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### **MCLE Article: Advice and Consents**

The uncertain effectiveness of advance consents is due, at least in part, to a misunderstanding of their purpose and use

*By Diane Karpman*

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For more than 30 years, lawyers have been grappling with California's stringent rule governing advance consents<sup>1</sup>--frequently without success.<sup>2</sup> Continuing legal education courses, including the mandatory courses on ethics, have brought an increased awareness of conflicts. Arguably, there are some cases in which the interests of the clients are completely aligned. However, in some instances, the mere passage of time can cause aligned interests of clients to diverge. And perhaps because of the greater sensitivity to conflicts engendered by the educational requirements, fewer and fewer conflicts are being held to be unforeseeable. Thus, in California, the issue often is not whether there is a consent, but how many are there?<sup>3</sup>

The varied success in using advance consents is at least in part due to lawyers misunderstanding their purpose and, therefore, their use.<sup>4</sup> In addition to protecting clients' interests, advance consents protect lawyers from clients who have selective memories or unpredictably play the conflicts card. They also help avoid a court's "factual reconstruction"<sup>5</sup> of the terms of the attorney-client relationship.

When representing multiple clients with potentially divergent interests, advance consents, while sometimes fraught with problems, can give lawyers a powerful tool and a modicum of control over future events. Careful consideration of a number of guiding principles in using, drafting, and executing consents will substantially increase the likelihood that they will be enforced.

Some of these factors have already received judicial approval. They include a consideration of the client's status, the lawyer's status, and the scope and timing of the consent. However, the most important element has been the degree of disclosure in the consent. Consents that fail to consider the specifics of a given client, lawyer, and situation are simply less sustainable.<sup>6</sup> These blanket or open-ended consents that are not specifically tied to particular events or circumstances purport to waive any conflicts that could arise at any time in the future. Sometimes, they are buried in lengthy fee agreements. These consents seldom comply with the disclosure goals of Rule 3-310 of the California Rules of Professional Conduct or Rule 1.7 of the ABA Model Rules of Professional Conduct.

Rule 3-310(A) requires attorneys to inform their clients of the events or facts that create or could result in a conflict, as well as the reasonably foreseeable adverse consequences<sup>7</sup> or the material risks.<sup>8</sup> To fulfill that duty and obtain an informed consent, the client needs sufficient information to be able to evaluate and consider fully the benefit and detriment of the proposed consent in order to understand what is being agreed to. The more information that the client has, the more likely that the consent will be validated by the court.<sup>9</sup> A consent is tantamount to a contractual offer--and like any other offer, its terms must be definite and certain. Therefore, blanket or open-ended consents often fail to give clients enough information to hold them to their promise.

Nevertheless, blanket consents are routinely used to achieve a variety of other objectives. They educate consumers of legal services about how conflicts can occur. For clients who have been educated about conflicts, blanket consents open the door to discussions if a potential conflict ripens into an actual one. Finally, blanket consents can be employed to leverage client cooperation in working out a problem, thereby promoting the interests of all clients in achieving the right to counsel of their choice.

## **Client Status**

The attorney-client relationship is contractual. Once initiated, the relationship imposes duties under the law of agency and trusts<sup>10</sup> in addition to other laws relating specifically to lawyers. In professional responsibility, although the retention agreement is characterized as being made at arm's length, a presumption exists that the attorney-client relationship is one that manifests unequal bargaining positions.<sup>11</sup> This is in addition to the basic rule of construction, which requires the fee agreement to be construed against the lawyer.<sup>12</sup> Like any other type of agreement in which the parties have unequal bargaining positions due to their position or understanding of information, the agreement can be reformed or voided. This presumption of inequality is exacerbated by ethical rules that can create an unfair situation for attorneys.

Against that backdrop, a detailed advance consent establishes actual and accurate client expectations and can create and demonstrate equality in the relationship.<sup>13</sup> For this reason alone, the judiciary should support robust consents because they illustrate the client's thoughts at the time of the agreement rather than impressions created years later.

The client's status is key to determining the client's reasonable expectations. An agreement with someone deemed disadvantaged, such as a minor or an intoxicated person, can be set

aside because of a lack of capacity. The emotional and intellectual capacity of the client, and the possibility of manipulation by a coclient, are also important.<sup>14</sup>

For example, if a conflict arises between jointly represented clients, Rule 3-700 and Model Rule 1.16 mandate the lawyer's withdrawal from the representation of both to comply with the duty of loyalty. This occurs, for instance, when a longstanding corporate client wants to provide for the joint defense of its own and its employee's interests because of the company's indemnification obligations or to be able to control the defense. If withdrawal might otherwise be required, the consent allows the parties to allocate risk in advance, and prevents the newer client from denying the primary client its long-trusted counsel.<sup>15</sup> However, this issue is often driven by its context. An individual client seeking justice in a marital dissolution or criminal case will rarely be deemed to have knowingly consented to sharing "his or her" lawyer.<sup>16</sup> However, if a lawyer is working for an insurance carrier in a tripartite relationship or representing a corporation or a class, the clients reasonably expect to share the loyalty of their counsel.<sup>17</sup>

When clients are experienced consumers of legal services who are reasonably informed and independently counseled, there is little reason to believe that they are being taken advantage of by their lawyers--and like others in the marketplace, these clients should be held to their bargains. Thus, large companies can consent under circumstances in which an individual might not be allowed to do so. Sophisticated clients who are versed in legal theories and routinely use legal services are commonly held to their promises.<sup>18</sup> Part of the determination, though, may be based upon the degree of risk in the engagement. For instance, a minor lease for a Fortune 500 company might justify the use of an advance consent, whereas the same advance consent on the same lease might not be justified for a small, closely held corporation.<sup>19</sup>

Major corporations have experienced in-house counsel to approve and review proposed consents. These companies often attempt to dictate the terms of the retention and representation on a "take it or leave it" basis. Often, these companies will require execution of their form fee agreements, which contain lists of subsidiaries or other companies with whom they have strategic relationships, and whom the lawyers agree not to represent or sue. Thus, the presumption of unequal bargaining power is absent.<sup>20</sup>

Since these corporations employ teams of attorneys in specialized areas, depending on the case, they may not expect any one attorney to faithfully represent their interest in all the endeavors of a corporation and its subsidiaries. They are more likely to agree to an advance consent for unrelated business matters, such as representation of employees in workers' compensation matters adverse to the company, insurance matters, or small contracts. Although some of the titans of industry can be offended by proposed consents,<sup>21</sup> the Association of Corporate Counsel published an "info pak" on conflicts that contains several pages on consents, indicating a level of acceptance among in-house corporate counsel.<sup>22</sup>

Some jurisdictions do not permit governmental organizations to "consent" to a conflict of interest:<sup>23</sup> "A governmental lawyer cannot obtain the informed consent of the citizenry to the representation of conflicting interests."<sup>24</sup> This concept is based on the appearance of

impropriety and public trust in the integrity of the judicial system. The knee-jerk prohibition on governmental consents should be compared with the concept of the "revolving door," which allows former government lawyers to find employment in the private sector. Everyone in society accepts the benefits and burdens of this practice. Therefore, governments should be permitted to consent when proper circumstances are presented.

## **Lawyer Status**

The enforceability of a consent is enhanced when it is needed because of a lawyer's special characteristics. A consent is appropriate when a client seeks an attorney who specializes in a unique area of the law or a boutique practice "in which conflicts between clients are frequent."<sup>25</sup> For instance, the concurrent representation of several school districts,<sup>26</sup> numerous airlines,<sup>27</sup> or financial service providers<sup>28</sup> can justify a consent in these niche practices. Even being recognized for "aggressive" behavior may validate a consent.<sup>29</sup> Hopefully, the converse would be approved as well. Additionally, if the services of a specific lawyer are unavailable in the marketplace without an advance consent, the freedom of contract and right to choose one's own lawyer may trump any subsequent claims of duress.<sup>30</sup>

Advance consents may also be justified when the client is seeking advice that, by its nature, will lead to a one-time retention. For example, immigration or ethics cases, or even the representation of financial institutions,<sup>31</sup> can validate the use of a consent to future conflicts of interest.

California's policy favoring client autonomy and decisional freedom in the area of consents is extremely strong. Indeed, the California Supreme Court in *Maxwell v. Superior Court*<sup>32</sup> held that an indigent, criminal defendant in a capital case could grant full media rights to his lawyers because the consent fully explained how the lawyers' economic interest could conflict with the interests of the accused. The court balanced the defendant's right to counsel of his choice in a death penalty case with counsel's full and complete right to exploit the criminal's story. During oral argument, counsel agreed that full and complete exploitation rights were tantamount to overreaching. Still, the consent was deemed valid.

## **Scope of Consents**

Overly broad and blanket consents are less sustainable, but generally a consent that authorizes an anticipated event before it happens is justifiable. Broad, nonspecific consents substantiate claims of overreaching and predatory lawyering. For example, one consent relieved "said Boone (the attorney) from all rights, burdens, obligations, and privileges which appertain to his said employment, and consent[ed] that said Boone may engage in services pro and con, as he may see fit."<sup>33</sup> Although this is an historic example of a consent, similar consents are still being employed.

Broad, generic clauses in a fee agreement are more susceptible to attack because they fail to satisfy the requirements of the rules and are often employed without concern for client status. For example, they are commonly hidden in the boilerplate of a standard fee agreement.<sup>34</sup> Yet

these broad sweeping clauses are being increasingly employed in the profession, particularly by large law firms, although the lawyers using them commonly found them difficult to obtain and do not know whether they are enforceable.<sup>35</sup>

Simply put, broad clauses commonly fail to consider the reasonably foreseeable consequences<sup>36</sup> involved with a specific client and a specific representation. That argument alone may defeat a standard form clause contained in an engagement letter.<sup>37</sup>

However, attorneys obtain broad consents--despite their dubious enforceability--to obtain leverage in neutralizing client objections should a conflict materialize.<sup>38</sup> Nevertheless, attorneys have an obligation to request additional consents as events occur and the contours of the relationship unfold.<sup>39</sup> Indeed, in one well-known case that applied the California consent rule,<sup>40</sup> the court indicated that a client's consent to a potential conflict failed to protect the firm from the actual conflict that evolved, although the clients were national airline carriers with teams of in-house lawyers. An ABA ethics opinion, later withdrawn, stated, "Even though one might think that the very purpose of the prospective waiver is to eliminate the need to return to the client to secure a 'present' second waiver when what was once an inchoate matter ripens into an immediate conflict, there is no doubt that in many cases that is what will be ethically required."<sup>41</sup>

Although a standard form or blanket consent fails to satisfy the requirement that the lawyer consider and explain the reasonably foreseeable consequences,<sup>42</sup> "California law does not require that every possible consequence of a conflict be disclosed for the consent to be valid."<sup>43</sup> Acts of war, or a contractual equivalent that cannot be foreseen--such as frustration of purpose or impossibility of performance--would likely justify the absence of an explanation in a consent.

By contrast, clauses that are limited to specific areas of practice, scope of representation, and time periods are easier for courts to approve.<sup>44</sup> For instance, if a sophisticated client retains a firm for a specific bankruptcy problem, then it is conceivable that the client will understand a request to not disqualify the firm in other areas of practice.

### **Details, Timing, and Confidential Information**

Consents should be as detailed as possible. They should provide the identity of the existing client who may become adverse to the new client.<sup>45</sup> Often, the identity of the adverse client can be identified by the type of business involved, if not by name. In describing the conflict, two primary fiduciary duties may be implicated: loyalty and confidentiality.<sup>46</sup> Clients have the right to fully understand when the performance of those duties is impaired. A robust consent describes the specific duty and the impairment that could occur.

When "the attorney's loyalty, i.e., independent judgment" is impaired, a disclosure might contain advice to seek independent counsel to review the consent.<sup>47</sup> "Consent counsel" should be truly independent--not a suite mate or friend of the attorney seeking the consent--and chosen by the client. The recommendation to seek independent counsel is the aspect of

the consent that is important, not whether that advice was heeded. Indeed, a client's failure to follow the advice can establish that the consent was voluntarily given.

The most important aspect of any advance consent is the full, unvarnished explanation of the potential or actual conflict. While laying out these details may make lawyers and clients squeamish, complete transparency will avoid claims of the lawyer taking advantage of a client by overreaching or "snatching" a consent because of greed or other improper motives.<sup>48</sup>

According to Rule 3-310, a lawyer faced with a conflict must not accept or continue a representation without obtaining an informed written consent. The timing of the consent can demonstrate duress, or its absence. Thus, advice to seek independent counsel necessarily implies a reasonable opportunity, under the circumstances, to obtain it. The rule of thumb is three or four business days.

The reasonableness of that opportunity may bolster the enforceability of the consent. Obviously, a client's alternatives are more limited on the eve of trial than before commencing litigation. Therefore, a request for consent should be made at the earliest opportunity to avoid the delay being characterized as sinister in a subsequent motion for disqualification--or in a suit for malpractice.

A consent creates an engagement of limited scope--for example, "We represent you only in this aspect of your bankruptcy, and you agree not to conflict us out of other litigation extrinsic to that matter." Therefore, lawyers should include in the consent a clause warning the client to be circumspect in disclosing other extraneous confidential information. Beware, however, that the client's inability to disclose information--or the insecurity in doing so--can interfere with the competent representation of less sophisticated parties. Therefore, the inadvertent transmission of confidential information should be anticipated in the agreement, perhaps by a provision for ethical walls, even when a client is warned and agrees not to disclose collateral, confidential information.<sup>49</sup>

The problem of confidential disclosures commonly arises in a joint venture when the parties consult a lawyer who has represented one of the parties in the past. Identifying and confirming in writing who is and is not the client is crucial. If the lawyer wants to maintain the longstanding client relationship, a consent agreed to by all other participants is wise. The lawyer may condition his or her engagement by the other joint venturers on their agreement to waive the right to disqualify the lawyer in subsequent adverse representations:<sup>50</sup>

"California courts have long recognized that a lawyer may represent an interest adverse to a client in a matter directly related to the lawyer's prior representation of the client "where the client expressly or impliedly consents to the adverse representation."<sup>51</sup>

## **Common Scenarios**

A number of situations exist that, by nature, make an advance consent not only necessary but also easier for the prospective client to accept. Lawyers should consider employing an advance consent in these circumstances.

Corporate mergers and acquisitions give rise to a host of possible conflicts. Suddenly, through no fault of a lawyer or his or her firm, the firm may realize it is on both sides of a deal. The client may create the conflict and so should easily understand the need for a consent.<sup>52</sup> Numerous ethics opinions address the scenario of parents and subsidiaries<sup>53</sup> and allow lawyers to continue the representation if a blameless client and lawyer, due to some accidental circumstances, are at risk for having their ongoing relationship dissolved by the court. Even intricate conflict-checking systems can fail to uncover related party conflicts or those that seem facially unconnected.

The merger mania among corporations is mirrored in legal practice. Megafirms are a rapidly growing legal phenomenon, and conflict clearing is mandated before serious discussion regarding law firm mergers begins. Not only would client identity need to be disclosed but also matter status, client goals, objectives, and strategy. In this instance, obtaining an advance consent from clients should be relatively easy, because conglomerate clients with developed law departments hopefully understand that law firms merge just as other types of businesses do.

Lawyer "beauty contests" also pose substantial risks. When potential clients are shopping for representation, they must disclose confidential information to a firm to allow it to evaluate the clients' work. However, that disclosure could taint the firms under consideration. An advance consent in these circumstances should be understood and accepted as a condition of participating in these contests.

Advance consents can also assist in the identification of the client in a case of joint venturers as well as promoters of a new corporation or enterprise. The advance consent can effectively deny a participant in the new endeavor the claim of "clienthood."<sup>54</sup>

Some Los Angeles firms refuse to allow attorneys to conduct initial client interviews and require paralegals to first obtain advance consents before discussing any matter with prospective clients. This is particularly common for lawyers in niche practices--such as family law, antitrust, and intellectual property. Since firms can be tainted from conversations with potential clients, a putative but disingenuous client can attempt to poison the well and prevent a particular lawyer from representing an adversary.

Positional conflicts--those that arise due to a client's ideology or business goals--are often the subject of advance consents. Obtaining a client's consent to having taken a different position in the past or to taking an opposing position in the future may seem unnecessary in Anglo-American jurisprudence.<sup>55</sup> However, some enterprises--particularly financial institutions and insurance carriers--require that their counsel never assume a position adverse to their side of a particular controversy or legal theory. Informing a client at the beginning of representation via an advance consent serves an educational purpose. These consents should be supported by clients and courts.

When lawyers become familiar with the concept of consents, they may overreact and request consents when they are unnecessary, as an ounce of prevention. Lawyers will be overly inclusive and may perceive a conflict where none exists. This overly cautious behavior can backfire. For example, in a disqualification motion or malpractice litigation, the mere fact that some members of a firm were murmuring about the possibility of a conflict could be construed as evidence that a conflict existed. Attorneys have been prosecuted by the State Bar for requesting consents, because the request can be deemed as an acknowledgment of a problem, whether that analysis was accurate or not.

Ultimately, deciding whether an advance consent is necessary should be based on the foreseeability and waivability of the conflicts that may arise. Advance consents can stave off problems that otherwise might be insurmountable after a conflict has arisen.

### **Sidebar: Drafting Effective Advance Consents**

While sample forms are helpful, they cannot replace carefully drafted advance consents that are appropriately tailored to the facts and clients at issue. To enhance the likelihood that an advance consent will be enforced, attorneys should follow several principles.

- Be as specific as possible. This is because a court ruling on a consent will make a fact-specific inquiry. Use the parties' actual names in lieu of Client #1 and Client #2. Detail precisely what is being agreed to.
- Limit the breadth of the consent. A consent is more likely to be rejected if it is unnecessarily broad.
- Restrict the consent's temporal scope.<sup>1</sup> A consent applicable to a particular case is more likely to be enforced than one that blithely frees a firm from its fiduciary duties forever. A periodic, fresh consent is also helpful, since the passage of time in disqualification motions is significant and can be determinative.
- Have a substantive, detailed conversation with the client about what the consent means. A complicated or substantial consent without an explanation is less valuable than one that has been completely explained to the client.
- Explain the nature of the anticipated conflicts and the areas of conflict that cannot be foreseen, the effect of those conflicts, and how the consent changes the representation regarding the duties of loyalty and confidentiality.
- Consider the sophistication of the client.
- Think about the interests of justice and obligations to the client. Too great a departure from these interests and obligations will result in a consent that will not be enforced, even if it is properly detailed, explained, and agreed to.
- Give the client instructions on what is expected regarding the client's actions in light of the consent. Tell the client to evaluate the situation, perhaps consult with independent counsel, and respond within a designated number of days.-**D.K.**

<sup>1</sup> Concat LP v. Unilever PLC, 350 F. Supp. 2d 796 (N.D. Cal. 2004).

### **Endnotes to Text**

<sup>1</sup> The terms "consent" and "waiver" are often, and incorrectly, used interchangeably. A consent is an agreement by a client before a triggering event. A waiver is broader and

involves the relinquishment of a right before or after an event.

2 See Cal. Rules of Prof'l Conduct R. 3-310, which requires an "informed written consent" for most cases. Rule 3-310(B) only requires a written disclosure if the attorney had a relationship with a party or witness in the matter involving the attorney's current client. Arguably, there are some situations in which the interests of the parties are aligned, and therefore a conflict is highly unlikely.

3 Cal. Rules of Prof'l Conduct R. 3-310(C), Official Discussion: "Moreover, if the potential adversity should become actual, the member must obtain a further informed written consent of the clients pursuant to paragraph (C)(2)." See also *Goss Graphics Sys., Inc. v. Man Roland Druckmaschinen Aktiengesellschaft*, 139 F. Supp. 2d 1040 (N.D. Iowa 2001) (With two advance consents, the firm was disqualified based on the court's determination that the narrower and later consent was controlling.).

4 The American Bar Association's Ethics 2000 amendments to the Model Rules of Professional Conduct have endorsed the use of informed written consents, and many states have followed suit to the extent they did not already permit them.

5 Charles W. Wolfram, *Former Client Conflicts*, 10 *Geo. J. Legal Ethics* 677 (1997).

6 Blanket consents are not per se unethical. State Bar of California, Standing Committee on Professional Responsibility & Conduct, Formal Op. No. 1989-115.

7 Cal. Rules of Prof'l Conduct R. 3-310(A).

8 ABA Model Rules of Prof'l Conduct R. 1.7 [22].

9 *Id.*

10 Stephen Gillers, *Regulation of Lawyers: Problems of Law & Ethics* 20 (5th ed. 1998).11 Rafael Chodos, *The Law of Fiduciary Duties* 34 (2000).

12 Civ. Code §§1654.

13 This result is consistent with the validation of an attorney-client relationship, which is determined according to the reasonable expectations of the client. Ronald Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 *Cal. W. L. Rev.* 209 (1986).

14 This can occur in situations involving an "accommodation client"--someone a preexisting client requests the attorney to represent concurrently. Cases involving the joint representation of a company and its employee are examples. See Los Angeles County Bar Association, Professional Responsibility & Ethics Committee, Formal Op. No. 471 (Conflicts of Interest--Informed Consent), available at <http://www.lacba.org>. The concurrent representation of a defendant corporation and its former CEO/CFO presents another dilemma. See *Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d 649 (E.D. Pa. 2001); *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285 (1995) (Two prior consents allowed firm to continue representing company when divergent interests developed that prohibited continued joint representation of two defendants.).

15 *Zador*, 31 Cal. App. 4th 1285; Los Angeles County Bar Association, Professional Responsibility and Ethics Committee, Formal Op. No. 471 (employer/employee concurrent representation). Some commentators consider California's broad consent policy to be detrimental to clients' well being. See, e.g., Theodore J. Schneyer, *Searching for New "Particles" in the Law of Lawyering; Recent Developments in the Attribution of "Clienthood,"* 1 *J. Inst. Study Legal Ethics* 79 (1996); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 *Yale L. J.* 407 (1998).

16 In some instances, the actual conflict will be judicially deemed "unconsentable." *Klemm v. Superior Court*, 75 Cal. App. 3d 893 (1977). Most authorities agree that a lawyer cannot represent both sides of a litigation, and so that situation is unconsentable. See Model Rules of Prof'l Conduct R. 1.7 (b)(3) and Restatement (Third) of Law Governing Lawyers §§122(2) (Client Consent to a Conflict of Interest).

17 Schneyer, *supra* note 15.

18 A client's motion to disqualify in the face of a consent is a revocation, or the exercise of a client's unfettered right of discharge. Case law is evolving in situations in which elements of promissory estoppel or detrimental reliance are present. Restatement (Third) of Law Governing Lawyers §§122 (Client Consent to a Conflict of Interest). Waivers, however, are not unilateral, and one party's revocation can have a significant negative impact upon the right of innocent clients to counsel of their choice. Arguably, a revocation because of a "changed mind" can be addressed in an *ex ante* waiver that articulates the process to be employed in that circumstance. See D.C. Bar, Legal Ethics Committee, Op. No. 317 (Nov. 2002), at <http://www.dcbbar.org>.

19 In small, closely held corporations, it is important to give the equivalent of a Miranda warning to all concerned regarding the client's identity, because the principals or owners often believe that they are the clients.

20 John Leubsdorf, *Pluralizing the Attorney-Client Relationship*, 77 *Cornell L. Rev.* 825 (1992).

21 James Schaller, *Waiving a Yellow Flag at Prospective Waivers*, *Legal Times*, Mar. 12, 2001.

22 Peter Jarvis & Mark Fucile, *A Conflicts Primer* n.10 (2002).<sup>23</sup> See <http://www.freivogelonconflicts.com/>.

24 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 888 (2006).

25 Charles W. Wolfram, *Modern Legal Ethics* 347 (1986).

26 *Elliott v. McFarland Unified Sch. Dist.*, 165 Cal. App. 3d 562 (1985).

27 *Blecher & Collins v. Northwest Airlines*, 858 F. Supp. 1442 (C.D. Cal. 1994).

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

29 *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F. 2d 1195 (2d Cir. N.Y. 1978).

30 *Elliott*, 165 Cal. App. 3d 562.

31 *Visa*, 241 F. Supp. 2d 1100.

32 *Maxwell v. Superior Court*, 30 Cal. 3d 606 (1982).

33 Richard W. Painter, *Advance Waiver of Conflicts*, 13 *Geo. J. Legal Ethics* 289, 293 (2000). See also *In re Boone*, 83 F. 944 (1897).

34 Susan P. Shapiro, *Tangled Loyalties: Conflict of Interest in Legal Practice* (2002).

35 *Id.* at 395; see also *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F. 2d 1195 (2d Cir. 1978).

36 Cal. Rules of Prof'l Conduct R. 3-310 (A); Model Rules of Prof'l Conduct R. 1.7 ("The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations the greater the likelihood that the client will have the requisite understanding.").

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

38 Shapiro, *supra* note 34, at 366.

39 Diane Karpman, *Written Consents to Prospective Conflicts of Interest*, *Cal. Lawyer*, Dec. 1998.

40 *Blecher & Collins v. Northwest Airlines*, 858 F. Supp. 1442 (C.D. Cal. 1994).

41 ABA Comm. on Ethics and Prof'l Responsibility, Op. No. 93-372 (1993) (*Waivers of Future Conflicts of Interest*) (withdrawn).

42 Foreseeable consequences encompass the benefits and burdens of proceeding in a conflict.

43 *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285 (1995).

44 See Model Rules of Prof'l Conduct R. 1.2(c).

45 Clearly, and initially, attorneys should obtain a consent from the first client to disclose its identity before it is disclosed to the second client.

46 Mallen & Smith, *supra* note 24, at 599.

47 Id. at 617.

48 For a catalogue of the despicable claims that can be asserted against lawyers who request and obtain consents, see Larry Fox, Forgeddabout Conflicts--If Citibar Has Its Way, We Can Have Just One Big Law Firm, 30 Hofstra L. Rev. 717 (1999). For a response to those claims, see Jonathan Lerner, Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship--A Response to MLos Angeles Lawyer The Magazine of the Los Angeles County Bar Association

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Nevertheless, blanket consents are routinely used to achieve a variety of other objectives. They educate consumers of legal services about how conflicts can occur. For clients who have been educated about conflicts, blanket consents open the door to discussions if a potential conflict ripens into an actual one. Finally, blanket consents can be employed to leverage client cooperation in working out a problem, thereby promoting the interests of all clients in achieving the right to counsel of their choice.

## **Client Status**

The attorney-client relationship is contractual. Once initiated, the relationship imposes duties under the law of agency and trusts<sup>10</sup> in addition to other laws relating specifically to lawyers. In professional responsibility, although the retention agreement is characterized as being made at arm's length, a presumption exists that the attorney-client relationship is one that manifests unequal bargaining positions.<sup>11</sup> This is in addition to the basic rule of construction, which requires the fee agreement to be construed against the lawyer.<sup>12</sup> Like any other type of agreement in which the parties have unequal bargaining positions due to their position or understanding of information, the agreement can be reformed or voided. This presumption of inequality is exacerbated by ethical rules that can create an unfair situation for attorneys.

Against that backdrop, a detailed advance consent establishes actual and accurate client expectations and can create and demonstrate equality in the relationship.<sup>13</sup> For this reason alone, the judiciary should support robust consents because they illustrate the client's thoughts at the time of the agreement rather than impressions created years later.

The client's status is key to determining the client's reasonable expectations. An agreement with someone deemed disadvantaged, such as a minor or an intoxicated person, can be set aside because of a lack of capacity. The emotional and intellectual capacity of the client, and the possibility of manipulation by a coclient, are also important.<sup>14</sup>

For example, if a conflict arises between jointly represented clients, Rule 3-700 and Model Rule 1.16 mandate the lawyer's withdrawal from the representation of both to comply with the duty of loyalty. This occurs, for instance, when a longstanding corporate client wants to provide for the joint defense of its own and its employee's interests because of the company's indemnification obligations or to be able to control the defense. If withdrawal might otherwise be required, the consent allows the parties to allocate risk in advance, and prevents the newer client from denying the primary client its long-trusted counsel.<sup>15</sup> However, this issue is often driven by its context. An individual client seeking justice in a marital dissolution or criminal case will rarely be deemed to have knowingly consented to sharing "his or her" lawyer.<sup>16</sup> However, if a lawyer is working for an insurance carrier in a tripartite relationship or representing a corporation or a class, the clients reasonably expect to share the loyalty of their counsel.<sup>17</sup>

When clients are experienced consumers of legal services who are reasonably informed and independently counseled, there is little reason to believe that they are being taken advantage of by their lawyers--and like others in the marketplace, these clients should be held to their bargains. Thus, large companies can consent under circumstances in which an individual might not be allowed to do so. Sophisticated clients who are versed in legal theories and routinely use legal services are commonly held to their promises.<sup>18</sup> Part of the determination, though, may be based upon the degree of risk in the engagement. For instance, a minor lease for a Fortune 500 company might justify the use of an advance consent, whereas the same advance consent on the same lease might not be justified for a small, closely held corporation.<sup>19</sup>

Major corporations have experienced in-house counsel to approve and review proposed consents. These companies often attempt to dictate the terms of the retention and representation on a "take it or leave it" basis. Often, these companies will require execution of their form fee agreements, which contain lists of subsidiaries or other companies with whom they have strategic relationships, and whom the lawyers agree not to represent or sue. Thus, the presumption of unequal bargaining power is absent.<sup>20</sup>

Since these corporations employ teams of attorneys in specialized areas, depending on the case, they may not expect any one attorney to faithfully represent their interest in all the endeavors of a corporation and its subsidiaries. They are more likely to agree to an advance consent for unrelated business matters, such as representation of employees in workers' compensation matters adverse to the company, insurance matters, or small contracts. Although some of the titans of industry can be offended by proposed consents,<sup>21</sup> the Association of Corporate Counsel published an "info pak" on conflicts that contains several pages on consents, indicating a level of acceptance among in-house corporate counsel.<sup>22</sup>

Some jurisdictions do not permit governmental organizations to "consent" to a conflict of interest:<sup>23</sup> "A governmental lawyer cannot obtain the informed consent of the citizenry to the representation of conflicting interests."<sup>24</sup> This concept is based on the appearance of impropriety and public trust in the integrity of the judicial system. The knee-jerk prohibition on governmental consents should be compared with the concept of the "revolving door," which allows former government lawyers to find employment in the private sector. Everyone in society accepts the benefits and burdens of this practice. Therefore, governments should be permitted to consent when proper circumstances are presented.

## **Lawyer Status**

The enforceability of a consent is enhanced when it is needed because of a lawyer's special characteristics. A consent is appropriate when a client seeks an attorney who specializes in a unique area of the law or a boutique practice "in which conflicts between clients are frequent."<sup>25</sup> For instance, the concurrent representation of several school districts,<sup>26</sup> numerous airlines,<sup>27</sup> or financial service providers<sup>28</sup> can justify a consent in these niche practices. Even being recognized for "aggressive" behavior may validate a consent.<sup>29</sup> Hopefully, the converse would be approved as well. Additionally, if the services of a specific lawyer are unavailable in the marketplace without an advance consent, the freedom of contract and right to choose one's own lawyer may trump any subsequent claims of duress.<sup>30</sup>

Advance consents may also be justified when the client is seeking advice that, by its nature, will lead to a one-time retention. For example, immigration or ethics cases, or even the representation of financial institutions,<sup>31</sup> can validate the use of a consent to future conflicts of interest.

California's policy favoring client autonomy and decisional freedom in the area of consents is extremely strong. Indeed, the California Supreme Court in *Maxwell v. Superior Court*<sup>32</sup> held that an indigent, criminal defendant in a capital case could grant full media rights to his lawyers because the consent fully explained how the lawyers' economic interest could conflict with the interests of the accused. The court balanced the defendant's right to counsel of his choice in a death penalty case with counsel's full and complete right to exploit the criminal's story. During oral argument, counsel agreed that full and complete exploitation rights were tantamount to overreaching. Still, the consent was deemed valid.

## **Scope of Consents**

Overly broad and blanket consents are less sustainable, but generally a consent that authorizes an anticipated event before it happens is justifiable. Broad, nonspecific consents substantiate claims of overreaching and predatory lawyering. For example, one consent relieved "said Boone (the attorney) from all rights, burdens, obligations, and privileges which appertain to his said employment, and consent[ed] that said Boone may engage in services pro and con, as he may see fit."<sup>33</sup> Although this is an historic example of a consent, similar consents are still being employed.

Broad, generic clauses in a fee agreement are more susceptible to attack because they fail to satisfy the requirements of the rules and are often employed without concern for client status. For example, they are commonly hidden in the boilerplate of a standard fee agreement.<sup>34</sup> Yet these broad sweeping clauses are being increasingly employed in the profession, particularly by large law firms, although the lawyers using them commonly found them difficult to obtain and do not know whether they are enforceable.<sup>35</sup>

Simply put, broad clauses commonly fail to consider the reasonably foreseeable consequences<sup>36</sup> involved with a specific client and a specific representation. That argument alone may defeat a standard form clause contained in an engagement letter.<sup>37</sup>

However, attorneys obtain broad consents--despite their dubious enforceability--to obtain leverage in neutralizing client objections should a conflict materialize.<sup>38</sup> Nevertheless, attorneys have an obligation to request additional consents as events occur and the contours of the relationship unfold.<sup>39</sup> Indeed, in one well-known case that applied the California consent rule,<sup>40</sup> the court indicated that a client's consent to a potential conflict failed to protect the firm from the actual conflict that evolved, although the clients were national airline carriers with teams of in-house lawyers. An ABA ethics opinion, later withdrawn, stated, "Even though one might think that the very purpose of the prospective waiver is to eliminate the need to return to the client to secure a 'present' second waiver when what was once an inchoate matter ripens into an immediate conflict, there is no doubt that in many cases that is what will be ethically required."<sup>41</sup>

Although a standard form or blanket consent fails to satisfy the requirement that the lawyer consider and explain the reasonably foreseeable consequences,<sup>42</sup> "California law does not require that every possible consequence of a conflict be disclosed for the consent to be valid."<sup>43</sup> Acts of war, or a contractual equivalent that cannot be foreseen--such as frustration of purpose or impossibility of performance--would likely justify the absence of an explanation in a consent.

By contrast, clauses that are limited to specific areas of practice, scope of representation, and time periods are easier for courts to approve.<sup>44</sup> For instance, if a sophisticated client retains a firm for a specific bankruptcy problem, then it is conceivable that the client will understand a request to not disqualify the firm in other areas of practice.

### **Details, Timing, and Confidential Information**

Consents should be as detailed as possible. They should provide the identity of the existing client who may become adverse to the new client.<sup>45</sup> Often, the identity of the adverse client can be identified by the type of business involved, if not by name. In describing the conflict, two primary fiduciary duties may be implicated: loyalty and confidentiality.<sup>46</sup> Clients have the right to fully understand when the performance of those duties is impaired. A robust consent describes the specific duty and the impairment that could occur.

When "the attorney's loyalty, i.e., independent judgment" is impaired, a disclosure might contain advice to seek independent counsel to review the consent.<sup>47</sup> "Consent counsel" should be truly independent--not a suite mate or friend of the attorney seeking the consent--and chosen by the client. The recommendation to seek independent counsel is the aspect of the consent that is important, not whether that advice was heeded. Indeed, a client's failure to follow the advice can establish that the consent was voluntarily given.

The most important aspect of any advance consent is the full, unvarnished explanation of the potential or actual conflict. While laying out these details may make lawyers and clients squeamish, complete transparency will avoid claims of the lawyer taking advantage of a client by overreaching or "snatching" a consent because of greed or other improper motives.<sup>48</sup>

According to Rule 3-310, a lawyer faced with a conflict must not accept or continue a representation without obtaining an informed written consent. The timing of the consent can demonstrate duress, or its absence. Thus, advice to seek independent counsel necessarily implies a reasonable opportunity, under the circumstances, to obtain it. The rule of thumb is three or four business days.

The reasonableness of that opportunity may bolster the enforceability of the consent. Obviously, a client's alternatives are more limited on the eve of trial than before commencing litigation. Therefore, a request for consent should be made at the earliest opportunity to avoid the delay being characterized as sinister in a subsequent motion for disqualification--or in a suit for malpractice.

A consent creates an engagement of limited scope--for example, "We represent you only in this aspect of your bankruptcy, and you agree not to conflict us out of other litigation extrinsic to that matter." Therefore, lawyers should include in the consent a clause warning the client to be circumspect in disclosing other extraneous confidential information. Beware, however, that the client's inability to disclose information--or the insecurity in doing so--can interfere with the competent representation of less sophisticated parties. Therefore, the inadvertent transmission of confidential information should be anticipated in the agreement, perhaps by a provision for ethical walls, even when a client is warned and agrees not to disclose collateral, confidential information.<sup>49</sup>

The problem of confidential disclosures commonly arises in a joint venture when the parties consult a lawyer who has represented one of the parties in the past. Identifying and confirming in writing who is and is not the client is crucial. If the lawyer wants to maintain the longstanding client relationship, a consent agreed to by all other participants is wise. The lawyer may condition his or her engagement by the other joint venturers on their agreement to waive the right to disqualify the lawyer in subsequent adverse representations:<sup>50</sup> "California courts have long recognized that a lawyer may represent an interest adverse to a client in a matter directly related to the lawyer's prior representation of the client "where the client expressly or impliedly consents to the adverse representation."<sup>51</sup>

## **Common Scenarios**

A number of situations exist that, by nature, make an advance consent not only necessary but also easier for the prospective client to accept. Lawyers should consider employing an advance consent in these circumstances.

Corporate mergers and acquisitions give rise to a host of possible conflicts. Suddenly, through no fault of a lawyer or his or her firm, the firm may realize it is on both sides of a deal. The client may create the conflict and so should easily understand the need for a consent.<sup>52</sup> Numerous ethics opinions address the scenario of parents and subsidiaries<sup>53</sup> and allow lawyers to continue the representation if a blameless client and lawyer, due to some accidental circumstances, are at risk for having their ongoing relationship dissolved by the court. Even intricate conflict-checking systems can fail to uncover related party conflicts or those that seem facially unconnected.

The merger mania among corporations is mirrored in legal practice. Megafirms are a rapidly growing legal phenomenon, and conflict clearing is mandated before serious discussion regarding law firm mergers begins. Not only would client identity need to be disclosed but also matter status, client goals, objectives, and strategy. In this instance, obtaining an advance consent from clients should be relatively easy, because conglomerate clients with developed law departments hopefully understand that law firms merge just as other types of businesses do.

Lawyer "beauty contests" also pose substantial risks. When potential clients are shopping for representation, they must disclose confidential information to a firm to allow it to evaluate the clients' work. However, that disclosure could taint the firms under consideration. An advance consent in these circumstances should be understood and accepted as a condition of participating in these contests.

Advance consents can also assist in the identification of the client in a case of joint venturers as well as promoters of a new corporation or enterprise. The advance consent can effectively deny a participant in the new endeavor the claim of "clienthood."<sup>54</sup>

Some Los Angeles firms refuse to allow attorneys to conduct initial client interviews and require paralegals to first obtain advance consents before discussing any matter with prospective clients. This is particularly common for lawyers in niche practices--such as family law, antitrust, and intellectual property. Since firms can be tainted from conversations with potential clients, a putative but disingenuous client can attempt to poison the well and prevent a particular lawyer from representing an adversary.

Positional conflicts--those that arise due to a client's ideology or business goals--are often the subject of advance consents. Obtaining a client's consent to having taken a different position in the past or to taking an opposing position in the future may seem unnecessary in Anglo-American jurisprudence.<sup>55</sup> However, some enterprises--particularly financial institutions and insurance carriers--require that their counsel never assume a position adverse to their side of a particular controversy or legal theory. Informing a client at the beginning of representation

via an advance consent serves an educational purpose. These consents should be supported by clients and courts.

When lawyers become familiar with the concept of consents, they may overreact and request consents when they are unnecessary, as an ounce of prevention. Lawyers will be overly inclusive and may perceive a conflict where none exists. This overly cautious behavior can backfire. For example, in a disqualification motion or malpractice litigation, the mere fact that some members of a firm were murmuring about the possibility of a conflict could be construed as evidence that a conflict existed. Attorneys have been prosecuted by the State Bar for requesting consents, because the request can be deemed as an acknowledgment of a problem, whether that analysis was accurate or not.

Ultimately, deciding whether an advance consent is necessary should be based on the foreseeability and waivability of the conflicts that may arise. Advance consents can stave off problems that otherwise might be insurmountable after a conflict has arisen.

### **Sidebar: Drafting Effective Advance Consents**

While sample forms are helpful, they cannot replace carefully drafted advance consents that are appropriately tailored to the facts and clients at issue. To enhance the likelihood that an advance consent will be enforced, attorneys should follow several principles.

- Be as specific as possible. This is because a court ruling on a consent will make a fact-specific inquiry. Use the parties' actual names in lieu of Client #1 and Client #2. Detail precisely what is being agreed to.
- Limit the breadth of the consent. A consent is more likely to be rejected if it is unnecessarily broad.
- Restrict the consent's temporal scope.<sup>1</sup> A consent applicable to a particular case is more likely to be enforced than one that blithely frees a firm from its fiduciary duties forever. A periodic, fresh consent is also helpful, since the passage of time in disqualification motions is significant and can be determinative.
- Have a substantive, detailed conversation with the client about what the consent means. A complicated or substantial consent without an explanation is less valuable than one that has been completely explained to the client.
- Explain the nature of the anticipated conflicts and the areas of conflict that cannot be foreseen, the effect of those conflicts, and how the consent changes the representation regarding the duties of loyalty and confidentiality.
- Consider the sophistication of the client.
- Think about the interests of justice and obligations to the client. Too great a departure from these interests and obligations will result in a consent that will not be enforced, even if it is properly detailed, explained, and agreed to.
- Give the client instructions on what is expected regarding the client's actions in light of the consent. Tell the client to evaluate the situation, perhaps consult with independent counsel, and respond within a designated number of days.-**D.K.**

<sup>1</sup> *Concat LP v. Unilever PLC*, 350 F. Supp. 2d 796 (N.D. Cal. 2004).

### **Endnotes to Text**

1 The terms "consent" and "waiver" are often, and incorrectly, used interchangeably. A consent is an agreement by a client before a triggering event. A waiver is broader and involves the relinquishment of a right before or after an event.

2 See Cal. Rules of Prof'l Conduct R. 3-310, which requires an "informed written consent" for most cases. Rule 3-310(B) only requires a written disclosure if the attorney had a relationship with a party or witness in the matter involving the attorney's current client. Arguably, there are some situations in which the interests of the parties are aligned, and therefore a conflict is highly unlikely.

3 Cal. Rules of Prof'l Conduct R. 3-310(C), Official Discussion: "Moreover, if the potential adversity should become actual, the member must obtain a further informed written consent of the clients pursuant to paragraph (C)(2)." See also *Goss Graphics Sys., Inc. v. Man Roland Druckmaschinen Aktiengesellschaft*, 139 F. Supp. 2d 1040 (N.D. Iowa 2001) (With two advance consents, the firm was disqualified based on the court's determination that the narrower and later consent was controlling.).

4 The American Bar Association's Ethics 2000 amendments to the Model Rules of Professional Conduct have endorsed the use of informed written consents, and many states have followed suit to the extent they did not already permit them.

5 Charles W. Wolfram, *Former Client Conflicts*, 10 *Geo. J. Legal Ethics* 677 (1997).

6 Blanket consents are not per se unethical. State Bar of California, Standing Committee on Professional Responsibility & Conduct, Formal Op. No. 1989-115.

7 Cal. Rules of Prof'l Conduct R. 3-310(A).

8 ABA Model Rules of Prof'l Conduct R. 1.7 [22].

9 *Id.*

10 Stephen Gillers, *Regulation of Lawyers: Problems of Law & Ethics* 20 (5th ed. 1998).

11 Rafael Chodos, *The Law of Fiduciary Duties* 34 (2000).

12 Civ. Code §§1654.

13 This result is consistent with the validation of an attorney-client relationship, which is determined according to the reasonable expectations of the client. Ronald Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 *Cal. W. L. Rev.* 209 (1986).

14 This can occur in situations involving an "accommodation client"--someone a preexisting client requests the attorney to represent concurrently. Cases involving the joint representation of a company and its employee are examples. See *Los Angeles County Bar Association, Professional Responsibility & Ethics Committee, Formal Op. No. 471 (Conflicts of Interest--Informed Consent)*, available at <http://www.lacba.org>. The concurrent representation of a defendant corporation and its former CEO/CFO presents another dilemma. See *Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d 649 (E.D. Pa. 2001); *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285 (1995) (Two prior consents allowed firm to continue representing company when divergent interests developed that prohibited continued joint representation of two defendants.).

15 *Zador*, 31 Cal. App. 4th 1285; *Los Angeles County Bar Association, Professional Responsibility and Ethics Committee, Formal Op. No. 471 (employer/employee concurrent representation)*. Some commentators consider California's broad consent policy to be detrimental to clients' well being. See, e.g., Theodore J. Schneyer, *Searching for New "Particles" in the Law of Lawyering; Recent Developments in the Attribution of "Clienthood,"* 1 *J. Inst. Study Legal Ethics* 79 (1996); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 *Yale L. J.* 407 (1998).

16 In some instances, the actual conflict will be judicially deemed "unconsentable." *Klemm v. Superior Court*, 75 Cal. App. 3d 893 (1977). Most authorities agree that a lawyer cannot represent both sides of a litigation, and so that situation is

unconsentable. See Model Rules of Prof'l Conduct R. 1.7 (b)(3) and Restatement (Third) of Law Governing Lawyers §§122(2) (Client Consent to a Conflict of Interest).

17 Schneyer, *supra* note 15.

18 A client's motion to disqualify in the face of a consent is a revocation, or the exercise of a client's unfettered right of discharge. Case law is evolving in situations in which elements of promissory estoppel or detrimental reliance are present. Restatement (Third) of Law Governing Lawyers §§122 (Client Consent to a Conflict of Interest). Waivers, however, are not unilateral, and one party's revocation can have a significant negative impact upon the right of innocent clients to counsel of their choice. Arguably, a revocation because of a "changed mind" can be addressed in an *ex ante* waiver that articulates the process to be employed in that circumstance. See D.C. Bar, Legal Ethics Committee, Op. No. 317 (Nov. 2002), at <http://www.dcbar.org>.

19 In small, closely held corporations, it is important to give the equivalent of a Miranda warning to all concerned regarding the client's identity, because the principals or owners often believe that they are the clients.

20 John Leubsdorf, *Pluralizing the Attorney-Client Relationship*, 77 *Cornell L. Rev.* 825 (1992).

21 James Schaller, *Waiving a Yellow Flag at Prospective Waivers*, *Legal Times*, Mar. 12, 2001.

22 Peter Jarvis & Mark Fucile, *A Conflicts Primer* n.10 (2002).<sup>23</sup> See <http://www.freivogelonconflicts.com/>.

24 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 888 (2006).

25 Charles W. Wolfram, *Modern Legal Ethics* 347 (1986).

26 *Elliott v. McFarland Unified Sch. Dist.*, 165 Cal. App. 3d 562 (1985).

27 *Blecher & Collins v. Northwest Airlines*, 858 F. Supp. 1442 (C.D. Cal. 1994).

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

29 *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F. 2d 1195 (2d Cir. N.Y. 1978).

30 *Elliott*, 165 Cal. App. 3d 562.

31 *Visa*, 241 F. Supp. 2d 1100.

32 *Maxwell v. Superior Court*, 30 Cal. 3d 606 (1982).

33 Richard W. Painter, *Advance Waiver of Conflicts*, 13 *Geo. J. Legal Ethics* 289, 293 (2000). See also *In re Boone*, 83 F. 944 (1897).

34 Susan P. Shapiro, *Tangled Loyalties: Conflict of Interest in Legal Practice* (2002).

35 *Id.* at 395; see also *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F. 2d 1195 (2d Cir. 1978).

36 Cal. Rules of Prof'l Conduct R. 3-310 (A); Model Rules of Prof'l Conduct R. 1.7 ("The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations the greater the likelihood that the client will have the requisite understanding.").

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

38 Shapiro, *supra* note 34, at 366.

39 Diane Karpman, *Written Consents to Prospective Conflicts of Interest*, *Cal. Lawyer*, Dec. 1998.

40 *Blecher & Collins v. Northwest Airlines*, 858 F. Supp. 1442 (C.D. Cal. 1994).

41 ABA Comm. on Ethics and Prof'l Responsibility, Op. No. 93-372 (1993) (Waivers

of Future Conflicts of Interest) (withdrawn).

42 Foreseeable consequences encompass the benefits and burdens of proceeding in a conflict.

43 *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285 (1995).

44 See Model Rules of Prof'l Conduct R. 1.2(c).

45 Clearly, and initially, attorneys should obtain a consent from the first client to disclose its identity before it is disclosed to the second client.

46 *Mallen & Smith*, supra note 24, at 599.

47 *Id.* at 617.

48 For a catalogue of the despicable claims that can be asserted against lawyers who request and obtain consents, see Larry Fox, *Forgedabout Conflicts--If Citibar Has Its Way, We Can Have Just One Big Law Firm*, 30 Hofstra L. Rev. 717 (1999). For a response to those claims, see Jonathan Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship--A Response to Mr. Fox*, 29 Hofstra L. Rev. 971 (2001).

49 See *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003) (holding that the consent was sufficient to permit a firm to sue a present client on an unrelated matter. The law firm erected an ethical wall to prevent leaks regarding confidential information.).

50 Los Angeles County Bar Association, Professional Responsibility and Ethics Committee, Formal Op. No. 471.51 *Id.* at 4 (citing *Grove v. Grove Value & Regulator Co.*, 213 Cal. App. 2d 646, 652-53 (1963) (citing, in turn, *Lessing v. Gibbons*, 6 Cal. App. 2d 598 (1935), in which actress Dolores Del Rio unsuccessfully claimed a conflict to decrease the fees owed to her attorney. The court's denial of Del Rio's claim was based on an oral consent to joint representation.)).

52 *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio 1990).

53 See Shapiro, supra note 34, at 395.

54 Schneyer, supra note 15.

55 "The representation of clients does not constitute endorsement of their political, social or moral beliefs (ABA Model Rule 1.2)." Diane Karpman, *An Ethics Riddle in the Notorious "Torture Memo,"* Cal. Bar J., Feb. 2005

r. Fox, 29 Hofstra L. Rev. 971 (2001).

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