] (last visited Sept. 29, 2024); *see also* MERLIN DONALD, *How Culture and Brain Mechanisms Interact in Decision Making*, *in* BETTER THAN CONSCIOUS? DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS 191, 191–192 (Christoph Engel & Wolf Singer eds., MIT Press 2008).

[114] Steven J. Harper, *Big Law Leaders Perpetuating Mistakes*, THE BELLY OF THE BEAST (Feb. 3, 2016), https://thelawyerbubble.com/2016/02/03/big-law-leaders-perpetuating-mistakes/ [https://perma.cc/B3K4-UVRB].

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mergers are the new and best way of doing business, according to our confirmation biases.[115] There is a real cultural, ethical, and legal impact to aggressive inorganic growth, however, including the failure of big firms, lawyer job loss, a decline in productivity, surging expenses, and the consolidation of power to a group of homogenous law partners.[116]

Big Law mergers are now happening at a breakneck pace with some analysts dubbing the last handful of years a "wave of consolidation."[117] These include Big Law firms joining with other Big Law firms, or Big Law firms consuming smaller boutique law firms, to create Mega Big Law firms that make it harder for midsize and small law firms to compete for business.[118] In 2018 and 2019, mergers and acquisitions of law firms nationally exceeded 200 in total.[119] That trend continued in 2022, a year that saw forty-six complete law firm mergers in the United States, and analysts said 2023 could lead to even more.[120] The first quarter of 2023 saw sixteen completed mergers involving U.S. law firms, including: Florida-based Holland & Knight's merger with Nashville-based Waller Lansden Dortch & Davis, Orrick Herrington & Sutcliff in San Francisco with Washington, DC-based Buckley, and Detroit-based Clark Hill with Philadelphia-based Conrad O'Brien.[121] Internationally, in May 2023, London-based Allen & Overy announced plans to merge with New York-based Big Law firm Shearman & Sterling, a merger that will create one of the largest law firms in the world boasting approximately 3,950 lawyers

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[115] *See Confirmation Bias and the Power of Disconfirming Evidence*, *supra* note 113.

[116] *See* Harper, *supra* note 114; Shonette Gaston, *Practice Innovations: Seeking Symbiosis—A Business Leader's Lens on Law Firm Mergers*, REUTERS (Mar. 31, 2022, 10:35 AM), https://www.reuters.com/legal/transactional/practice-innovations-seeking-symbiosis-business-leaders-lens-law-firm-mergers-2022-03-31/ [https://perma.cc/4HU9-5JHT]; *see also 2023 Report on the State of the Legal Market: Mixed Results and Growing Uncertainty*, THOMSON REUTERS (Jan. 9, 2023), https://www.thomsonreuters.com/en-us/posts/legal/state-of-the-legal-market-2023/ [https://perma.cc/KFZ2-KZB8].

[117] *See* Skyler Frazer, *With Law Firm Mergers Up Nationally, Could Carmody Deal Signal More Consolidation in CT?*, HARTFORD BUS. J. (May 15, 2023), https://www.hartfordbusiness.com/article/with-law-firm-mergers-up-nationally-could-carmody-deal-signal-more-consolidation-in-ct [https://perma.cc/S7FS-XFBD].

[118] *See id.*

[119] *See* Bantz, *supra* note 1.

[120] *See* Frazer, *supra* note 117; *see also* Thomas & Merken, *supra* note 3; Justin Wise, *Legal Mergers Rise on Firms' Desire to Take on Biggest Rivals*, BLOOMBERG L. (May 22, 2023, 5:38 PM), https://news.bloomberglaw.com/business-and-practice/legal-mergers-rise-on-firms-desire-to-take-on-biggest-rivals [https://perma.cc/62MJ-4PVA].

[121] *See* Frazer, *supra* note 117.

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and 800 partners across forty-eight offices.[122] The combined revenue of these firms will total $3.4 billion.[123]

For these mergers to work, many factors such as having a compatible culture, similar billing practices, and overlapping areas of expertise come into play.[124] But a workable regulatory scheme must also support this manner of doing business, and advance waivers of conflict will continue to become even more of a necessary tool for lawyers and law firms. Discussions of conflicts and potential conflicts are a necessary part of any merger negotiation.[125] As a result, the advance waiver has been dubbed an "essential business and ethics practice for large law firms in the United States."[126] These often cut to the beating heart of a Mega Big Law firm's business operations, largely because massive clients bring with them a number of subsidiaries and affiliates that could be embroiled if a conflict arises.[127] This presents a consequential dilemma: resolve the conflict preemptively, or lose the profits through disqualification from representation.[128]

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[122] *See* Wise, *supra* note 120; *see also A&O Shearman Merger Continues to Progress as Partners Prepare to Vote*, A&O SHEARMAN (Sept. 17, 2023), https://www.aoshearman.com/en/news/ao-shearman-merger-continues-to-progress-as-partners-prepare-to-vote [https://perma.cc/P5J9-KRGC].

[123] *See* Staci Zaretsky, *With Nearly 'Everyone' in Favor of This Biglaw Merger, A&O Shearman 'Is Going to Happen,'* ABOVE THE L. (Sept. 28, 2023, 1:13 PM), https://abovethelaw.com/2023/09/with-nearly-everyone-in-favor-of-this-biglaw-merger-ao-shearman-is-going-to-happen/ [https://perma.cc/9KV2-SVEH]; *see also* Adam Hakki, *A&O Shearman Merger Approved*, A&O SHEARMAN (Oct. 13, 2023), https://www.aoshearman.com/en/News/ao-shearman-merger-approved [https://perma.cc/J5J3-X3LA] (discussing that on October 13, 2023, the merger was approved).

[124] *See* Barry H. Genkin, *How to Make Law Firm Mergers Work: It Starts With Culture*, BLOOMBERG L. (July 21, 2015, 12:53 PM), https://news.bloomberglaw.com/business-and-practice/how-to-make-a-law-firm-merger-work-it-starts-with-culture [https://perma.cc/SP6Z-YASD]; *see also* Barry H. Genkin, *How to Make a Law Firm Merger Work: The Business Case*, BLOOMBERG L. (Aug. 11, 2015, 9:59 AM), https://news.bloomberglaw.com/business-and-practice/how-to-make-a-law-firm-merger-work-the-business-case [https://perma.cc/954L-SRYJ]; Barry H. Genkin, *Law Firm Mergers—How to Make Them Work, Part 4: Integration*, BLOOMBERG L. (Aug. 21, 2015, 4:41 PM), https://news.bloomberglaw.com/business-and-practice/law-firm-mergers-how-to-make-them-work-part-4-integration [https://perma.cc/Y7CR-5BCU].

[125] *See* DiLernia, *supra* note 66.

[126] *Id.* at 97. DiLernia defines large law firms as those with 1,000 or more lawyers spread over one or two dozen offices, domestic or foreign. *See id.*

[127] *See id.*

[128] *See id.* at 123.

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Confirmation bias may play a role in nurturing the frenetic mergers and acquisitions trend currently gripping the business of law. But even if it does not, mergers can come at a cost for lawyers, clients, and society by keeping profits, legal expertise, knowledge, and new opportunities consolidated in the exclusive and predominantly white setting of Mega Big Law conference rooms.

B. Lack of Diversity at Big Law Firms Means Less Diversity in Industry Lawyering

Diversity in the legal profession and client representation is important because it increases innovation, enhances client satisfaction, and improves decision-making and problem-solving.[129] The amassing of large corporate clients and keeping the business in the same law firm is exactly why advance waivers of conflict were born, and why they exist to this day. These waivers may be viewed by this segment of industry lawyers as flexible tools of modern practice,[130] but if these tools are only used in the rarefied air of firms lacking in all the benefits diversity brings, then can prospective waivers of conflict really advance the ethical practice of law? As illustrated above, advance waivers of conflict allow these Mega Big Law firms to essentially hoard big business clients. Of course, for the most part, these large and "sophisticated clients" go along willingly with this plan under the guise of the power of choice, until something goes awry and courts become the arena for resolution.

Over the past several years, the media has congratulated law firms for improving diversity, equity, and inclusion metrics after decades of stagnation, and the praise is not without merit.[131] However, it would be a mistake to conclude the matter is settled, or that diversity in Big Law firms comes anywhere close to

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[129] *See* AM. BAR ASS'N, *supra* note 25, at 3.

[130] *See* Morgan, *supra* note 20, at 972 n.53 (explaining how waivers serve as flexible tools in modern legal practice by enabling clients and lawyers to proactively address potential conflicts of interest, thereby expanding the freedom of clients and lawyers).

[131] *See The 2023 Diversity Scorecard: Ranking Law Firms on DEI*, LAW.COM (July 13, 2023, 10:02 AM), https://www.law.com/americanlawyer/2023/07/13/the-2023-diversity-scorecard-ranking-the-legal-industry/ [https://perma.cc/68JH-AWPK] (surveying more than 200 law firms across the country). The surveys demonstrate that in 2022, 21.6% of U.S. lawyers in Big Law were racially or ethnically diverse, up 1.4% from 20.2% in 2021. *Id.*; *see also* Roe, *supra* note 24. This is the second year in a row that minority lawyer populations grew and exceeded the annual growth rate of the past ten years. *Id.* This ranking uses metrics that assess each law firm's percentage of ethnic and racial diversity across the lawyer head count by role; leadership of the executive committee, offices and practice and industry groups, as well as hiring, retention, and promotion. *Id.*

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representing the diversity in the overall national population.[132] The United States Supreme Court's 2023 ruling that race cannot be a consideration in college admissions could further exacerbate the issue of a lack of diversity in Big Law by restricting the recruiting pipeline to such firms that already self-select from a handful of elite law schools.[133]

Diversity in every profession matters. This rings especially true in the legal field, which is notorious for being one of the least diverse professions in the country.[134] Diversity itself encompasses more than racial or ethnic identity; it also extends to gender, race, sexual orientation, age and/or disability.[135] Fair representation—being in the room where laws are made that affect different populations—and even the public perception of the legal profession as a whole, are improved when doors are opened to historically underrepresented populations.[136] The legal profession is charged to be a reflection of our larger society.[137] And yet, the numbers are not where anyone would like them to be, especially in Big Law.

In 2023, Black and Hispanic lawyers were represented at a rate of 5% and 6% in the profession, respectively, while Native Americans represented 0.6%, with just

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[132] Jack Thorlin, *Racial Diversity and Law Firm Economics*, 76 ARK. L. REV. 131, 132 (2023) (illustrating that non-Hispanic Whites constitute 59.3% of the overall population, while Blacks constitute 13.6%). From 2007–2019, Black representation among law firm partners rose from 1.9% to 2.2%, while White attorneys constitute 89.9% of equity partners, a slight downtick from 93.7% in 2007. *Id.* This rate would lead to Black attorneys being proportionally represented among law firm partners in close to 2378. *Id.*

[133] *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023). In a 6-3 ruling, the Supreme Court held that Harvard and UNC's admissions processes, which accounted for the race of applicants at various stages, violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.* at 230. In the majority opinion authored by Chief Justice John Roberts, the Court held that the interests asserted by these schools were not sufficient to pass strict scrutiny and that the racial categories used by both Harvard and UNC were either arbitrary or too broad and not connected to the interests they purported to pursue. *Id.* at 214.

[134] *See Diversity in Law: Who Cares?*, ABA (Apr. 30, 2016), https://www.americanbar.org/groups/litigation/resources/newsletters/diversity-inclusion/diversity-law-who-cares [https://perma.cc/K45V-EGHA].

[135] *See id. See generally About Us*, PITT. LEGAL DIVERSITY & INCLUSION COAL., https://pghlegaldiversity.org/aboutus/mission-story/ [https://perma.cc/L9ZL-BA6X] (last visited Sept. 29, 2024) for more discussion on diversity and inclusion.

[136] *See Diversity in Law: Who Cares?*, *supra* note 134; *see also* Jaya Harrar, *Why Diversity is Important in the Legal Sector in the US*, LAW. MONTHLY, https://www.lawyer-monthly.com/2020/10/why-diversity-is-important-in-the-legal-sector-in-the-us/ [https://perma.cc/VL84-C3ER] (last updated Nov. 3, 2020).

[137] Harrar, *supra* note 136.

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21% of the total population being lawyers of color.[138] The number of Black lawyers has remained virtually unchanged over the past ten years.[139] In another attempt to light a fire under firms to actively seek out a diverse workforce, the ABA and its House of Delegates passed a resolution at the 2023 Annual Meeting in August urging employers to "evaluate law students holistically during the On-Campus Interview process by considering more than a student's grade point average and class rank."[140] According to the resolution, "[e]quity partners in multi-tier law firms continue to be disproportionately white men."[141] This assertion was affirmed earlier in January 2023 when the National Association for Law Placement, Inc. ("NALP") released its annual Report on Diversity at U.S. Law Firms.[142] The report illustrated that, while overall gains were noted in the representation of women, people of color, and the LGBTQ community in the law, those improvements were found primarily in the ranks of associate and summer associates and not at the partner level.[143] According to the NALP study, people of color made up 11% of lawyers at the partner level.[144] In a multi-tier law firm, that distinction is particularly important.

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[138] *See Profile of the Legal Profession*, AM. BAR ASS'N (2023), https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf [https://perma.cc/85RG-VMUF].

[139] *See id.*

[140] *See* AM. BAR ASS'N, *supra* note 25, at 1. "[A]n undue focus on GPA and class rank fails to consider the full range of skills and experiences that candidates may bring to a firm." *Id.* at 2. "A more holistic approach, one that considers a broader range of attributes and experiences, would likely yield a more diverse and dynamic workforce, better equipped to meet the challenges and opportunities of the legal profession." *Id.* at 3.

[141] *See id.* at 2.

[142] *See* NALP, 2023 REPORT ON DIVERSITY IN U.S. LAW FIRMS 5 (2024), https://www.nalp.org/uploads/Research/2023NALPReportonDiversityFinal.pdf [https://perma.cc/K2NV-XNA8].

[143] *See* Press Release, NALP, Black Lawyers and Students Drive Diversity in Associate Ranks at U.S. Law Firms; Gains at the Partnership Level Continue to Lag Behind (Jan. 12, 2023), https://www.nalp.org/uploads/PressReleases/NALPPressReleaseDiversityReportJanuary2023.pdf [https://perma.cc/QKD9-HSDT]. In 2022, people of color and women comprised 11.4% and 26.65% of all partners, respectively. *Id.* To compare, 28.32% of associates are people of color, and 49.42% are women. *Id.* The percentage of Black and Latinx partners each increased by 0.1 percentage point as compared to 2021. *Id.* "The data demonstrates that we are nowhere near achieving the progress one would expect from an industry that has been focused on the issue of diversity for over three decades," according to NALP Executive Director Nikia L. Gray. *Id.*

[144] *See id.*; *see also* Tatyana Monnay, *Affirmative Action's Demise Threatens Big Law Diversity Pipeline*, BLOOMBERG L. (June 30, 2023, 5:30 AM), https://news.bloomberglaw.com/business-and-practice/affirmative-actions-demise-threatens-big-law-diversity-pipeline [https://perma.cc/2CAU-CTW3].

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In this context, "multi-tier law firms" is code for a system of management primarily employed by Mega Big Law firms, which involves different partnership tracks such as equity and non-equity partners. Noting this disparity in diversity at the highest level of law firm governance is important because equity partners generally control the direction and goals of the law firm and reap the lion's share of the firm's profits.[145] Equity partners help determine which clients to pursue and retain, are responsible for business development,[146] and are in the best position to determine whether or not to use business-expanding tools like advance waivers of conflict.

The top one hundred law firms in the United States generated a combined gross revenue of approximately $131 billion dollars in 2022,[147] and they did not achieve these numbers by representing small-town mom-and-pop frozen yogurt shops. Instead, these Mega Big Law firms primarily represent Fortune 500 industrial and large corporate clients.[148] For example, in 2015, Kirkland & Ellis reported that it was listed as primary outside counsel for the following Fortune 500 companies: General Motors, Cigna, Boeing, Dow Chemical, Abbott Laboratories, Pfizer, and Delta Airlines, among many others.[149] In 2017, *Corporate Counsel Magazine* published a list of the top ten law firms representing America's biggest companies as mentioned in PACER filings (so law firms did not violate ABA Model Rules Rule 1.6: Confidentiality of Information).[150] Greenville, South Carolina-based Ogletree, Deakins, Nash, Smoak & Stewart topped the list with fifty-nine mentions.[151] This

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[145] *See generally* William D. Henderson, *An Empirical Study of Single-Tier versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691 (2006).

[146] *See id.* at 1691–92.

[147] *See Total Revenue of the Leading Law Firms in the United States from 2015 to 2022*, STATISTA (July 26, 2023), https://www.statista.com/statistics/878140/total-revenue-of-the-leading-law-firms-united-states [https://perma.cc/UL27-5R77].

[148] *See* McKayla Giradin, *15+ Top Law Firms in 2024*, FORAGE, https://www.theforage.com/blog/companies/top-law-firms [https://perma.cc/PW3M-XBPR] (last updated Oct. 25, 2023).

[149] *See Who Represents America's Biggest Companies*, KIRKLAND & ELLIS (Sept. 21, 2015), https://www.kirkland.com/news/award/2015/09/who-represents-americas-biggest-companies [https://perma.cc/CWN6-EEGM].

[150] *See* Rebekah Mintzer, *Meet the Law Firms that Represent America's Biggest Companies*, LAW.COM, https://www.law.com/corpcounsel/2017/11/29/meet-the-law-firms-that-represent-americas-biggest-companies/ [https://perma.cc/4NV5-37YY] (last updated Nov. 29, 2017, 3:44 PM). The survey used PACER data for the Fortune 1000 in ten litigation practice areas for the year 2016. *Id.* The list represents the top ten firms with the most overall mentions in the court documents. *Id.*

[151] *Id.*

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law firm placed seventy-seventh on the Am Law 200 Ranking in 2023.[152] Pittsburgh-based Reed Smith came in eighth with thirty mentions, and the firm placed twenty-ninth on the Am Law 200 ranking for 2023.[153]

If Mega Big Law firms lead the legal profession in industry lawyering, and these Big Law firms lag behind in terms of the diversity of their workforce, then so-called industry lawyering itself suffers from a diversity problem. Thus, companies going to the same Big Law firms over and over again are not being best served by a diverse legal profession.

C. Jurisdictions Aggravate Problems by Catering Ethics Rules to Industry Lawyering

Predictably, state-based legal ethics policymakers in large metropolitan areas of the country where Mega Big Law firms proliferate blazed the trail for the increased use of advance waivers. After the stage was set by the ABA and the ALI, it was time for those jurisdictions harboring a large concentration of Big Law firms to step in and offer their own take on the validity of advance waivers as a way to advance localized economic development strategies. In most cases, these lawyer regulatory bodies offered approval of the use of the tool. Elite law firms concentrate their offices in "the costliest districts of superstar cities,"[154] and are therefore disproportionately represented in metro areas such as New York City, Los Angeles, and Washington, DC.[155] The effect is often referred to in economic development terms as "clustering," which is where firms of any industry aggregate within a certain region to take advantage of common strengths and to draw on the advantage of

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[152] *Ogletree Deakins*, LAW.COM, https://www.law.com/law-firm-profile/?id=512&name=Ogletree-Deakins [https://perma.cc/GW9M-H3QQ] (last visited Sept. 29, 2024). Ogletree Deakins has 909 attorneys and posted $600 million in gross revenue in 2022. *Id.* It ranks as the ninety-eighth highest grossing law firm in the world. *Id.*

[153] *Reed Smith*, LAW.COM, https://www.law.com/americanlawyer/law-firm-profile/?id=250&name=Reed-Smith [https://perma.cc/F6K8-6E4K] (last visited Sept. 29, 2024). Reed Smith had 1,540 attorneys and posted $1.4 billion in gross revenue in 2022. *Id.* It also ranked as the thirty-sixth highest grossing law firm in the world. *Id.*

[154] Gregory H. Shill, *The Puzzle and Persistence of Biglaw Clustering*, THE CLS BLUE SKY BLOG (Oct. 3, 2022), https://clsbluesky.law.columbia.edu/2022/10/03/the-puzzle-and-persistence-of-biglaw-clustering/ [https://perma.cc/9K34-NHJB].

[155] *Id.* The headquarter city of the Top 25 Am Law 100 firms by RPL are New York, Los Angeles, Boston, Silicon Valley, Chicago, and Washington, DC. With the most extreme concentration existing in New York City. *Id.* Of the top twenty-five Big Law firms, NYC is home to fifteen of these firms' headquarters, and four other of these firms' largest offices. *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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proximity and connections.[156] And because jurisdictions decide what rules of professional conduct to adopt and enforce, this process of selection can complement or override the model rules.

The ABA promulgates the Model Rules of Professional Conduct, and jurisdictions are free to adopt wholesale—or in part—their own rules of professional conduct to govern lawyers. While there are plenty of substantive differences, every state bar has an ethical rule that sets forth the basic prohibition that lawyers shall not undertake representation of clients in the presence of a non-consentable conflict of interest.[157] Of course, many concurrent and prospective conflicts of interest can be waived, and these rules have evolved over the past two decades in such a way that assumes most conflicts are consentable. This is especially true when dealing with sophisticated clients and regular users of legal services. That is, many conflicts of interest may seem consentable until clients decide they are not.[158]

California was among the earliest jurisdictions to explicitly declare that the use of advance waivers of conflict did not inherently contravene ethical standards, and it did so before the ABA issued its perspective in the 1993 opinion.[159] In 1989, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion 1989-115 wherein it asserted, "an advance waiver of conflict of interest and confidentiality protections is not, *per se*, invalid."[160] The Committee based this opinion on the case of *Maxwell v. Superior Court*,[161] in which

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[156] *See* Joseph Cortright, *Making Sense of Clusters: Regional Competitiveness and Economic Development*, BROOKINGS (Mar. 1, 2006), https://www.brookings.edu/articles/making-sense-of-clusters-regional-competitiveness-and-economic-development [https://perma.cc/TK9X-4H6Z].

[157] *See generally Legal Ethics*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/legal_ethics [https://perma.cc/4UVQ-VFJG] (last visited Sept. 29, 2024); *see also Additional Legal Ethics and Professional Responsibility Resources*, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest/?login [https://perma.cc/JH67-E44L] (last visited Sept. 29, 2024) (listing every state in the nation and a link to each jurisdiction's code of professional conduct).

[158] *See generally* William Freivogel, *A Short History of Conflicts of Interest. The Future?*, 20 PROF. LAW. 3 (2010).

[159] *See* ABA Comm. on Ethics & Prof. Resp., Formal Op. 93-372 (1993).

[160] Cal. Bar. Ass'n Comm. on Ethics & Pro. Resp., Formal Op. 1989-115 (2022).

[161] 639 P.2d 248 (Cal. 2009). An indigent criminal defendant was charged with a capital offense entered into a fee agreement with his lawyers granting media rights to his life's story, including the story and details of the pending criminal litigation. *Id.* at 249–50. The contract spelled out the potential conflict of interest issues, how far the waiver of confidentiality would extend, and the risks of the arrangement made before the conclusion of the criminal matter. *Id.* at 250. The trial court disqualified the lawyers because of the conflict of interest created. *Id.* at 251. The California Supreme Court reverted and re-instated the

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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the California Supreme Court examined an advance waiver of conflict and found that when entered into by the criminal defendant client knowingly, intelligently, and unconditionally, the strict rules prohibiting such an arrangement due to a conflict of interest seemed "neither necessary nor workable."[162] At the time, Rule 3-310(A) of the California Rules of Professional Conduct was strict in terms of precluding lawyers from representing multiple parties with conflicting interests, as well as precluding acceptance of employment adverse to present or former clients if the lawyer had obtained material confidential information from either.[163] California would affirm this stance in 1996 in *Zador Corp. v. Kwan*, in which an advance waiver of conflict was upheld when the prospective, adverse client was specifically named in the written and signed waiver.[164] Advance waivers used with large corporate

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lawyers, focusing on the blanket waiver at issue and saying that the ethics rules as applied here were too strict, and the defendant was more than adequately informed as to the risks. *Id.* at 257–58.

[162] *Id.* at 257 ("Rules that are that strict seem neither necessary nor workable. Not all imaginable consequences of a conflict that inheres in a life-story contract can be predicted before trial. Indeed, much of the information needed to assess the impact of the conflict on defendant's case may be privileged."). Author's Note: *Maxwell v. Superior Court* is overruled in part by *People v. Doolin*, 198 P.3d 11 (Cal. 2009), where that court rejects a defendant's conflict of interest claim and notes disapproval of prior cases holding that lawyer conflict claims under the State of California Constitution should be analyzed under a standard different than the one set forth by the U.S. Supreme Court. People v. Doolin, 198 P.3d 11 (Cal. 2009). Additionally, note that these cases both deal with criminal defendants, making the issue of waiver tangled with the special constitutional protections afforded criminal defendants.

[163] *See* Cal. Bar. Ass'n Comm. on Ethics & Pro. Resp., Formal Op. 1989-115 (2022) (citing the 1989 version of Rule 3-310(A) of the California Rules of Professional Conduct, which precluded a lawyer from accepting or continuing representation if the lawyer had a relationship with another party interested in the representation). Rule 3-310(B) precludes the concurrent representation of multiple clients with conflicting interests; and Rule 3-310(D) precludes acceptance of employment adverse to a present or former client if the lawyer has obtained material confidential information from the present or former client. *Id.* Rule 3-310(F) defines "informed" as "full disclosure to the client of the circumstances and advice to the client of any actual or reasonably foreseeable adverse effects of those circumstances upon the representation." *Id.* The rule has changed as of 2023.

[164] 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 1995). The language of the letter read, in part:

> In the event of a dispute or conflict between you and the Co-defendants, there is a risk that we may be disqualified from representing all of you absent written consent from all of you at that time. We anticipate that if such a conflict or dispute were to arise, we would continue to represent the subsidiary companies of Miramar Hotel & Investment Co., Ltd. (the 'Companies'), whose legal interests in this matter are aligned, notwithstanding any adversity between you and the Companies' interests . . . . Accordingly, we are now asking that you consent to our continued and future representation of the Companies and agree not to assert any such conflict of interest or to seek to disqualify us from representing the Companies, notwithstanding any adversity that may develop. By signing and returning to us the agreement and consent set forth at the end

clients by Big Law firms would encounter fairly smooth sailing through the California courts for the next decade until the California Bar adopted a revised Rule 1.7 in 2018.[165] However, the effective use of advance waivers of conflict may not be so clear in the future for Big Law firms and corporate clients in the Golden State.[166] In 2023, California boasted fifteen firms that made the Am Law 100 list, including Latham & Watkins, Gibson Dunn, Orrick, Herrington & Sutcliff, Morrison & Foerster, Sheppard, Mullin, Richter & Hampton, and O'Melveny & Myers, all of which showed revenue growth in 2022.[167]

In 2001, the District of Columbia Bar issued its Ethics Opinion 309 that includes a sample of a potentially enforceable advance waiver of a conflict of interest.[168] The DC Bar appeared to adopt the market-contractarian model favoring Big Law because it opens the discussion of the issue with an explanation of the changing face of the legal practice from small firms to global powerhouse law firms representing large corporate clients.[169] Further, it rests its approval of the use of

> of this letter, you will consent to such arrangement and waive any conflicts regarding that arrangement.

Id. at 756.

165 In 2018, California adopted a new set of Model Rules that included a revised Rule 1.7; the current client conflict rule mirrors the ABA Model Rule 1.7 closely in that the rule does not "preclude an informed written consent to a future conflict in compliance with existing case law." CAL. RULES OF PRO. CONDUCT r. 1.7 cmt. 9. (2018). This represented a complete revision of Rule 3-310. Subsequent cases in California after the adoption of this rule will be discussed *infra* in Section IV, but it appears California may be rolling back its initial embrace of advanced waivers of conflict.

166 *See id.*

167 Jessie Yount, *California's Am Law 100 Firms Saw Head Count Soar in 2022, Despite Varied Financial Results*, THE RECORDER (Apr. 18, 2023, 12:31 PM), https://www.law.com/therecorder/2023/04/18/californias-am-law-100-firms-saw-head-count-soar-in-2022-despite-varied-financial-results/ [https://perma.cc/D4P8-43FZ].

168 *Ethics Opinion 309: Advance Waivers of Conflicts of Interest*, *supra* note 14. The sample waiver language reads, "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." *Id.* It continues, "[For example, although we are representing you on __________, we have or may have clients whom we represent in connection with ________________.]" *Id.* In such a scenario, the client agrees that the firm may continue with or undertake future representation of "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." *Id.*

169 *Id.* "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." *Id.* "Increasingly, though, law firms have

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advance waivers of conflict on theories of a client's personal autonomy to choose "whatever champion the client feels is best suited to vindicate the client's legal entitlements."[170] The regulatory body doubled-down on its sanctioning of the use of advance waivers of conflict just one year later in Ethics Opinion 317, Repudiation of Conflict of Interest Waivers.[171] Once again reaching into the annals of history to justify the primacy of client choice in deciding whether or not to waive a conflict of interest,[172] the DC Bar addressed the issue of what should happen when a client decides to change his or her mind about a previously executed advance waiver of conflict.[173] Settling on the triggering issue of whether or not the other client or lawyer detrimentally relied on the advance waiver, Opinion 317 concludes that the lawyer should be able to continue representing the other client unless specific provisions of Rules 1.7, 1.9, or 1.16, or consent of a tribunal apply.[174] Further, the opinion notes that lawyers should include the effect of repudiation in the advance waiver itself to

hundreds or even thousands of lawyers, with multiple offices across the country and around the globe." *Id.* "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." *Id.* "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." *Id.*

[170] *Id.* at n.4 ("Giving effect to a client's consent to a conflicting representation might rest either on the ground of contract freedom or on the related ground of personal autonomy of a client to choose whatever champion the client feels is best suited to vindicate the client's legal entitlements."). *See also* Painter, *supra* note 15.

[171] *Ethics Opinion 317: Repudiation of Conflict of Interest Waivers*, DC BAR ASS'N (Nov. 2002), https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-317 [https://perma.cc/T4KV-JYZB].

[172] In Ethics Opinion 309, the DC Bar cites to the 1908 ABA Canon of Legal Ethics, as well as the 1967 ABA Opinions on Professional Ethics to bolster its argument against curtailing a client's choice of lawyers. *Ethics Opinion 309: Advance Waivers of Conflicts of Interest*, *supra* note 14. In Opinion 307, similar historic arguments are being made regarding client choice. *Ethics Opinion 317: Repudiation of Conflict of Interest Waivers*, *supra* note 171.

[173] *Ethics Opinion 317: Repudiation of Conflict of Interest Waivers*, *supra* note 171.

[174] *Id.* ("[P]ossible bases for such a withdrawal may be that the repudiation of the waiver effectively has discharged the lawyer, see DC Rule 1.16(a)(3) (mandatory withdrawal), continuing both representations will cause the lawyer to violate the conflict of interests prohibition of the Rules, see DC Rules 1.7, 1.9; DC Rule 1.16(a)(1) (mandatory withdrawal), withdrawal can be accomplished without prejudice to the repudiating client (if that indeed is the case), see DC Rule 1.16(b) (permissive withdrawal); DC Ethics Op. 272 (1997) (same), the repudiation constitutes failure 'to fulfill an obligation to the lawyer regarding the lawyer's services,' DC Rule 1.16(b)(3) (same), 'obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult,' DC Rule. 1.16(b)(4) (same), and a tribunal has found 'other good cause' for withdrawal, DC Rule 1.16(b)(5) (same).").

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avoid future issues, again promoting the idea of contracting around ethical rules prohibiting conflicts.[175] In 2023, the Am Law 100 list featured twelve law firms with a large presence in DC, including Crowell & Moring, Jones Day, Wilmer Cutler Pickering Hale and Dorr, and Squire Patton Boggs.[176]

In 2006, the New York Committee on Professional and Judicial Ethics in its formal Opinion 2006-1 also weighed in on advance waivers of future conflicts, concluding that advance consents are permissible.[177] The opinion provides three sample advance waivers for practitioners to work with and includes more specific guidance on how to craft an advance waiver when seeking to represent clients in substantially related matters.[178] Again, the jurisdiction predicated its position on the client's choice of counsel as a "fundamental right."[179] The opinion goes even further and is more explicit than the California or DC ethics opinions in its defense of the rights of law firms by stating that an overly broad interpretation of the duty of loyalty

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[175] *Id.*

[176] Abigail Adcox, *DC Firms Have Strong Showing in Latest Am Law 100*, NAT'L L.J. (Apr. 21, 2023, 12:03 PM), https://www.law.com/nationallawjournal/2023/04/21/dc-firms-have-strong-showing-in-latest-am-law-100 [https://perma.cc/NH8V-WMC4].

[177] *Formal Opinion 2006-1: Multiple Representations; Informed Consent; Waiver of Conflicts*, NYC BAR ASS'N (Feb. 17, 2006), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2006-1-multiple-representations-informed-consent-waiver-of-conflicts [https://perma.cc/2WSY-7ZUM].

[178] *Id.*

> [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.

Id.

[179] *Id.* "A client's choice of counsel is a fundamental right that the New York Court of Appeals recognized in *Levine [sic] v. Levine*, 56 N.Y.2d 42 (1982), in which the Court approved a single lawyer representing potentially adverse parties to a marital separation agreement." *Id.* In that case, the court also noted that the parties had an "absolute right" to use the same lawyer for the case as long as there was "full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity." *Id.*

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is a "significant" constraint to business interests.[180] Specifically, the opinion uses an example of a "mega" law firm with offices in various locations and cities that could be "precluded from defending a long-standing client in 'bet-the-company' litigation because another of the firm's offices, thousands of miles away and staffed by different lawyers, is representing the plaintiff in an unrelated and minor transaction."[181] An example of how this permissive view of advance waivers of conflict has helped a major New York-based Big Law firm is also included in the opinion, designed to illustrate how inequitable it would have been for "burgeoning law firm" Skadden, Arps if the court had decided not to uphold an advance waiver in *Kennecott Copper Corp. v. Curtiss-Wright Corp.* in 1978.[182] That law firm is now known as Skadden, Arps, Slate, Meagher & Flom, LLP, and it ranks fifth on the Am Law 200 list with more than $3 billion in revenue and $5 million in profit per equity partner.[183]

Today, New York still has a strong, vested interest in ensuring its biggest law firms can continue to do business within its jurisdictional borders. The NYLJ, an annual ranking of the largest firms in New York created by The New York Law Journal, shows that a large number of Big Law firms increased in size in 2022 by 4.5% over the prior year.[184] The fifteen biggest law firms in the city include Kirkland

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[180] *Formal Opinion 2006-1: Multiple Representations; Informed Consent; Waiver of Conflicts*, *supra* note 177.

[181] *Id.*

[182] No. 78 Civ. 1295, slip op. at 6–7 (S.D.N.Y. Apr. 11, 1978) ("Quite clearly, Skadden, Arps, a burgeoning law firm, was unwilling to close its doors to future clients by risking disqualification in its field of specialty merely because Curtiss-Wright [a 'one shot client'] might set its sights on some company which happened then to be a client of Skadden, Arps."). *See also Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 MICH. L. REV. 1074, 1075 n.6 (1981) (noting that Skadden Arps accepted representation only after obtaining a waiver from the client). Additionally, the article suggests that a restriction on the use of advance waivers would affect large, rapidly-growing law firms and should therefore be disfavored because law firms would not be able to grow at such a pace if concerned about the potentiality for numerous future conflicts. *Id.* at 1086 n.57.

[183] *Skadden*, LAW.COM, https://www.law.com/law-firm-profile/?id=279&name=Skadden%2F [https://perma.cc/L24Y-K2XA] (last visited Sept. 29, 2024).

[184] Staci Zaretsky, *The 100 Largest Law Firms in New York (2022)*, ABOVE THE L. (Aug. 14, 2023, 1:44 PM), https://abovethelaw.com/2023/08/the-100-largest-law-firms-in-new-york-2022/ [https://perma.cc/2SKF-4ZHS]; *NYLJ 100: New York's Largest Law Firms by Attorney Headcount*, LAW.COM (Aug. 11, 2023, 11:00 AM), https://www.law.com/newyorklawjournal/2023/08/11/nylj-100-new-yorks-largest-firms-by-attorney-headcount/ [https://perma.cc/2KVS-E4UT] ("Kirkland & Ellis holds the top spot, followed closely by Davis Polk. Next is Paul Weiss. All three firms have more than 700 lawyers based in New York State.").

& Ellis, Davis Polk, Paul Weiss, Skadden, Ropes & Gray, Cravath, and Sidley. Headcounts at these firms range from 795 lawyers to 435.[185]

III. COURTS REMAIN A CHAOTIC CHECK ON BIG LAW FIRM USE OF ADVANCE WAIVERS OF CONFLICT

Early court decisions from the 1970s through the 1990s upholding the use of advance waivers undoubtedly led regulators of the legal profession to favor these tools, as they revised the ethics rules to be more accommodating to industry lawyering.[186] As regulators remain silent, it is now the courts which must determine the enforceability of advance waivers.

Every conflicts analysis is necessarily fact-intensive, and there are some general guidelines for crafting advance waivers that could survive judicial scrutiny. For example, factual specificity regarding future conflicts is favored, as is recommending outside counsel to the client before signing, securing a showing of meaningful informed consent, and ensuring a high level of candor between the lawyer and the clients.[187] But just because you can does not mean you should, nor does it mean that success is a guarantee. Variable enforcement should lead to more caution—not less—when determining whether or not to deploy an advance waiver.

At issue are the modern courts that have demonstrated an absence of uniformity when it comes to contested advance waivers and the scorned clients who consider disqualification motions or preliminary injunction requests merely a litigation tactic.[188]

A. *Lawyer's Loyalty Came with $100 Million Price Tag*

In 2023, the United States District Court for the Middle District of Florida, Orlando Division, presided over a contentious disqualification dispute in

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[185] *NYLJ 100: New York's Largest Firms by Attorney Headcount*, *supra* note 184.

[186] *See generally* Painter, *supra* note 15, at 289.

[187] *See Formal Opinion 2006-1: Multiple Representations; Informed Consent; Waiver of Conflicts*, *supra* note 177.

[188] Sports Med. Serv. of Gramercy Park, P.C. v. Perez, 657 N.Y.S.2d 314, 315 (N.Y. Civ. Ct. 1997) (observing that motions to disqualify are now "a cottage industry. All too frequently, attorneys bring such motions as a litigation tactic. Even where the situation presented seems to implicate a disciplinary rule if read literally, the court must be wary to prevent its misuse, particularly when it is unnecessarily detrimental to the adverse party's rights.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1050
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SuperCooler Technologies, Inc. v. Coca Cola Co.[189] The client, fizzy with feelings of betrayal, and its Big Law counsel tussled over a motion to disqualify based on the enforceability of an advance waiver of conflict.[190] Spoiler alert: the behemoth corporate client lost,[191] raising the issue of who (or what) is really protected by the enactment of the ethical rules permitting such waivers of future conflict.

Atlanta-based Coca-Cola, a company which employs between 150 to 200 in-house lawyers and spends millions of dollars in legal services annually,[192] found out the hard way that an advance waiver of conflict would be enforced against it. The waiver at issue was introduced in 2021 when Coca-Cola was represented by Los Angeles-based Paul Hastings in connection with human rights work in the Democratic Republic of the Congo.[193] Signed by both a Paul Hastings partner and one of Coca-Cola's in-house lawyers, the engagement letter purported to give the firm wide latitude when it came to accepting future clients that might be adverse to Coca-Cola, so long as the representation was not "substantially related to a matter in which we have represented you."[194] Additionally, it included language to the effect

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[189] 682 F. Supp. 3d 1071, 1074 (M.D. Fla. 2023).

[190] *Id.* "Coca-Cola's motion and Paul Hastings' opposition frame a particular conflict that is more likely to occur as law firms get bigger. Larger law firms aggregate more work and more clients." *Id.* The court continued:

> And as firms take on more clients, it is more likely that a law firm's advocacy for one client will run up against the firm's duty of loyalty to another. . . . Common sense may lead one to believe that a lawyer cannot sue a client on another client's behalf.

Id. "But that is not so. The ethical rules governing the practice of law sometimes allow a lawyer to sue a client if the lawyer obtains informed consent from all involved." *Id.*

[191] *Id.* at 1084.

[192] *Id.* "And in the last five years, it has retained more than 50—perhaps even more than 100—outside law firms, spending tens of millions of dollars. . . . I find that Coca-Cola is an experienced, frequent, and sophisticated consumer of legal services." *Id.*

[193] *Id.* at 1074. Paul Hastings ranked as the thirty-first highest grossing law firm in the world, according to the 2023 Global 200 survey. *Paul Hastings*, LAW.COM, https://www.law.com/americanlawyer/law-firm-profile/?id=232&name=Paul-Hastings [https://perma.cc/HV69-Z9XA] (last visited Sept. 29, 2024). It ranks twenty-seventh on the 2024 Am Law 200 ranking and boasted a revenue of $1.8 billion in 2023. *Id.*

[194] *SuperCooler Techs.*, 682 F. Supp. 3d at 1074–75. The language of the waiver is as follows:

> Because we represent a large number of clients in a wide variety of legal matters, it is possible that we will be asked to represent a client whose interests are actually or potentially adverse to your interests in matters that may include, without limitation, mergers, acquisitions, financing, restructuring, bankruptcy,

that Coca-Cola would agree to accept the adverse representation and further waive any actual or potential future conflicts, provided that the law firm take precautions to protect confidential information and the adverse client waives the conflict as well.[195] After the letter was executed, no other letter or modification occurred, and no issues arose until 2023 when Paul Hastings began to investigate hiring lawyers from the firm Cahill Gordon & Reindell, LLP, another Mega Big Law firm based in New York.[196] These lateral hires had been retained by SuperCooler Technologies, Inc. to develop legal strategies against Coca-Cola for a lawsuit alleging misappropriation of trade secrets and intellectual property and seeking more than $100 million in damages.[197] In February 2023, the Cahill attorneys filed a lawsuit on behalf of SuperCooler against Coca-Cola in Florida.[198] Then, when the lawyers

> litigation, or administrative, rulemaking or regulatory proceedings. We may also be asked to serve a subpoena or take other discovery of you on behalf of another client. In particular, the Firm has established relationships with clients engaged in a business in your industry or a related industry and may have represented such clients in connection with various aspects of their business, including, without limitation, mergers, acquisitions, financing, restructuring, bankruptcy, litigation, or administrative, rulemaking or regulatory proceedings. In any of these circumstances, we agree that we will not undertake any such representation if it is substantially related to a matter in which we have represented you. If the other representation is not substantially related to a matter in which we have represented you, however, then you agree to our accepting such representation and you waive any resulting actual or potential conflicts of interest that may arise, provided that (1) our effective representation of you and the discharge of our professional responsibilities to you are not prejudiced by our undertaking the other representation; (2) we protect your confidential information and implement ethical walls as necessary to screen the lawyers working on the other representation from involvement in your matters, and vice versa; and (3) the other client has consented to and waived potential and actual conflicts of interest.

Id.

[195] *Id.* at 1075.

[196] *See* Cassie Hanson, *Quandries & Quagmires: Advance Waivers: Lessons from* Paul Hastings v. Coca Cola, MINN. LAWYER (Sept. 25, 2023), https://minnlawyer.com/2023/09/25/quandaries-quagmires-advance-waivers-lessons-from-paul-hastings-vs-coca-cola/ [https://perma.cc/74SQ-KDSC]; *see also Cahill*, LAW.COM, https://www.law.com/international-edition/law-firm-profile/?id=53&name=Cahill-Gordon-%26-Reindel-LLP [https://perma.cc/V89R-CHCS] (last visited Sept. 29, 2024). Cahill Gordon is ranked 153rd in the United States, and placed 110th on the 2024 Am Law 200 ranking. *Id.* It posted gross revenue of $403 million in 2023. *Id.*

[197] *See* Hanson, *supra* note 196.

[198] *SuperCooler Techs.*, 682 F. Supp. 3d, at 1075.

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changed firms in March, SuperCooler transferred its business to Paul Hastings, which created an imputation conflict with a current client.[199] The filings do not contain further information regarding the depth or nature of confidential information shared or held between Coca-Cola and Paul Hastings during its prior representation, or as between the law firm and its new client.

In April, Coca-Cola filed a motion to disqualify Paul Hastings, and U.S. Magistrate Judge Robert M. Norway denied it after finding that, while a direct adversity conflict did exist under Florida Rule 4-1.7(a), Coca-Cola waived it with informed consent in the 2021 engagement letter.[200] The court scrutinized the disclosure itself and found it reasonably adequate for a sophisticated user of legal services such as Coca-Cola, and that it was reasonably foreseeable for Coca-Cola to comprehend that its lawyer may appear against it in litigation.[201] Judge Norway also appeared to jest at Coca-Cola's expense, concluding that the company knowingly waived the specific conflict at issue in the case:

> Think of it this way. A magician performing magic tricks is perceived differently by different people. A toddler in the audience might be surprised and delighted to

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[199] *See id.* at 1075–76.

[200] *Id.* at 1079–80, 1084. Florida Rule 4-1.7 mirrors the ABA Model Rule 1.7 in pertinent part:

> (a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if: (1) the representation of 1 client will be directly adverse to another client; or (2) this is a substantial risk that the representation of 1 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.

Compare R. REGULATING FLA. BAR r. 4-1.7(a) (2024), *with* MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 1983). Under section (b), the lawyer may still represent a client notwithstanding the conflict provided:

> (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 position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

R. REGULATING FLA. BAR r. 4-1.7. Both the Florida Rules and the ABA standards define informed consent the same as well, but differ in that Florida does not expressly recognize a client being able to consent to future conflicts. *Compare id.*, with MODEL RULES OF PRO. CONDUCT r. 1.7(b) (AM. BAR ASS'N 1983).

[201] *See SuperCooler Techs.*, 682 F. Supp. 3d, at 1084.

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> see the magician pull a rabbit out of his hat. Teenagers and adults in the audience may respond differently based on the number and types of magic shows they have experienced. But the seasoned vaudeville actor lurking just off the stage won't be surprised. . . . Here, Coca-Cola is most like the jaundiced-eyed vaudeville actor. Coca-Cola knew what Paul Hastings is, what Paul Hastings does, and the types of clients Paul Hastings represents.[202]

But should Coca-Cola have known that loyalty from its lawyers came with a $100 million price tag and the prospect of facing its own law firm at the opposing counsel's table? As unsympathetic as both parties seem to be in this particular matter, it is a universal truth that Big Law firms need to bring in more clients to maintain profitability, and large corporate clients demand their choice of counsel. Even a large and legally sophisticated corporation like Coca-Cola, however, may feel the pinch of disloyalty when its hired gun turns against it by causing a conflict of interest. Recruiting lateral lawyers and representing a directly adverse manufacturer of beverage supercooling technology against a current client is the textbook definition of betrayal and is what the rules of professional conduct in this area are designed to prevent.

Did the advance waiver signed as part of an engagement letter clearly articulate that Paul Hastings might later represent a client bringing a $100 million lawsuit against a current client to whom it owed a duty of loyalty? It did not do so with any degree of specificity; otherwise, that would defeat the purpose of an advance waiver of conflict.

In the aftermath of this case, analysts once again exhorted clients and lawyers alike to be careful when deploying an advance waiver of future conflict.[203] Although the outcome was favorable for the Big Law firm in this instance, it does not guarantee the enforceability of advance waivers as a general rule.

B. *Judge Slams Mega Big Law Firm for Breach of Fiduciary Duty in Hostile Takeover*

In a cautionary tale from the Steel City, a judge keenly aware of the reasons why Big Law firms and large corporate clients find themselves in these ethical quagmires made a strong ruling against the enforceability of an advance waiver of

[202] *Id.*

[203] Hanson, *supra* note 196.

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conflict.[204] Lawyers at Mega Big Law firms sell their services to multiple clients in the same industry to maintain profitability, and with that tactic necessarily comes ethics conflicts.[205] In *Mylan, Inc. v. Kirkland & Ellis, LLP*, the purported advance waiver appeared in an engagement letter executed in 2013 between Mylan, Inc., a cluster of Mylan subsidiaries, and Kirkland & Ellis.[206] As in the *SuperCooler* case, both parties were large, sophisticated, industry giants in this 2015 action. Mylan is a global pharmaceutical company with billions of dollars in total revenues, and its law firm Kirkland & Ellis is one of the top-grossing law firms in the world.[207] The waiver at issue was similar to the *Coca-Cola* waiver in that Kirkland & Ellis conceded it may represent adverse interests to the client, and that the signer agreed to "allow[]

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[204] Mylan, Inc. v. Kirkland & Ellis LLP, No. 15-581, 2015 U.S. Dist. LEXIS 194338 (W.D. Pa. June 9, 2015).

> Considerations outside the scope of this Recommendation include both certain questions of morality, ethics, national/international social policy, and/or economic or legal philosophy regarding, *e.g.*, (i) inverse tax transactions and other corporate business practices, (ii) a trend toward oligopolies in certain industries and in legal practice, (iii) the evolution of the ethical rules governing lawyers' conduct and the natural constraint considerations reflected in those rules may place on the continued consolidation of law firms and resultant reduction in the availability of qualified counsel to provide unconflicted client representation in specialized areas.

Id. at *4 n.8.

[205] *See* Alison Frankel, *Lessons from Kirkland's 'Unfortunate and Unethical' Mylan Mess*, REUTERS (June 25, 2015, 5:32 PM), https://www.reuters.com/article/idUS3076688403/ [https://perma.cc/J5WC-HB6M].

[206] *Mylan, Inc.*, 2015 U.S. Dist. LEXIS 194338, at *2. Plaintiffs included Mylan, Inc., Mylan Pharmaceuticals, Inc., Mylan Technologies, Inc., and Mylan Specialty LP ("Mylan Clients"). *Id.* The hostile takeover attempt was of Mylan N.V., the parent holding company of the "Mylan Clients," formed as a public company two years after the engagement letter was signed (2015). *Id.* Competitor Teva Pharmaceutical Industries, Ltd., led the hostile takeover attempt and was also represented by Kirkland & Ellis. *Id.*

[207] *See, e.g.*, *Mylan Announces Third Quarter 2020 Financial Results and Looks Ahead to the Launch of Viatris Inc.*, MYLAN (Nov. 6, 2020), https://investor.mylan.com/news-releases/news-release-details/mylan-announces-third-quarter-2020-financial-results-and-looks [https://perma.cc/5NHH-2TJQ]. In 2020, Mylan N.V. and Pfizer, Inc. formed a new company, Viatris, after a merger between Pfizer and Upjohn. *Mylan and Pfizer Announce Viatris as the New Company Name in Planned Mylan-Upjohn Combination*, MYLAN (Nov. 12, 2019), https://investor.mylan.com/news-releases/news-release-details/mylan-and-pfizer-announce-viatris-new-company-name-planned-mylan [https://perma.cc/RA9D-YUSX]. Kirkland & Ellis has 3,415 lawyers and is ranked third in the United States among law firms. *Kirkland & Ellis*, LAW.COM, https://www.law.com/law-firm-profile/?id=173&name=Kirkland-Ellis [https://perma.cc/DA6X-YNAB] (last visited Sept. 29, 2024). In 2023, it boasted $7.2 billion in gross revenue, and on the 2023 Global 200 survey is ranked as the highest grossing law firm in the world. *Id.*

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adverse representation," so long as it does not somehow relate to legal services provided in the past, present, or future by the law firm.[208] The fundamental distinction, however, was that there was no affirmative language stating the current client expressly agreed to waive potential future conflicts.[209]

At the time the engagement letter containing the advance waiver was signed, the Mylan plaintiffs knew the law firm also served as counsel for Teva Pharmaceutical Industries, Ltd., including in some matters that were adverse to Mylan.[210] The Mylan plaintiffs had accepted some risk of cross-contamination. However, the plaintiffs likely did not know Teva would attempt a hostile takeover of its holding company two years later. In fact, at the time of the signing of the waiver, the Mylan N.V. holding company had not yet been formed.[211] The findings of fact in this case are richer than those provided in the *SuperCooler* case, and what they illustrate is a tangled web of confidences shared between the many branches of the pharmaceutical giant, its medical products, and the law firm that represented it for two years.[212] It also shows that in the pharmaceutical industry things change quickly over a short period of time. More broadly, it illustrates how complicated industry lawyering is, how quickly conflicts can arise, and how both firms and clients submit to incestuous interactions until they hit a breaking point. The final straw for the Mylan plaintiffs came when Kirkland & Ellis accepted the representation of Teva. Although a conflict check that revealed Mylan N.V. had never been a client, Kirkland & Ellis did not tell the Mylan plaintiffs directly about the adverse representation.[213] Instead, Mylan learned of the representation from the hostile

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[208] *Mylan, Inc.*, 2015 U.S. Dist. LEXIS 194338, at *5–6.

[209] *Id.* at *41 (detailing the contents of the engagement letter, which included advance waiver provisions of future adverse representation). Author's note: It is also likely the underlying substantive confidential information in hand with the lawyers was different as between Kirkland & Ellis and Paul Hastings, with Kirkland & Ellis possessing detailed insider business information.

[210] *Id.* at *10.

[211] *Id.* at *16.

[212] *Id.* at *12–15. For instance, "[t]he pharmaceutical products as to which K&E represented the Mylan Clients approximated $4 billion in total market revenue [in 2014]." *Id.* at *14. The law firm prepared detailed financial forecasts for unlaunched products, produced confidential memos regarding proprietary information, pricing strategies, and engaged in conversations protected under attorney-client privilege. *Id.* at *15.

[213] *Id.* at *17. Mylan N.V. had only been formed a month prior to the conflicts check. *Id.* at *16. At the same time, the law firm created an ethical wall between the teams working on Mylan plaintiff matters and those on the Teva matter. *Id.*

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takeover entity.[214] Thereafter, Mylan filed for a preliminary injunction to stop Kirkland & Ellis from representing both sides of the hostile takeover bid.[215]

After finding a direct adversity conflict under Pennsylvania Rule of Professional Conduct 1.7 to both Mylan N.V. and the Mylan plaintiffs,[216] United States Magistrate Judge Lisa Pupo Lenihan dubbed the circumstances surrounding this case "unfortunate and unethical,"[217] and invoked the classic principles of loyalty and fiduciary duty to chastise Kirkland & Ellis:

> Thus, throughout virtually all of K&E's ongoing representation, K&E had been clearly prohibited, under Rule 1.7, from lending its services to an attempted hostile takeover of the Mylan Clients. Defendant's contention that the fortuitous circumstance of a recent reorganization adding a tier of holding-company ownership to the Mylan corporate affiliate structure now relieves it of an important component of its fiduciary duty is disquieting. The sacrosanct duties that characterize an attorney's faithfulness to his/her client are not so easily forfeited.[218]

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[214] *Id.* at *17.

[215] *Id.* at *2–3.

[216] Rule 1.17 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: (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.

Pa. Rules. of Pro. Conduct r. 1.7.

[217] *Mylan, Inc.*, 2015 U.S. Dist. LEXIS 194338, at *64–65.

[218] *Id.* at *30.

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Judge Lenihan's ruling cited a classic conflict of interest case, *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, a Pennsylvania Supreme Court case from 1992 cited in almost every Professional Responsibility casebook today as an example of what not do to when seeking to represent a current client at the same time as a client's competition.[219] However, the *Maritrans* case does not involve an advance waiver.[220] Rather, it involved the common law concept of fiduciary duty and how breaches of these duties occur when law firms engage in active conflicts of interest.[221] Recall, however, that active conflicts of interest are exactly what advance waivers are designed to allow lawyers and clients to circumvent—at least until they hit a breaking point.

The breaking point is another reason why advance waivers can be unreliable tools, and it is precisely why lawyers are taught to steer clear of conflicts of interest to avoid both disciplinary and civil liability in the first place. In this case, the Mylan plaintiffs were fine with a certain amount of conflict, until adversity arose and they felt betrayed. Similarly, in the *SuperCooler* case, the client was sophisticated and aware of the potential for conflict until the moment when the disloyalty became too expensive.

C. Large Jurisdictional Proponent of Advance Waivers Changes Direction?

As further evidence of the lack of uniformity regarding advance waivers, consider California, a jurisdiction that once viewed advance waivers favorably. In 2018, the California Supreme Court held that an attorney services contract was unenforceable as against public policy in a decision that stemmed from Sheppard,

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[219] *Id.* at *7. Philadelphia-based law firm represented client Maritrans on various business issues for over a decade gaining detailed playbook knowledge of the company and its operations, including plans on how it would handle competition. Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1280 (Pa. 1992). When the law firm began representing those competitors, Maritrans objected and the law firm agreed to limit the representation of competition. *Id.* at 1280–81. However, the law firm continued to court competitors and when Maritrans objected again the firm dropped its representation of the company. *Id.* at 1281. The trial court imposed a preliminary injunction preventing the law firm from representing competitors, but the appellate court reversed. *Id.* at 1281–82. The Supreme Court of Pennsylvania found a breach of fiduciary duty and emphasized the common law prohibition against conflicts of interest and the imposition of civil liability in the event of breach, as well as discipline under the rules of professional conduct. *Id.* at 1287–89.

[220] *See Maritrans GP Inc.*, 602 A.2d at 1279 ("This case involves the question of whether the conduct of Appellee-attorneys is actionable independent of any violation of the Code of Professional Responsibility.").

[221] *Id.* at 1280–81.

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Mullin, Richter & Hampton, LLP's use of a broad advance waiver and failure to disclose a known and existing conflict.[222] The Los Angeles Mega Big Law firm has 909 lawyers, ranks number forty-nine on the Am Law 200 in 2024, and boasted $1.1 billion in gross revenue in 2023.[223] One of the things that distinguishes this case from both *SuperCooler* and *Mylan*, however, is that the court here focused on the law firm's failure to disclose a concurrent live conflict rather than the language of the advance waiver itself, which stands somewhere between the weak waiver offered in *Mylan* and the more detailed waiver in *SuperCooler*.[224] Associate Justice Leondra R. Kruger, who authored the opinion, wrote: "[T]he law firm's conflict of interest rendered the agreement with the manufacturer, including its arbitration clause, unenforceable as against public policy. Although the manufacturer signed a conflicts

[222] *See* Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., 425 P.3d 1, 9 (Cal. 2018) (holding that a law firm's conflict of interest rendered an agreement with manufacturer client, including its arbitration clause, unenforceable as against public policy). The client signed a conflicts waiver, but the waiver was found not effective because the firm failed to disclose a known conflict with a current conflict. *Id.* at 13. However, the court says the firm can recover the value of the services it rendered to the client, in opposition to the holding of the Court of Appeals. *Id.* at 24.

[223] *See Sheppard Mullin*, LAW.COM, https://www.law.com/law-firm-profile/?id=272&name=Sheppard-Mullin [https://perma.cc/BC6W-44EF] (last visited Sept. 29, 2024).

[224] *Sheppard, Mullin, Richter & Hampton*, 425 P.3d at 6. The language of the waiver read:

> Sheppard, Mullin, Richter & Hampton LLP has many attorneys and multiple offices. We may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving [J-M]. We undertake this engagement on the condition that we may represent another client in a matter in which we do not represent [J-M], even if the interests of the other client are adverse to [J-M] (including appearance on behalf of another client adverse to [J-M] in litigation or arbitration) and can also, if necessary, examine or cross-examine [J-M] personnel on behalf of that other client in such proceedings or in other proceedings to which [J-M] is not a party *provided* the other matter is not substantially related to our representation of [J-M] and in the course of representing [J-M] we have not obtained confidential information of [J-M] material to representation of the other client. By consenting to this arrangement, [J-M] is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations. We seek this consent to allow our Firm to meet the ***70** needs of existing and future clients, to remain available to those other clients and to render legal services with vigor and competence. Also, if an attorney does not continue an engagement or must withdraw therefrom, the client may incur delay, prejudice or additional cost such as acquainting new counsel with the matter.

Id.

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waiver, the waiver was not effective because the law firm failed to disclose a known conflict with a current client."[225]

Here, the California court went back to a more stringent application of informed consent in the advance waiver context. Even though the client, J-M Manufacturing Co., Inc., signed an engagement agreement to allow Sheppard Mullin to represent current or future clients who might be adverse, the agreement did not specifically mention the representation of another current client, South Tahoe Public Utility District.[226] Both clients signed the agreement waiving future conflict, which ostensibly demonstrates informed consent from sophisticated industry clients. But as soon as South Tahoe discovered the adverse representation of a rival by its lawyers, a disqualification motion followed.[227] Quickly thereafter, J-M Manufacturing Co., Inc. decided not to continue paying its legal fees, leading to a suit for unpaid fees by the law firm, followed by a cross claim for (among other things) breach of fiduciary duty.[228] What should have protected the law firm became a costly albatross.

Contrastingly, the United States District Court for the Northern District of California went in the direction of protecting client choice of counsel in the 2018 case of *Simpson Strong-Tie Co. v. Oz-Post International, LLC*. There, the court upheld a broadly written advance waiver between similarly-situated sophisticated clients, holding that there was no "actual threat to the duty of loyalty" owed by Foley & Lardner, LLP to its client Simpson Strong-Tie Co., Inc.[229] Further, enforcing the broad advance waiver in support of a client's right to choose did not constitute a "legitimate threat to the integrity of the bar."[230] Based in Milwaukee, Wisconsin, Foley & Lardner ranks as the forty-sixth highest-grossing law firm in the nation, reporting gross revenue of $1.08 billion for the 2022 fiscal year.[231] The advance waiver was included in an engagement letter and signed by Simpson Strong Tie in

[225] *Id.* at 5.

[226] *Id.* at 6.

[227] *Id.* at 6–7.

[228] *Id.* at 7.

[229] Simpson Strong-Tie Co. v. Oz-Post Int'l, LLC, No. 3:18-cv-01188, 2018 U.S. Dist. LEXIS 140158, at *2 (N.D. Cal. Aug. 17, 2018).

[230] *Id.* at *50 (citing Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 644–45 (Cal. Ct. App. 2010)).

[231] *Foley Jumps Two Spots, Ranks No. 46 on 2023 Am Law 100*, FOLEY & LARDNER LLP (Apr. 18, 2023), https://www.foley.com/news/2023/04/foley-jumps-two-spots-ranks-no-46-2023-am-law-100/ [https://perma.cc/JZ59-KKLA].

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2014.[232] During the case, the law firm acknowledged that the waiver at issue was "unlimited in time" and "broad in scope," but that it was "very specific" in that no future adverse representation could be taken on if the matters were "substantially related."[233] Here, although the court said the law firm should have sought a second waiver following a complex corporate merger that birthed the concurrent conflict, United States District Judge William H. Orrick denied Simpson Strong Tie's motion to disqualify the law firm stating, "I am concerned with the prejudice to OZCO [defendant Oz-Post International, LLC] if I granted the motion to disqualify, and I am not concerned that denying this motion threatens California's ethical rules and policy."[234]

What guidance is there for lawyers and law firms practicing in California? As with every conflicts case, the devil is in the details. When was the waiver signed? Was it specific? Are the clients sophisticated? Did a conflict arise due to a merger? Does the judge favor public policy or client choice? With the adoption of a new set

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[232] *Simpson Strong-Tie Co.*, 2018 U.S. Dist. LEXIS 140158, at *7. The language of the advance waiver at issue:

> [Simpson Manufacturing] agrees that [Foley] may represent current or new clients in work directly adverse to [Simpson Manufacturing], and may be adverse to the business entities with which you are affiliated, provided such work is not substantially related to the Matter and [Foley] does not use any of [Simpson Manufacturing's] confidential information in representing such clients. This consent includes our being counsel in litigation or other formal disputes adverse to [Simpson Manufacturing]. In addition, [Simpson Manufacturing] agrees that, even though [Foley] represents [Simpson Manufacturing] in this Matter, [Foley] may represent in the future other parties who are adversely involved in the Matter, or who may later become adversely involved in the Matter, as long as that representation of other parties is substantially unrelated to the Matter. By way of examples only, and assuming such representations are not substantially related to the Matter, we may represent one or more parties in bankruptcy cases that may have interests adverse to [Simpson Manufacturing], we may represent clients with regard to intellectual property rights that may be adverse to those of [Simpson Manufacturing], or we may represent clients in contract negotiations adverse to [Simpson Manufacturing]. [Foley] agrees that it will not use any of [Simpson Manufacturing's] confidential information in representing such other clients and, when needed, we will establish an ethical wall to assure that confidential information is not exchanged between those working on the Matter and those working for such other clients.

Id. at *9–10.

[233] *Id.* at *39.

[234] *Id.* at *54.

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of rules of professional conduct by the California Supreme Court in 2018, including a revised rule 1.7 that looks nearly identical to the ABA Model Rule 1.7,[235] and the recent cases taking different approaches, it looks like California will continue to defy accurate predictions of the enforceability of advance waivers of conflict for the foreseeable future.

CONCLUSION

One of the primary characteristics said to distinguish the practice of law from a business is that a lawyer's relationship to clients is one of the "highest degree fiduciary"; a lawyer is constantly faced with conflicting loyalties that must be reconciled.[236] According to Justice Harlan Stone, "it is needful that we look beyond the club of the policeman as a civilizing agency to the sanctions of professional standards which condemn the doing of what the law has not yet forbidden."[237] Advance waivers of conflicts are not forbidden, but do they effectively serve to reconcile conflicting loyalties? Further, what interests do they actually serve?

There were more than 1.3 million lawyers in the United States in 2023, according to the ABA's annual *Profile of the Legal Profession* report.[238] One-fourth of those lawyers can be found in two states: New York and California.[239] Although a lion's share of the attention from the media and the courts goes to Mega Big Law firms, the fact is that the backbone of the legal services market is still small- and medium-sized law firms.[240] Yet the rules governing current conflicts of interest and

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[235] *See Supreme Court Approves First Comprehensive Revision to Attorney Rules of Professional Conduct in Twenty-Nine Years*, CAL. CTS. NEWSROOM (May 10, 2018), https://newsroom.courts.ca.gov/news/supreme-court-approves-first-comprehensive-revision-attorney-rules-professional-conduct-twenty [https://perma.cc/33K4-35VQ]. *Compare* CAL. R. PRO. CONDUCT r. 1.7, *with* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

[236] *See* DRINKER, *supra* note 9, at 5–6 (citing Edson R. Sunderland, *An Inquiry Concerning the Functions of Procedure in Legal Education*, 21 MICH. L. REV. 372, 383–83 (1923)).

[237] Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 13 (1934). From an address delivered at the dedication of the University of Michigan's Law Quadrangle, Justice Stone stated, "those who act as fiduciaries in the strategic positions of our business civilization, should be held to those standards of scrupulous fidelity which society has the right to demand." *Id.*

[238] *See Profile of the Legal Profession*, *supra* note 138.

[239] *Id.* New York has 188,341 lawyers, and California has 170,959. *Id.* The state with the fewest lawyers is Wyoming with 1,673. *Id.*

[240] *2021 SUSB Annual Datasets by Establishment Industry*, U.S. CENSUS BUREAU (Dec. 2023), https://www.census.gov/data/datasets/2021/econ/susb/2021-susb.html [https://perma.cc/L7LL-37TA] (choose "U.S. & states, 6 digit NAICS").

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the use of advance waivers appear to have two primary beneficiaries—Mega Big Law firms and their industry clients. Advance waivers do little to serve the duty of loyalty, instead they are employed as weapons until a breaking point is reached.

After thirty years of watching courts grappling inconsistently with the enforceability of advance waivers, the ABA and the ALI should either revisit the rules governing concurrent client conflicts and provide additional guidance on how to craft an enforceable advance waiver, or come up with a simpler and more reliable way to confront conflicts of interest even if that means doing away with advance waivers altogether. Additional courses of action could include striking the vague language, more clearly defining "in the same or substantially related matter," and focusing on other practical tools such as screening.[241] On the other side, industry clients could refuse to sign broad advanced waiver provisions from their Big Law lawyers and instead look to smaller and midsize law firms for expertise and perhaps even a measure of loyalty. Until such action is taken at a regulatory level, the courts will be forced to referee costly fights over loyalty on a case-by-case basis with unpredictable results. Unpredictable results offer no security for clients or their lawyers, and consistent inconsistency flies in the face of the fundamental purpose of the rule of law.

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[241] *See* MODEL RULES OF PRO. RESP. r. 1.9(a) (AM. BAR ASS'N 2018).

> 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.

Id.; *see also* Adam Raviv, *The Real and Imagined Beneficiaries of Legal Ethics*, 35 GEO. J. LEGAL ETHICS 321, 352 (2022) (Noting that if the purpose of the rules governing conflicts of interest is to prevent real harm to clients caused by a lawyer's duties to another client with conflicting interests, practical solutions exist to avoid changing the ethics rules. One such solution is an increased use of screening mechanisms when one lawyer moves to another firm that could help limit the imputation of conflicts within a law firm.).

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