Waiving Conflicts of Interest

Fred C. Zacharias[†]

This Essay explores the issue of when multiple clients may consent to concurrent representation by a single lawyer.[1] Most American jurisdictions evaluate client consent according to rules formulated by the American Bar Association.[2] The rules allow clients to waive their lawyers' conflicts of

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† Professor, University of San Diego School of Law. The author thanks his colleagues, Kevin Cole, Shaun Martin, and Don Weckstein for their helpful comments. Thanks also to Lucinda Jacobs, Chris Koch, Raquel Koch, and Dana Robinson for their strong research assistance.

1. Numerous commentators have addressed general issues relating to conflict-of-interest rules, including what constitutes a conflict, what standards of regulation should apply, and whether regulation should focus on particular areas of practice. *See, e.g.*, Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977) (identifying a range of situations involving conflicts of interests); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992) (raising questions about conflict-of-interest regulation and, particularly, about how conflicts should be defined); Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interests: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1 (1990) (arguing for more context-specific regulation of conflicts of interest). Most of the commentators who have considered when consent to conflicts of interests should be honored have discussed the issue only in passing. *See, e.g.*, McMunigal, *supra*, at 875-76 (noting unresolved issues under the professional rules regarding who should decide whether the risk of impaired lawyer performance justifies prohibiting concurrent representation); Fred C. Zacharias, *Foreword: The Quest for the Perfect Code*, 11 GEO. J. LEGAL ETHICS (forthcoming 1998) (manuscript at 6-8, on file with *The Yale Law Journal*) (mentioning weaknesses in California's regulation of consent in conflict-of-interest cases); *cf.* Peter R. Jarvis & Bradley F. Tellam, *When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflicts Law*, 33 WILLAMETTE L. REV. 145 (1997) (analyzing which conflicts should be waivable but focusing primarily on the difficulty of crafting a manageable bright-line rule); Nancy L. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982) (providing a useful pre-Model Rules analysis of concurrent client regulation).

2. Virtually all states except California follow one of the two model ethics codes developed by the American Bar Association (ABA): the MODEL RULES OF PROFESSIONAL CONDUCT (1995) [hereinafter MODEL RULES] (adopted in 1983), and the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) [hereinafter MODEL CODE]. *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 5 (5th ed. 1998) (discussing state adoptions of the ABA model codes). Observers agree that the Model Rules' formulation of conflict-of-interest regulation is an advance over the less sophisticated Model Code provisions. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.1, at 314 (1986) (noting that the Model Rules "substantially improve on" the Model Code); *cf.* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 624 (2d ed. 1994) ("Case law on conflicts issues filled the gaps left by the Canons and the Model Code"); Moore, *supra* note 1, at 220-29 (illustrating the inadequacies of the Model Code's approach). Accordingly, most American jurisdictions have adopted some form of Model Rule 1.7. *See infra* notes 3, 17, 18 and sources cited therein.

interest but impose significant limitations on that right.[3] This Essay concludes that the prevailing consent model is fundamentally flawed.[4]

In order to highlight problems with the ABA approach, this Essay focuses on the primary alternative: California Rule of Professional Conduct 3-310.[5] Like other American jurisdictions, California forbids lawyers to represent clients whose interests conflict, or potentially conflict, with the interests of another current client, a former client, or the lawyer[6] herself.[7] But unlike the other states, California's conflicts provision gives potentially prejudiced clients an absolute right to waive a conflict.[8] The viability of this provision has been questioned even in California. At least one appellate court

3. *See* MODEL RULES, *supra* note 2, Rule 1.7(a), (b). The Model Code, in a similar but more opaque fashion, recognizes the right of clients to consent to conflicted representation, but only when "it is obvious that the lawyer can adequately represent the interests of each . . . ." MODEL CODE, *supra* note 2, DR 5-105(C). Only four jurisdictions currently follow DR 5-105. *See* COLO. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1996); NEB. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1996); TENN. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1997); VT. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1992). Several others adopted provisions based on DR 5-105 but amended them (sometimes to bring them more in line with the Model Rules). *See, e.g.*, GA. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1996) (eliminating small portions of the rule); IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 5-105 (1994) (eliminating a small portion of the rule and adding a special provision for matrimonial cases); MASS. CANONS OF ETHICS AND DISCIPLINARY RULES DR 5-105 (1996) (adding a provision for "public counsel"); N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1994) (adding an imputed disqualification provision); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1995) (eliminating portions of the rule); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1994) (adding a successive representation provision).

4. This Essay does not focus on the broader question of what level of information clients must receive to be capable of giving informed consent. A few commentators have analyzed this issue in the conflicts realm and elsewhere. *See, e.g.*, Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980) (discussing the level of information clients should be required to have before being allowed to authorize acts by lawyers); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (arguing for an approach to legal "informed" client consent similar to that prevailing in the medical profession); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987) (same).

5. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310(C) (1992) [hereinafter CAL. RULES].

6. *Compare id.* Rule 3-310, *with* MODEL CODE, *supra* note 2, EC 5-1 to 5-3, DR 5-105, *and* MODEL RULES, *supra* note 2, Rules 1.7 to 1.9. To avoid repetition, this Essay will refer primarily to the Model Rules conflict provisions.

7. This Essay treats the lawyer with a potential conflict as female. For balance, I treat the other actors in the process (e.g., clients and opposing counsel) as male.

8. *Compare* CAL. RULES, *supra* note 5, Rule 3-310, *with* MODEL RULES, *supra* note 2, Rule 1.7(a)(2) (authorizing lawyers to accept client consent only when the lawyers reasonably believe that the representation will not be adversely affected). California's general approach to legal ethics has long been considered idiosyncratic. Most states' rules of professional conduct mirror or adapt the ABA's two model ethics codes. *See* GILLERS, *supra* note 2, at 5. California has gone its own way in many important areas of professional regulation other than conflicts of interest. *See, e.g.*, Howard v. Babcock, 863 P.2d 150 (Cal. 1993) (approving, for the first time, noncompetition covenants in law firm partnership agreements); STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS at xiii (1996 ed.) (noting that California was the last jurisdiction to adopt a rule governing lawyers' statements to the press); Roderick W. Leonard, *The New California Rules of Professional Conduct: What They Mean*, 11 GLENDALE L. REV. 1 (1992) (analyzing California's 1989 reformulation of its professional rules provision by provision); Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367 (1994) (discussing California's unique approach to attorney-client confidentiality).

has suggested that, despite the Code's absolute language, some conflicts of interests are nonwaivable.[9]

California's rule and the judicial response raise important questions about the proper role of consent in conflict-of-interest situations. Consider this example:

> *Two criminal codefendants, one an alleged drug kingpin and the other a lieutenant in his organization, retain the organization's regular lawyer to represent them. They consent to joint representation after being informed of the potential for conflicting interests.*[10]

Or, consider this common illustration from a transactional setting:

> *A commercial real estate developer agrees to buy a parcel of land. The developer retains an attorney to represent it and the seller of the property. Both clients are informed of the potential conflict of interest. The seller agrees to the multiple representation because the transaction seems straightforward and the developer has agreed to pay the cost of the representation.*[11]

Should such clients be able to waive lawyer conflicts? When, if ever, should the clients' waivers be overridden? Why, for example, do the California courts foresee a need to find exceptions to California's unambiguous waiver rule?

The following pages analyze these issues. Part I contrasts the conflicts provisions in the California Code with those in the ABA Model Rules. Part II considers the reasons why regulators sometimes allow clients to waive the regulatory protections. Part III identifies the reasons why courts typically reserve the power to void client consent if the regulators have not done so.

The Essay then attempts to draw from California's experience. Part IV describes and evaluates the judicial effort to modify California's absolute waiver provision. Part V concludes that California's conflict-of-interest rule

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9. *See* Klemm v. Superior Court, 142 Cal. Rptr. 509, 512 (Ct. App. 1977) (stating in dicta that actual conflicts at trial or hearing are nonwaivable); *see also* Tsakos Shipping & Trading v. Juniper Garden Town Homes, Ltd., 15 Cal. Rptr. 2d 585, 598 (Ct. App. 1993) (citing *Klemm*'s dicta with approval); People v. Sanford, 219 Cal. Rptr. 726, 729-30 (Ct. App. 1985) (applying *Klemm* but holding the conflict in question to be waivable); Sklar v. Review Dep't, 2 Cal. St. B. Ct. Rptr. 602, 615 (1993) (approving *Klemm*'s dicta); *cf.* Flatt v. Superior Court, 885 P.2d 950, 955 (Cal. 1995) (supporting the view that disqualification in actual concurrent conflict cases is usually "automatic"); L.A. County Bar Ass'n, Formal Op. 471 (1994) (suggesting that a client may not agree to representation in which it is unlikely that the lawyer can represent the client competently).

10. This scenario was addressed in a series of cases culminating in *Wheat v. United States*, 486 U.S. 153 (1988). In these cases, the government typically challenged the joint representation on the alternative grounds that it was unfair to one of the defendants, that it was prejudicial to the ability of the government to obtain convictions through pleas or grand jury testimony, and that it was prejudicial to the fair administration of justice. *See* sources cited *infra* note 69.

11. *See, e.g.*, *In re* Dolan, 384 A.2d 1076, 1078 (N.J. 1978).

focuses insufficiently on the contradictory purposes that conflict regulation serves. The analysis, however, suggests that the ABA alternatives are equally flawed. Part VI therefore offers a new codification of principles regarding waiver of conflicts among concurrent clients that would accomplish the goals of conflicts-of-interest regulation more effectively.

I. THE CONFLICT-OF-INTEREST RULES

The Model Rules contain two rules governing conflicts of interest among current clients. Model Rule 1.7(a) provides in pertinent part:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client. . . .[12]

Model Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . .[13]

The California Rules of Professional Conduct, though worded differently, contain similar proscriptions against conflicted representation:

> A member shall not . . .
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.[14]

Both the Model Rules and the California conflict-of-interest rules allow current clients to waive their objections to the conflicting representation. The ABA formulation is, however, more guarded in its attitude toward consent.[15] The two ABA provisions limit the client's ability to authorize the representation when the lawyer concludes that the consent is tactically unwise.

12. MODEL RULES, *supra* note 2, Rule 1.7(a).

13. *Id.* Rule 1.7(b).

14. CAL. RULES, *supra* note 5, Rule 3-310(C).

15. The ABA attitude toward representation of successive clients defers more to client decisionmaking and thus merges with California's approach. The Model Rules assume that former clients have a lesser right to demand the loyalty of a former attorney. *See* MODEL RULES, *supra* note 2, Rule 1.9 cmt. Although there are situations in which a lawyer may not act adversely to the interests of a former client, the former client's right to consent to such representation is absolute. *See id.* Rule 1.9(a), (b). This rule parallels the California Code's comprehensive conclusion that any conflict of interest can be approved through "the informed written consent of the client or former client." CAL. RULES, *supra* note 5, Rule 3-310(E).

Under Model Rule 1.7(a), the lawyer may not accept a client's consent if she believes, or should believe, that the representation will "adversely affect [her] relationship with the other client."[16] Similarly, under Model Rule 1.7(b), the lawyer may not accept a client's waiver if she believes that the representation will be "adversely affected."[17]

In contrast, the California code exhibits no hesitation about allowing concurrent clients to waive conflicts. The prohibition against the representation itself contains the caveat that the prohibition applies only when the lawyer acts "without the informed written consent of each client."[18]

At least one jurisdiction, Oregon, takes a third, slightly different, approach to the issue of consent.[19] The Oregon Code of Professional

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16. MODEL RULES, *supra* note 2, Rule 1.7(a)(1).

17. *Id.* Rule 1.7(b)(1). The following jurisdictions have adopted provisions identical to Model Rule 1.7: ALA. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997); ARIZ. CODE OF PROFESSIONAL CONDUCT Rule 1.7 (1995); ARK. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997); CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995); DEL. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997); HAW. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1996); IND. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1996); KAN. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994); KY. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1996); MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1993); MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997); MO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997); MONT. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994); OKLA. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994); PA. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1993); R.I. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1996); S.C. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997); S.D. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994); and W. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994).

Several others have adopted the essence of Rule 1.7 but have made minor modifications. *See, e.g.*, RULES REGULATING THE FLA. BAR Rule 4-1.7 (1994) (amending Rule 1.7(a)(1) slightly and adding a provision relating to familial representation); ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995) (requiring "disclosure" instead of "consultation"); LA. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995) (adding a "loyalty" provision); MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994) (expanding the disclosure requirement); MISS. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995) (expanding the consent requirement); NEV. RULES OF PROFESSIONAL CONDUCT Rule 157 (1993) (adding a suggestion of written disclosure); N.H. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995) (expanding the consent requirement); N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997) (adding a disclosure requirement and forbidding consent by a public entity); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-107 (1997) (expanding the consultation requirement); N.C. RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1997) (expanding the disclosure requirement and adding provisions regarding continuing obligation to evaluate conflicts and subsequent representation); N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997) (rewording Rule 1.7 and adding a confidentiality provision); UTAH RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1993) (adding a provision forbidding the representation of adverse parties in separate matters); WASH. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1996) (expanding the consultation and disclosure requirements and adding a provision for representatives of governmental entities); WIS. RULES OF PROFESSIONAL CONDUCT SCR 20:1.7 (1993) (adding a written-consent requirement).

18. CAL. RULES, *supra* note 5, Rule 3-310(C). The California rule mirrors a proposal made by the American Trial Lawyers' Association (ATLA) as an alternative to the Model Rules. The ATLA provision stated: "A lawyer may serve one or more clients, despite a divided loyalty, if each client who is or may be adversely affected by the divided loyalty is fully informed of the actual or potential adverse effects, and voluntarily consents." Moore, *supra* note 1, at 215 n.19 (quoting the ATLA proposal).

19. Oregon's approach is championed in Jarvis & Tellam, *supra* note 1. As discussed above, Jarvis and Tellam argue that joint representation rarely can be justified, even in instances when the clients conclude that they would benefit from the representation. *See id.* at 175. Jarvis and Tellam also suggest that the District of Columbia's recent amendments to its conflict rule produce a provision virtually identical to Oregon's. *See id.* at 172. The District's rule, however, may honor client consent in some actual conflict-of-interest situations, in contrast to Oregon's absolute prohibition. *See* D.C. RULES

Responsibility follows the Model Rules but amends them to distinguish between waivable and nonwaivable conflicts.[20] When an actual conflict exists—"when the lawyer has a duty to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client"[21]—she may not accept a client's consent.[22] In contrast, when a conflict of interest is only potential, or "likely,"[23] consent is permissible.[24]

II. REASONS FOR ALLOWING CLIENT WAIVER OF CONFLICT-OF-INTEREST PROTECTIONS

Most justifications for client consent provisions are premised on the view that honoring consent exhibits concern for client autonomy.[25] Identifying the meaning of autonomy in this context is not simple.[26] To the extent that autonomy simply refers to a client's right to make choices, it is tautological to say that honoring consent enhances autonomy. Yet clearly autonomy does not mean that a client can or should be able to do whatever he wishes. A client may not bribe a juror, choose to commit perjury, or insist that his lawyer commit malpractice. The conceptualization of autonomy as client freedom

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OF PROFESSIONAL CONDUCT Rule 1.7(b)(1) (1996) [hereinafter D.C. RULES] (referring to the consent provisions of Rule 1.7).

For other jurisdictions that have adopted provisions diverging substantially from both the Model Rules and Model Code, see ME. CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.4 (1992), which combines Model Rule 1.7 and Model Code DR 5-105, and TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rules 1.06 to 1.07 (1997), which abbreviates Model Rule 1.7 and adds a caveat that cases involving adversaries are nonwaivable. *Cf.* P.R. CANONS OF PROFESSIONAL ETHICS Canon 21 (1994) (adopting a general anticonflict rule emphasizing loyalty and forbidding a lawyer from representing conflicting interests when "it is his duty to contend for that which duty to another client requires him to oppose").

20. OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1992) [hereinafter OR. CODE]; *accord* D.C. RULES, *supra* note 19, Rule 1.7 (b)(1).

21. OR. CODE, *supra* note 20, DR 5-105(A)(1).

22. The Oregon Code provides, in pertinent part: "Except as provided in DR 5-105(F), a lawyer shall not represent multiple current clients in any matters when such representation would result in an actual or likely conflict." *Id.* DR 5-105(E). The Oregon rule is absolute in this regard. The District of Columbia rule seems to allow some wiggle room for consent in certain actual conflict cases. *See* D.C. RULES, *supra* note 19, Rule 1.7(c).

23. OR. CODE, *supra* note 20, DR 5-105(E).

24. The Oregon Code states that "[a] lawyer may represent multiple current clients in instances otherwise prohibited by DR 5-105(E) when such representation would not result in an actual conflict and when each client consents to the multiple representation after full disclosure." *Id.* DR 5-105(F).

25. *See, e.g.*, Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1350 (9th Cir. 1981) (citing the client's right to make risky choices); Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754, 759 (Ct. App. 1995) (relying on an autonomy rationale); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 cmt. g(iv), reporter's note (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT] ("The preferred position, taken in the Comment, is that in most circumstances concern for client autonomy warrants respecting a client's informed consent."); WOLFRAM, *supra* note 2, § 7.2.2 ("Giving effect to a client's consent to a conflicting representation must rest either on the ground of contract freedom or on the related ground of personal autonomy . . . ."); Strauss, *supra* note 4, at 336-39 (arguing for an informed consent model that heightens the emphasis on client autonomy in the lawyer-client relationship).

26. Similar issues hound the notion of autonomy in the medical context. *See, e.g.*, CARL E. SCHNEIDER, THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS (forthcoming 1998) (manuscript at 39-52, on file with *The Yale Law Journal*) (describing various possible "models of autonomy" in the context of medical practice).

therefore does little to advance the determination of which client choices should be honored.

Confusion over the meaning of autonomy appears most starkly in the comments to Section 202 of the recently adopted *Restatement (Third) of the Law Governing Lawyers*:[27]

> Concern for client autonomy generally warrants respecting a client's informed consent. In some situations, however, joint representation would be objectively inadequate despite a client's voluntary and informed consent.[28]

The relationship between the objective adequacy of the representation and the client's autonomy is not obvious. The freedom to choose presumably encompasses the right to choose unwisely.[29] If the adequacy of the representation is to be considered in deciding whether honoring client choice enhances autonomy, then the *Restatement* drafters must be saying that the autonomy in question is a "good thing" only if it benefits, or might benefit, the client.[30] This version (or vision) of autonomy justifies consent only when the client has a valid instrumental reason for exercising a questionable choice.

The California conflict rules seem to express a preference for the tautological view of autonomy. The exercise of choice itself is a benefit that justifies honoring consent.[31] California's professional regulators have acted on

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27. The *Restatement* was formally approved in May, 1998, subject to the Reporter's final editing and revision. The most recent published draft addressing conflicts of interest was circulated in March, 1996. *See* RESTATEMENT, *supra* note 25. Except where otherwise specified, this Essay will therefore cite to the 1996 version, with apologies to the drafters if the final version should include changes of which the author is presently unaware.

28. RESTATEMENT, *supra* note 25, § 202 cmt. g(iv).

29. *See* David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 467, 472 (analyzing the argument that lawyers sometimes have better senses than the clients themselves of what is good for the clients and noting that "what is good according to a person's own values" may not be the same thing as "what is in the person's best interest"); Moore, *supra* note 1, at 236-37, 237 n.128 (relating theories of paternalism to conflicts-of-interest regulation); Strauss, *supra* note 4, at 321-22 (discussing the justifications for paternalistic behavior by lawyers).

30. Contrast this with the way professional code drafters traditionally have treated autonomy in the context of attorney-client confidentiality. Here, the drafters refer to autonomy in its starkest sense, as a right that has value independent of the results to which it leads. Proponents of strict confidentiality rules argue that there is a societal benefit simply in letting clients make choices and decisions within the legal system. *See, e.g.*, Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 ("[I]ncreasing individual autonomy is morally good."). Attorney-client confidentiality arguably is necessary to enable clients to obtain the information that enables them to exercise their ability to choose. *See, e.g.*, MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 4, 27-41 (1975) (discussing the importance of confidentiality in enabling a client to give his lawyer information so that the client can present an effective case with his lawyer's assistance); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 6-10, 14-17, 43-64 (1990) (discussing the importance of client autonomy in defining the lawyer's role). The existence of confidentiality does not turn on whether the decisions it allows clients to make are wise.

31. *See, e.g.*, SCHNEIDER, *supra* note 26, at 40-52 (discussing the mandatory autonomy model and citing authorities); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 204 (1978) (arguing for the inherent importance of client autonomy); Pepper, *supra* note 30, at 616-18 (discussing the inherent value of autonomy); Strauss, *supra* note 4, at 336

a similar preference in adopting an absolute attorney-client confidentiality provision: Lawyers may not use confidential information to frustrate a client's exercise of autonomy, even if withholding such information may jeopardize the life of a third party.[32] Thus, it is easy to imagine that the California Code's drafters have relied upon pure autonomy notions in giving clients an absolute right to waive conflicts of interest, regardless of the consequences to themselves.

Alternatively, the California consent provisions may simply mask confusion over how far the right to autonomy should extend. The ABA codes and the *Restatement* certainly suggest that, in order to be honored, the exercise of the consent power must be reasonable. Yet, on the surface, it seems inherently unreasonable for a client to accept a lawyer who may exercise less than independent judgment on the client's behalf.[33] To proffer qualifying acts of autonomy, one must be able to identify situations in which rational clients are justified in choosing imperfect representation.[34]

The most obvious justification is cost.[35] Using a single lawyer jointly can save clients the expense of duplicative representation.[36] Even when clients are antagonists, the potential benefits that an aggressive, unconflicted lawyer might achieve on behalf of a client may be less than the expense of the

("[C]lient decisionmaking is an inherent good because it recognizes individual dignity and personhood, and the right of self-determination."); *cf.* DAN W. BROCK, LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS 34 (1993) (arguing that deferring decisionmaking power to doctors can conflict impermissibly with patient self-determination).

32. California's confidentiality rule is found in CAL. BUS. & PROF. CODE § 6068(e) (West 1990 & Supp. 1998). The Code provides, in pertinent part, that "it is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." *Id.* Although there is some argument that this absolute provision is subject to common-sense exceptions, at least one local bar association has issued an opinion holding that the risk of death to a third party does not justify breaching confidentiality. *See* San Diego County Bar Ass'n Legal Ethics & Unlawful Pracs. Comm., Op. 1990-1, at 3 (1990); *see also* Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 PEPP. L. REV. 1467, 1468 (1995) (noting that some California decisions have recognized the existence of implied confidentiality exceptions); Zacharias, *supra* note 8, at 369 n.3, 371 n.14 (citing authorities supporting and questioning the absoluteness of California's confidentiality rule).

33. It is in part for this reason that Peter Jarvis and Bradley Tellam support the Oregon approach, which forbids consent to any representation involving an actual conflict of interest. *See* Jarvis & Tellam, *supra* note 1.

34. Of course, to some degree virtually *every* representation is burdened by personal interests on the part of the lawyer, including the desire to collect fees, to impress clients and onlookers, and to enjoy the job.

35. *See, e.g.*, Kaiser v. Stewart, No. CIV.A.96-6643, 1997 WL 186329, at *4 (E.D. Pa. Apr. 10, 1997) (holding that, in a complicated multidefendant lawsuit, "[i]t is not for the court to second guess decisions of the various defendants . . . [or] to compel a party to engage separate counsel [they] may not be able to afford"); Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 REV. LITIG. 567, 574-78 (1997) (cataloguing some benefits of multiple representation); Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 592 (1992) (describing some of the savings that may be inherent in concurrent representation).

36. *See, e.g.*, Aronson, *supra* note 1, at 822-33 (cataloguing instances in which multiple clients with potentially or actually conflicting interests might prefer joint representation in order to save on costs, including insurers-insureds, buyer-sellers, borrowers-lenders, husbands-wives, and joint plaintiffs or defendants); *see also* Conrad Chevrolet v. Rood, 862 S.W.2d 312, 315 (Ky. 1993) (Spain, J., dissenting) (arguing that a waiver of a conflict in reducing the parties' negotiations to writing should be permissible).

additional representation. Thus, for example, both parties to a divorce proceeding may prefer to divide their community resources using the advice of a single lawyer even though the advice may serve one client better than the other.[37]

A client might also wish to retain a lawyer who has conflicting responsibilities because that lawyer has the best qualifications for the job.[38] Suppose, for example, that a criminal defendant's alibi witness has personal reasons for not wanting to appear at the defendant's trial. The witness's lawyer is known to be the best defense lawyer in town. That lawyer is willing to represent the defendant, but only on the condition that the defendant waive the conflict of interest and agree that the lawyer need not use the alibi defense if it would entail calling the witness-client to the stand. The defendant may reasonably conclude that he is better off with this lawyer arguing insanity or reasonable doubt than he would be if a different, but lesser, lawyer who has no conflict argues the alibi defense.[39]

Likewise, clients may wish to retain a conflicted lawyer because they know and trust her.[40] They may be unsure of their ability to relate as well to a new lawyer. Although this rationale often has been overemphasized, it sometimes has been recognized in cases in which a client has sought to keep counsel who may be called as a witness at trial.[41]

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37. *See* Halvorsen v. Halvorsen, 479 P.2d 161 (Wash. Ct. App. 1970) (holding that concurrent representation of husband and wife is proper as long as no actual conflict of interest exists); *see also* Moore, *supra* note 1, at 245-58 (discussing the history and wisdom of permitting joint representation of spouses seeking a divorce); *cf.* Or. St. Bar Legal Ethics Comm., Formal Op. 86 (1991) (holding that joint representation of divorcing spouses is usually improper).

38. *See, e.g.*, Fisons Corp. v. Atochem N. Am., Inc., No. 90 Civ. 1080, 1990 WL 180551, at *5 (S.D.N.Y. Nov. 14, 1990) (approving a client's consent to representation by a lawyer with a conflict because, in the client's judgment, "it was far more important that it obtain the benefit of [the law firm's] familiarity with the ongoing trademark dispute than it was to avoid facing any adverse consequences due to its attorney's conflict of interest").

39. In some situations, multiple representation may afford the client actual tactical advantages, including the ability to present joint claims or to stonewall an attack. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting) ("A common defense often gives strength against a common attack."); *see also* sources cited *infra* note 69 (discussing several examples of ways in which a lawyer can orchestrate stonewalling by common clients).

40. *See, e.g.*, Karen A. Covy, Note, *The Right to Counsel of One's Choice: Joint Representation of Criminal Defendants*, 58 NOTRE DAME L. REV. 793, 801-02 (1983) (discussing a criminal client's limited right to counsel of his choice and the importance of trust in choosing an attorney).

41. *See, e.g.*, State v. Vanover, 559 N.W.2d 618, 634 (Iowa 1997) (noting that, for purposes of disqualification, "a long-standing professional relationship could conceivably create a situation where an attorney has an extraordinary and irreplaceable familiarity with the affairs of his client" (citing MacArthur v. Bank of New York, 524 F. Supp. 1205, 1211 (S.D.N.Y. 1981))); Note, *The Advocate-Witness Rule: If Z, then X. But Why?*, 52 N.Y.U. L. REV. 1365, 1398 (1977) (noting that a "client's confidence and trust in his chosen counsel is an interest worthy of protection," discussing the case law, and arguing for a more relaxed professional rule that would give more weight to the client's desires); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 168 cmt. h, reporter's note (Tentative Draft No. 8, 1997) ("Courts normally are reluctant to accept the challenged lawyer's own assertion of a unique psychological or other need on the part of the client for the lawyer's services."). In California, courts currently do not need to resort to this rationale because the California professional rule governing lawyers who may be witnesses gives clients an absolute right to consent to the continued representation. *See* CAL. RULES, *supra* note 5, Rule 5-210 ("A member shall not act as an advocate before a jury which will hear testimony from the member unless . . . [t]he member has the informed, written consent of the client.").

Finally, particularly within specialized practice areas or in small towns in which few lawyers practice and in which most residents know each other, using a conflicted lawyer may be the only feasible way to obtain representation. Imagine a farmer who sues his neighbor for stealing his chickens. His lawyer is in the process of accepting the representation of the neighbor in an unrelated matter. The magnitude of the potential recoveries in the chicken case and the neighbor's unrelated matter do not justify the expense of hiring an out-of-town lawyer. Arguably, both clients would be reasonable in taking the risk of hiring the lawyer with conflicting responsibilities.[42]

In each of these categories of cases, the clients could, in theory, retain independent counsel. As a strategic matter, some of the clients probably would be wise to do so. To the extent the professional codes allow the clients to consent to the conflicted representation, the codes simply are saying that either choice is sufficiently reasonable to fit within the scope of that autonomy the codes are willing to recognize.[43] Alternatively, the codes may be saying that the disadvantages of the conflicted representation are sufficiently speculative or limited that the spiritual benefits of honoring client autonomy should trump.

III. REASONS FOR OVERRIDING CLIENT CONSENT

Under the tautological view of autonomy, there can only be one reason for refusing to honor a client's waiver. A lawyer, disciplinary agency, or court[44] that believes the client is insufficiently informed to make an intelligent

42. *Cf.* Jarvis & Tellam, *supra* note 1, at 175-76 (asserting that the costs of disallowing joint representation in small cases involving a conflict are not significant).

As suggested in the text, the same considerations may apply even in larger jurisdictions, in situations in which only a few good lawyers practice a particular speciality. A client may prefer to hire one of those lawyers despite a conflict of interest rather than seek less qualified representation or representation from a different jurisdiction. *Cf.* Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 MICH. L. REV. 1074, 1075 & n.6 (1981) (recognizing that a specialized firm might be unwilling to represent small or one-time clients if that representation would foreclose the potential for representing clients in more lucrative matters down the road).

43. Richard Epstein explains this approach in a more sophisticated way. He suggests that conflict-of-interest rules are designed to set a default position, or baseline, designed to limit agency costs in bargaining between lawyers and clients. Whenever a client entrusts information to a lawyer, the client risks the possibility that the lawyer will use the information to his disadvantage; for example, in subsequent representation adverse to the client. Part of the fee clients pay includes protections against such conduct, including confidentiality and conflict rules that help prevent the conduct. *See* Epstein, *supra* note 35, at 580-83. In Epstein's view, these protections should be subject to bargaining. The right to bargain is validated by the presence of consent and waiver provisions in the rules. *See id.* at 590; *see also* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 71-72 (1996) (characterizing conflict rules as rules of "risk avoidance" that allocate the risk that a lawyer's representation of one client will injure another).

44. Each of these actors may be a decisionmaker on the issue of waiver. The lawyer must make a judgment in the first instance of whether to accept or continue with the representation. A disciplinary agency may need to rule on the subject before the fact, in the context of an advisory opinion or, after the fact, in response to a specific complaint of improper concurrent representation. A court may need to rule on the waiver in assessing a motion to disqualify the conflicted lawyer, in making an independent judgment on whether the representation in a matter before the court is appropriate, or in deciding a subsequent malpractice action or fee dispute.

choice is justified in concluding that the client's choice does not represent a fair exercise of the client's freedom.[45] Even California recognizes this justification for setting aside a client's consent.[46]

There is a related justification that straddles the line between the competing visions of autonomy. On occasion, judges have postulated that a particular conflict situation is so inherently complex that a lawyer cannot explain the situation in sufficient detail to enable the client to make an informed choice[47] or cannot offer an explanation in an impartial manner.[48] Here, a court purports to honor the client's right to autonomy; it simply concludes that the client's waiver was not informed. In actuality, however, the court is determining that autonomy can never be implemented properly in such situations. In essence, the court rejects the autonomy principle for a limited set of circumstances.

The *Restatement*'s approach to autonomy suggests that conflict regulation may protect clients more directly from their own poor choices.[49] The ABA exceptions to the consent authority are examples of this attitude.[50] Lawyers may not accept conflicted representation when, despite the client's consent, the representation is likely to be inadequate or "adversely affected"

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45. *See, e.g.*, State v. Johnson, 823 P.2d 484, 490-91 (Utah 1991) (holding that a criminal defendant was inadequately informed and so could not have effectively consented to conflicted representation); *see also* Baglini v. Pullman, Inc., 412 F. Supp. 1060, 1065-66 (E.D. Pa.) (holding that a client's consent was sufficiently informed), *aff'd sub nom.* Fraboni v. Pullman, 547 F.2d 1160 (3d Cir. 1976); Griva v. Davison, 637 A.2d 830, 844-46 (D.C. 1994) (holding that an individual partner of a client company was inadequately informed with respect to joint representation by a law firm of the partnership and another partner).

46. *See, e.g.*, Image Technical Servs. v. Eastman Kodak, 820 F. Supp. 1212, 1216-18 (N.D. Cal. 1993) (rejecting uninformed consent even though the client was a sophisticated corporate entity).

47. *See, e.g.*, Kelly v. Greason, 244 N.E.2d 456, 462 (N.Y. 1968) ("[T]he unsophisticated client . . . may not be . . . able to understand the ramifications of the conflict, however much explained to him."); *In re* Boivin, 533 P.2d 171, 174-75 (Or. 1975) (noting that in some situations clients cannot understand a lawyer's disclosure and therefore cannot consent); *cf.* Strauss, *supra* note 4, at 344-46 (discussing a theory of paternalism that would allow lawyers to override client consent when clients are incapable of understanding the complexities of the decision to be made).

Jarvis and Tellam discuss a fairly recent New Jersey opinion that seems to follow this approach. *See* Jarvis & Tellam, *supra* note 1, at 157. In *Baldasarre v. Butler*, 625 A.2d 458, 467 (N.J. 1993), the court held that in complex commercial real estate transactions the potential for conflict was too great to allow even informed participants to consent to joint representation. Although the court did not explain its decision, the emphasis on the complexity of such transactions is explicable only if the court viewed these transactions as so complicated that clients could not understand the lawyer's explanation of conflict issues.

48. Thus, for example, the incentives for the lawyer to encourage joint representation may be so overpowering that a court could conclude that the lawyer cannot provide the requisite information. *See infra* text accompanying notes 77-80 (discussing lawyers' personal incentives in obtaining client consent).

49. This approach, in general, raises a host of issues associated with lawyer paternalism. *See generally* Luban, *supra* note 29, at 487-93 (discussing whether and when paternalistic decisionmaking is appropriate for lawyers).

50. In analyzing the professional conflict-of-interest rules, Kevin McMunigal seems to accept the ABA's premise that the "actual impairment" or "risk of impairment" of the lawyer's performance justifies forbidding concurrent representation and that this is the only potentially viable reason for overriding client consent. McMunigal, *supra* note 1, at 833-34. McMunigal does note that an issue exists regarding "who decides" what is "the proper balance of authority and responsibility between buyer and client." *Id.* at 871. Again, however, the sole factor he seems to consider relevant to that issue is who can best assess the risk of impairment. *See id.* at 871-75.

by the lawyer's responsibilities to another client.[51] Thus, representing both sides in adverse litigation is improper because the lawyer's decisions always will harm one client's interests (or the lawyer's relationship with the client).[52] Arguably, the consent override protects the client from poor performance by a lawyer who, by definition, is inadequate.[53]

Interestingly, the ABA provisions' exceptions to the client's consent authority are absolute. Even if a client has made a reasonable decision that the benefits of retaining the lawyer outweigh the costs of the lawyer's inadequacy,

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51. MODEL RULES, *supra* note 2, Rule 1.7(b)(1).

52. Similarly, representing differently situated parties in the same litigation is typically found to be improper. *See, e.g.*, Kelley's Case, 627 A.2d 597, 599-600 (N.H. 1993) (holding that one client's indemnification of the other for potential damages arising out of the joint representation is insufficient to validate a waiver where neither client is "sufficiently informed so as to understand the actual or potential conflicts"); Whitman v. Estate of Whitman, 612 A.2d 386, 389 (N.J. Super. Ct. Law Div. 1992) (noting that a lawyer's strategy to benefit a sole heir "dealt a potentially serious blow to the Estate"). Jarvis and Tellam note:

> As to opposing parties in business or litigation, the clear answer in Oregon and the District of Columbia is that, with rare exception, lawyers may not represent both parties even with disclosure and consent. . . . [R]epresenting opposing parties creates a fixed-sum or zero-sum game—more for one participant necessarily means less for the other.

Jarvis & Tellam, *supra* note 1, at 173 (citations omitted); *cf.* Conrad Chevrolet v. Rood, 862 S.W.2d 312, 314 (Ky. 1993) (finding that consent was not possible because the lawyer in a business transaction had confidential information from one client that would be useful to the other); People v. McDowell, 718 P.2d 541, 545 (Colo. 1986) (holding that joint representation of both a buyer and a seller of a corporation was impermissible even with the clients' consent because the lawyer "could not effectively exercise independent professional judgment on behalf of one of them without adversely affecting the interests of the other"); *In re* Rockoff, 331 A.2d 609, 611 (N.J. 1975) (Pashman, J., concurring) (advocating a per se prohibition of multiple representation in real property transactions); *In re* Lanza, 322 A.2d 445, 448 (N.J. 1974) (stating that simultaneous representation of two parties in negotiating a contract ordinarily is impermissible); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1295-96 (1981) (arguing that joint representation inevitably hurts one of the two clients).

53. The only commentator who has considered the substantive issues relating to consent in conflict-of-interest decisionmaking is Nancy Moore. *See* Moore, *supra* note 1, at 238. Moore analyzes the then-proposed Model Rules and concludes that the client-override provisions are too diffuse:

> [T]he wholesale transfer of decision-making power to lawyers in multiple representation cases cannot be justified unless it is true—as both the ABA Code and the Proposed Model Rules assume—that rational potential clients believe that a lawyer's objectivity and superior legal knowledge *always* make him the more competent decision maker.

Id. Moore argues that this assumption is sometimes correct but often fails because a client has superior information or a better feel for what is important to him. Moore therefore proposes an alternative "capacity for informed and voluntary consent" standard. This standard focuses on (1) whether the clients are likely to understand the advantages and disadvantages of the particular representation, and (2) whether the decision is based on an assessment of those advantages and disadvantages rather than on psychological or economic stress. *Id.* at 240; *cf.* Jarvis & Tellam, *supra* note 1, at 147, 165 (considering the waivability of conflicts primarily from the perspective of whether the prevailing rules require clarification).

Although this Essay shares many of Moore's concerns, the approach it takes focuses less on whether the client's choice is wise or duress-free and more on the decisions lawyers and clients should be entitled to make. The psychological inquiry that Moore's analysis would require makes her proposal difficult to apply. Moreover, unlike Moore, I envision a category of cases in which client interests are not dominant. *See infra* text accompanying notes 55-73. I agree with Moore that there is another category of cases in which lawyers have an independent obligation to reject joint representation. Under my approach, however, the lawyer should make the assessment of whether to reject directly on the basis of whether the engagement is reasonably consistent with the client's best interest. *See infra* text accompanying notes 136-140.

the codes reject the representation.[54] Unless the codes are taking the counterfactual position that such cost-benefit analyses are per se faulty, the only plausible justification for the exceptions is that societal or systemic interests outweigh the client's own.

There are several possible interests the codes might be protecting. The first is the systemic interest in resolving conflict-of-interest issues early in the representation. Even when a client consents to a potential conflict, there is the possibility that he will revoke the consent later in the representation.[55] Moreover, in most jurisdictions, lawyers who have obtained a consent to representation burdened with a potential conflict must obtain a second consent once the potential develops into an actual conflict.[56] Subsequent replacement of the lawyer often delays prosecution of the matter, to the detriment of both the client and the adversary.[57] When the replacement lawyer enters her appearance near or in the middle of trial, the costs extend to the judicial system.[58] In cases in which the need to replace the lawyer seems likely to occur, codes arguably are justified in requiring different counsel at the outset.[59]

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54. Arguably, the codes' mandates may encompass a limited exception for cases in which the potential limitation of the representation is de minimis or extraordinarily unlikely to occur.

55. *See, e.g.*, San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, 208 Cal. Rptr. 494, 498 n.4 (Ct. App. 1985) (upholding a client's right to withdraw consent to joint representation); Griva v. Davison, 637 A.2d 830, 846 (D.C. 1994) (same).

56. *See, e.g.*, Klemm v. Superior Court, 142 Cal. Rptr. 509, 513 (Ct. App. 1977) (noting that once an actual conflict develops, a previous waiver of potential conflicts becomes ineffective); Lysick v. Walcom, 65 Cal. Rptr. 406, 414 (Ct. App. 1968) (holding that when a conflict develops between an insured and insurer, the lawyer relying on consent to joint representation in an insurance policy must seek an additional waiver to continue the joint representation); Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1989-115 (1989) (approving blanket prospective waivers but requiring a new waiver once a potential conflict ripens into an actual conflict); *cf.* Ishmael v. Millington, 50 Cal. Rptr. 592, 596 (Ct. App. 1966) (suggesting a lawyer must withdraw once "adversity of interest" appears in the course of the representation); Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1993-133 (1993) (noting a lawyer's "continuing responsibility to obtain [a waiving concurrent client's] written consent in the event unanticipated circumstances arise which could adversely affect the attorney's representation").

57. *See, e.g.*, United States v. Stites, 56 F.3d 1020, 1024 (9th Cir. 1995) (noting the danger of a court's being "whipsawed" by a subsequent reversal or successive motions); William H. Raley, Co. v. Superior Court, 197 Cal. Rptr. 232, 236-37 (Ct. App. 1983) ("[T]he court . . . must consider in favor of disqualification the disruptive effect of repeated disqualification proceedings on the administrative process of the court and the financial burden of such proceedings on the moving party." (citation omitted)).

58. Courts have considered these costs primarily in considering whether to honor a motion to disqualify brought in the middle of judicial proceedings. One court reasoned as follows:

> The court must weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of conflicts of [sic] interest.

River West, Inc. v. Nickel, 234 Cal. Rptr. 33, 40 (Ct. App. 1987).

59. *See, e.g.*, Comden v. Superior Court, 576 P.2d 971, 975 (Cal. 1978) (noting that a client's right to representation by counsel of his choice must yield to considerations of ethics that "run to the very integrity of our judicial process" (quoting Hull v. Celanese Corp., 513 F.2d 568, 572 (2d Cir. 1975))); Chambers v. Superior Court, 175 Cal. Rptr. 575, 580-81 (Ct. App. 1981) (weighing the needs of efficient judicial administration and the potential advantage of immediate preventative measures).

Society may also desire unconflicted representation as a means to further the pursuit of truth or, at least, of appropriate results within the adversary system.[60] The adversary system purports to achieve its results through the efforts of competing advocates who act in a fully partisan fashion.[61] Arguably, the client has a right to hurt himself by choosing counsel who lacks independent judgment. Yet society has a right to insist that, when the adversary system is invoked, the processes work in accordance with the system's premises.[62] Public confidence in the system is affected by the results it produces.[63]

Similarly, society has an interest in litigation in which valuable evidence will be adduced in the pursuit of truth.[64] Conflicted representation may interfere with that pursuit, as in the situation in which a lawyer hesitates to call herself[65] or a necessary witness[66] to the stand in order to protect her own

60. *See, e.g.*, State v. Johnson, 823 P.2d 484, 491 (Utah Ct. App. 1991) ("Trial courts have an 'institutional interest in protecting the truth-seeking function of the proceedings over which [they are] presiding by considering whether [defendants have] effective assistance of counsel, regardless of any profferred waiver[s].'" (quoting United States v. Moscony, 927 F.2d 742, 749 (3d Cir. 1991))).

61. *See, e.g.*, David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER 83, 89 (David Luban ed., 1984) ("Each side of an adversary proceeding is represented by a lawyer whose sole obligation is to present that side as forcefully as possible; anything less, it is claimed, would subvert the operation of the system."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 54 (1991) ("[T]he assumption is that aggressive, competitive lawyering, guided exclusively by client interests, produces appropriate results."); *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 52, at 1294 (arguing that the "loyalty" considerations underlying conflicts rules "occup[y] a central position in an adversary system whose legitimacy rests on the most zealous possible presentation of each party's position").

62. *See, e.g.*, Wheat v. United States, 486 U.S. 153, 164 (1988) (upholding the disqualification of a lawyer despite a client's waiver because joint representation represented a threat to the administration of justice); *River West*, 234 Cal. Rptr. at 40 (holding that judges evaluating disqualification motions must weigh, inter alia, the client's interest in choosing counsel against "the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of . . . interest"); Attorney Grievance Comm'n v. Kent, 653 A.2d 909, 920 (Md. 1995) (holding that consent to a conflict is not legally effective when it would undermine the "public interest," as when it would result in preventing the public disclosure of a crime); *see also* MGM v. Tracinda Corp., 43 Cal. Rptr. 2d 327, 331 (Ct. App. 1995) (noting the court's interest in the "scrupulous administration of justice and in the integrity of the bar" and "considerations of ethics that run to the very integrity of our judicial process" (emphasis omitted)); Greene v. Greene, 47 N.Y.2d 447, 451 (1979) (holding that the rule against conflicted representation guards against "abuse of the adversary system"); *cf.* Lon Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34, 34-36 (H. Berman ed., rev. ed. 1971) ("The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the power of his mind to its formulation.").

63. *Cf.* State v. Rivera, 556 A.2d 1227, 1233 (N.J. Super. Ct. App. Div. 1989) ("[A] defendant's right to counsel of choice [can be] outweighed by the need to preserve public confidence in the judicial system . . . ."); Graf v. Frame, 352 S.E.2d 31, 38 (W. Va. 1986) ("[W]here the public interest is involved, an attorney may not represent conflicting interests even with the consent of all concerned. It is essential that the public have absolute confidence in the integrity and impartiality of our system of justice." (citation omitted)).

64. *See, e.g.*, Collett, *supra* note 35, at 580 (describing how joint representation may result in "critical facts" being omitted); Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1030-32 (1967) (arguing that competitive lawyering helps factfinders understand evidence and law); Zacharias, *supra* note 61, at 54 (arguing that the adversary process helps "ensure[] that factfinders will not overlook obscure but relevant information").

65. In deciding whether to engage a lawyer in a case in which the lawyer might be, or should be, called as a witness, a client needs to recognize that the lawyer's representation may undermine her credibility as a witness, to the client's detriment. Alternatively, one option for employing the lawyer

conflicting interests or those of a third party.[67] Again, society may have a right to give its interest in the truth-seeking process[68] a higher priority than the client's interest in autonomy.[69]

Even where one cannot point to specific injuries to the process that conflicted representation produces, the codes and courts may conclude that certain kinds of representation "appear" so unfair as to warrant rejection of a client's choice.[70] A client may, for example, wish the adversary's lawyer to represent him in the same litigation. The client may perceive sufficient benefits in the arrangement to justify the obvious disadvantages of the arrangement.[71] But observers of the litigation may not perceive the benefits, or they may otherwise disagree with the client's calculus. These observers will lose confidence in the merits of a system that seems to afford the client no better representative than the opposing lawyer. For the sake of the system, a

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may be for the client to forgo using the lawyer as a witness on the grounds that she is not "necessary," even if potentially helpful. Even if the client wants the lawyer to continue as counsel, however, professional rules typically regulate the lawyer's decision to engage in the representation because the system and the adversary may have an interest in receiving the lawyer's testimony. *See, e.g.*, MODEL RULES, *supra* note 2, Rule 3.7.

66. *See, e.g.*, *supra* text accompanying note 39 (discussing a hypothetical scenario).

67. For example, in the scenarios discussed above, *see supra* text accompanying note 39; *supra* note 65 and accompanying text, the lawyer may have an interest in encouraging the client to forgo using her as a witness so that the lawyer can reap the rewards inherent in undertaking the representation.

68. These interests include, inter alia, maintaining a justice system that produces appropriate results, providing appropriate deterrence through criminal and civil verdicts, and assuring fair compensation to injured victims of torts and crimes.

69. One situation in which concurrent clients' interests clearly may be inconsistent with societal interests arises when a single lawyer represents multiple clients before a grand jury. Because the lawyer can orchestrate stonewalling by both clients (i.e., the exercise of their Fifth Amendment rights), the lawyer can interfere with the prosecution's efforts to obtain incriminating evidence from one against the other. *See, e.g.*, Nancy J. Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. REV. 1, 4 (1979) (analyzing the stonewalling issue); *see also* Covy, *supra* note 40, at 812-13 (discussing the potential conflict between a client's right to counsel of choice, his right to effective assistance of counsel, and "the judicial interest in promoting the effective administration of justice"). In *Wheat v. United States*, 486 U.S. 153, 164 (1988), the Supreme Court held that in some such instances, society's interests in the fair administration of justice may outweigh the clients' interest in insisting on the benefits of joint representation. *See also* United States v. Stites, 56 F.3d 1020, 1025 (9th Cir. 1995) (overruling a defendant's consent to counsel's conflicted representation on the basis of the need for proper judicial administration); United States v. Gopman, 531 F.2d 262, 265-66 (5th Cir. 1976) (upholding the government's standing to allege the existence of a conflict of interest in the representation of multiple grand jury witnesses on the grounds that the lawyer's advice to "stonewall" the grand jury would hamper the investigation); Pirillo v. Takiff, 341 A.2d 896, 902-06 (Pa. 1975) (same).

70. *See, e.g.*, McMunigal, *supra* note 1, at 840-42 (discussing the "appearances of impropriety" rationale for rejecting concurrent representation); Neil D. O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MARQ. L. REV. 313, 350 (1979) (arguing that the appearance-of-impropriety rationale requires delineation); Anthony G. Flynn, Note, *Disqualification of Counsel for the Appearance of Professional Impropriety*, 25 CATH. U. L. REV. 343, 362-63 (1976) (discussing cases relying on the appearance-of-impropriety rationale); Regina Zelonker, Note, *Appearance of Impropriety as the Sole Ground for Disqualification*, 31 U. MIAMI L. REV. 1516, 1523 (1977) (supporting a two-part test for evaluating motions to disqualify based on the "appearance of impropriety"); *cf.* Victor H. Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243, 265 (1980) (discussing the judicial use of appearance-of-impropriety reasoning in conflicts and other cases and concluding that it "is simply too dangerous and vague a standard to serve as a foundation for guiding professional conduct").

71. *See, e.g.*, *supra* text accompanying notes 35-43.

court arguably should be able to rely on the "appearance of impropriety"[72] to reject the consent.[73]

Thus far, I have considered two categories of justifications for overriding consent: protecting the client and protecting independent interests of the legal system. A third category, however, may better explain the ABA code's exceptions.

In the words of the *Restatement*, it seems unlikely that informed rational clients will often choose representation that is "objectively inadequate."[74] Yet empirically, client consent to conflicted representation is not unusual.[75] Perhaps regulators and courts are unwilling to honor client choice because they distrust the motives of the lawyers who advise the clients or distrust the explanations that the lawyers give clients on the merits of waiving conflicts.[76]

Lawyers have a vested economic interest in retaining their clients.[77] By sending a client to another lawyer, a lawyer risks losing not only the particular case but also future cases that the client might bring her.[78] Thus, the lawyer has an incentive[79] to phrase her explanation in a way that encourages the client to waive the conflict—to believe that the lawyer herself is somehow unique.[80]

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72. Zelonker, *supra* note 70, at 1523 (approving the "appearance of impropriety" rationale as a basis for disqualification motions); *see also* Moore, *supra* note 1, at 214, 227-29 (discussing the rationale that overriding client consent may be necessary to preserve "lawyers' reputations through an avoidance of apparent impropriety").

73. *See, e.g., In re* Bentley, 688 P.2d 601, 605 (Ariz. 1984) (relying, in part, on the appearance-of-impropriety rationale).

74. RESTATEMENT, *supra* note 25, § 202 cmt. g(iv); *see also supra* text accompanying notes 27-30 (discussing the *Restatement*'s approach to waiver).

75. *See* O'Toole, *supra* note 70, at 321 (discussing a large number of pre-Model Rules cases in which courts relied on Canon 9 of the Model Code in disposing of disqualification motions); Steinberg & Sharpe, *supra* note 1, at 1 & n.1 (discussing the "continual parade of litigation" involving conflict issues); Craig D. Grear, Current Developments, *Conflicts of Interest: Simultaneous Representation*, 2 GEO. J. LEGAL ETHICS 103 (1988) (discussing actions against law firms that agree to engage in conflicted representation).

76. At least one commentator has mentioned this issue in the context of evaluating what degree of information clients must receive before giving their so-called "informed consent." *See* Strauss, *supra* note 4, at 341-44.

77. *See* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 106-15 (1974) (discussing how lawyers' incentives influence decisions they make on behalf of clients); *cf.* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1351 (1995) (discussing the effect of lawyers' natural incentives in causing lawyers to adopt a highly partisan approach to representation).

78. Clients tend to stick with the lawyers they have. A client who engages in continuing communications with a lawyer to which the client has been referred will often discuss new matters with that lawyer as well.

79. A lawyer's economic incentives in engaging in conflicted representation sometimes may extend beyond a mere desire to keep the client. When the lawyer is implicated in wrongdoing, referring the client elsewhere may result in action being taken against her. *See, e.g.*, Fairfax Sav., F.S.B. v. Weinberg & Green, 685 A.2d 1189 (Md. Ct. Spec. App. 1995) (involving a firm that had overbilled its client in one case and encouraged the client to waive the conflict in subsequent representation, inter alia, to avoid having the overbilling become public). That, in part, may be why the Model Rules have framed the inquiry for nonwaivable conflicts as whether "a disinterested lawyer" could properly "ask for such agreement or provide representation on the basis of the client's consent." MODEL RULES, *supra* note 2, Rule 1.7 cmt. para. 5.

80. *See, e.g.*, Zacharias, *supra* note 1 (manuscript at 8) (describing the different kinds of advice lawyers might give clients faced with a conflict of interest).

The codes attempt to guide lawyers and to counteract their economic incentives by requiring lawyers to think in terms of the conflict rules.[81] Nevertheless, the self-interested lawyer who views the conflict provisions as a roadblock to be circumvented often can obtain misguided waivers. Judicial inquiry into the informed nature of the consent ordinarily will not counteract such conduct.[82] By the time the case reaches court, the lawyer will have prepared her client and convinced him that she is essential to his cause.

In short, there are a number of theoretically defensible justifications for overriding client consent. These range from assuring that the consent truly reflects the exercise of client autonomy to protecting the client against his own unwise choices to furthering independent societal interests to simply providing prophylactic protections against improper influence by lawyers in inducing a waiver. The ABA rules do not specify the bases for their anticonsent provisions. The California code does not recognize any of the justifications, leaving it to the courts to raise and evaluate them.

IV. *KLEMM*

In *Klemm v. Superior Court of Fresno County*,[83] a husband and wife agreed to dissolve their marriage amicably. Custody of their children was to be joint, and the wife waived alimony and child support payments.[84] The couple could not afford an attorney. A family friend agreed to represent them both without compensation.[85]

The matter became complicated when the County District Attorney's Office petitioned the court to require child support payments of $50 per month.[86] The County's interest lay in the fact that the $50 would be used to offset AFDC payments made to the wife.[87] The couple's attorney, armed with written conflict waivers from husband and wife, appeared on their behalf to

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Lawyers also have some economic incentives to avoid conflicted representation when their performance may be impaired. Poor performance may result in client dissatisfaction or a tarnished reputation. *See* McMunigal, *supra* note 1, at 833-34 (noting the existence of incentives to avoid conflicted representation but arguing that the adoption of professional conflict-of-interest rules implicitly assumes that such incentives are insufficient in practice).

81. *See* MODEL RULES, *supra* note 2, Rule 1.7 cmt. para. 5 ("[A] lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee."); *see also* Lee E. Hejmanowski, Note, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 892 (1993) (discussing the interplay between conflict-of-interest regulation and lawyers' economic incentives in accepting representation).

82. *See, e.g.*, Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1345-46 (9th Cir. 1981) (adopting the *Boivin* rule that consent must be informed); Image Technical Servs. v. Eastman Kodak, 820 F. Supp. 1212, 1216-17 (N.D. Cal. 1993) (rejecting consent as uninformed); *cf. In re* Perry, 194 B.R. 875, 879 (E.D. Cal. 1996) (inquiring into the validity of a client's waiver); People v. Johnson, 164 Cal. Rptr. 746, 751 (Ct. App. 1980) (finding implied consent after inquiring into its presence).

83. 142 Cal. Rptr. 509 (Ct. App. 1977).

84. *See id.* at 510-11. This waiver was not unreasonable in light of the fact that the husband earned a meager living as a part-time carpenter. *See id.* at 510.

85. *See id.* at 510-11.

86. *See id.* at 511.

87. *See id.*

object to the County's petition.[88] The trial court refused to accept the conflict waivers and required both Mr. and Mrs. Klemm to seek independent counsel.[89] They instead sought a writ of mandamus to overturn the trial court's decision.

The California Court of Appeals's opinion turned on the court's view of the facts. It concluded that the conflict between husband and wife was potential in nature.[90] Legally, the wife could ask the court to order child support at a later date,[91] for example after her AFDC benefits lapsed. Currently, however, only the state stood to profit. Thus, the court reasoned, her decision to oppose child support and waive her lawyer's conflict of interest was reasonable in light of her desire to maintain amicable relations with her husband.[92] The conflict was potential; potential conflicts may be waived with the client's intelligent and informed consent.

The Court of Appeal's holding was unsurprising in light of the absolute consent provision in California's professional rules.[93] The court's dicta on the issue of consent in cases of actual conflict of interest was more controversial. Despite the language of the professional rules, the court stated:

> As a matter of law, a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.[94]

Had there been an actual conflict between Mr. and Mrs. Klemm—for example, if child support payments would have inured to her benefit—the couple's lawyer could not have continued the representation.[95] This despite the reality that the couple could not afford independent representation and that the cost of independent counsel might well have exceeded the amount in dispute.

Klemm's dicta concerning nonwaivable conflicts has been cited approvingly in subsequent cases.[96] But to date, no court has used *Klemm* to

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88. *See id.* These were the facts on which the court based its decision. To give the court its due, however, the actual situation was a bit more complicated. Most significantly, before signing the written waiver, Mrs. Klemm had expressed confusion as to whether there was a conflict and whether she wanted the lawyer to continue. *See id.*

89. *See id.*

90. *See id.* at 512.

91. *See id.* at 513.

92. *See id.*

93. In *Klemm*, the court was following the old California professional rule regarding concurrent conflicts of interest. *See id.* at 511-12. This rule included essentially the same absolute consent provision as its successor. *See* CAL. BAR RULES OF PROFESSIONAL CONDUCT Rule 5-102(b) (1981) ("A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.").

94. *Klemm*, 142 Cal. Rptr. at 512.

95. *See id.* at 513.

96. *See* cases cited *supra* note 9.

disqualify counsel in a case in which both clients consent to the lawyer's representation. California law thus remains unclear on whether clients' decisions to waive counsel in cases of actual conflict must be honored.

V. THE LESSONS OF *KLEMM*

At first glance, the *Klemm* court's distinction between potential and actual conflicts seems semantic. Potential conflicts range from purely hypothetical conflicts[97] to conflicts that are nearly ripe and extremely likely to occur.[98] Likewise, even the actual conflict the *Klemm* court pointed to as the paradigm—simultaneous representation of adversaries at a contested hearing[99]—can be hypothetical. For example, the facts at a contested hearing may not be in dispute and the conflicting arguments of law may be clear and evident to the judge. A single lawyer may be able to focus the issues sufficiently (at least competently enough) to enable the court to decide, without disadvantaging either party. At the very least, therefore, the dividing line between likely potential conflicts and theoretical but unimportant actual conflicts blurs.[100]

When one scrutinizes the *Klemm* court's one-paragraph explanation of nonwaivability, one cannot help noticing that the court—perhaps without knowing it[101]—identifies two separate justifications for its holding. Initially, the court concludes that consent in the paradigm situation would, by definition, "be neither intelligent nor informed."[102] Subsequently, the court states that dual representation would be "per se inconsistent with the [lawyer's] adversary position," which would render dual representation "unthinkable" for the court to allow.[103]

This Essay has already noted that a client's decision to waive independent counsel can be intelligent. Indeed, when the cost of independent

97. *See, e.g.*, *In re* Candida S., 9 Cal. Rptr. 2d 521, 528-29 (Ct. App. 1992) (holding that a lawyer for multiple sexually-abused children in a single dependency hearing was not subject to disqualification by the parents); Castro v. Los Angeles County Bd. of Supervisors, 284 Cal. Rptr. 154, 161 (Ct. App. 1991) (holding that the representation of separate parties by separate administrative units of a county nonprofit corporation involved potential conflicts so "speculative" in nature as to pass muster under the conflicts rules).

98. *See, e.g.*, Kelley's Case, 627 A.2d 597, 600 (N.H. 1993) (holding that not even one client's promise to indemnify the other sufficed to offset the real risks of the potential conflict); Whitman v. Estate of Whitman, 612 A.2d 386, 389-90 (N.J. Super. Ct. Law Div. 1992) (holding that a potential conflict between a sole heir and an estate is serious because of possible intestacy interests).

99. *See Klemm*, 142 Cal. Rptr. at 512.

100. *See* McMunigal, *supra* note 1, at 847 (arguing that the distinction between actual and potential conflicts "reflects an underlying conceptual confusion as to the appropriate response to situations which threaten attorney impairment").

101. It would be a fair reading of *Klemm* to conclude that the court's surprising dicta resulted from its loose use of language and inadvertent conflating of multiple rationales. Whether that is the case or not, the resulting decision does reflect the tensions in the law of consent that this Essay addresses and provides a useful vehicle for analyzing that tension.

102. *Klemm*, 142 Cal. Rptr. at 512.

103. *Id.*

representation exceeds the expected recovery[104]—as it probably did in *Klemm*—a client would be foolhardy to bear the cost. The *Klemm* court therefore must have been focusing on the "informed" part of "intelligent and informed."[105] It apparently believed that a client who waives a lawyer's actual conflict is so often misinformed or has been advised so poorly that inquiring into the nature of the waiver on a case-by-case basis is not worth the effort.

The *Klemm* court's second rationale focuses on the adversary system. The court identifies only the single example of dual representation of direct adversaries at a contested hearing. But there are other situations in which a conflict may keep a lawyer from engaging in fully adversarial advocacy. For example, when a lawyer has an incentive to avoid injury to an opponent[106] or when she contracts with the client to avoid calling a witness to the stand,[107] she has the same effect on the adversarial process as the dual representative. The lawyer has put herself in a position in which she may not introduce all favorable evidence on her client's behalf or in which she may intentionally fail to articulate the client's strongest arguments.

The *Klemm* court's concern about the lawyer's nonadversarial nature cannot rest solely on the danger to the client's interests because, as we have seen, such danger may be outweighed by benefits that the client prefers to pursue.[108] Under the California rules, at least, if the client is fully informed about the risks, his right to decide his own preferences should govern.[109] In stating that it is "unthinkable" to honor this consent, the *Klemm* decision must be focusing on the system's independent interests in adversarial lawyering. Arguably, judges and juries need the help of partisan advocates in introducing all evidence favorable to each party and in sifting the arguments to reach appropriate results.[110]

The ramifications of this analysis for California's professional rules are significant. *Klemm* highlights a small universe of cases in which the client is not entitled to choose even though he can best gauge his own interests. The regulatory focus on protecting clients and the attorney-client relationship must give way to other considerations that the courts deem more important.[111] In this universe, lawyers initially and courts, in the final instance, must protect the adversary system's independent interests in partisan advocacy.

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104. By "expected recovery," I refer to the potential recovery, discounted for its improbability and the costs of obtaining the recovery (including attorneys' fees).

105. "Intelligent" and "informed" clearly are linked concepts. I do not mean to suggest that courts parse them finely in evaluating waivers. Nevertheless, each term has separate substantive content that probably plays a role in judicial evaluations of consent.

106. For instance, this would be true if the opponent were a valued client in other matters.

107. *See, e.g., supra* text accompanying note 39 (discussing such a scenario).

108. *See supra* text accompanying notes 35-42.

109. *See* CAL. RULES, *supra* note 5, Rule 3-310.

110. *Cf.* Jones v. Barnes, 463 U.S. 745 (1983) (approving a lawyer's decision to omit briefing issues that his client wanted him to argue before the Appellate Division of the New York Supreme Court on grounds that lawyers serve an important function in winnowing out weaker arguments on appeal); *see also supra* notes 59-62 and accompanying text (discussing the putative effects of adversarial advocacy).

111. *Cf.* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992) (arguing that the phenomenon of professional regulation is based on a vision of lawyering that is different from the vision of the courts).

In the other, larger universe of cases, the client's interests matter most. A properly informed client may choose his lawyer based on his own preferences. The *Klemm* court's reluctance to accept client consent in actual conflict cases simply suggests that the professional rules are inadequate to insure that clients receive the proper level of information.

In this regard, California's conflict provisions posit ideal representation, in which a lawyer plays out her role as impartial advisor. The rules envision lawyers as client-centered assistants who anticipate conflicts, provide full information concerning the risks of the representation, and encourage clients to seek independent counsel. Yet, as noted above, lawyers often have their own agendas. The rules neither confront the need to guide lawyers on how to advise clients nor provide incentives to counteract lawyers' natural tendency to seek waivers.[112] Nor do the rules establish mechanisms for enforcing lawyers' obligations.

Indeed, by mixing the issues of what constitutes a conflict, when a client may choose to accept it, and what lawyers should do before participating in the representation, the California rules send lawyers a faulty message. The rules suggest that if clients are willing to waive a conflict, that decision should govern. This suggestion masks the existence of distinct systemic interests and distinct lawyer obligations that bear on the appropriateness of a waiver.

The ABA rules, though more cautious about client consent, share the failings of the California provisions. Again, the regulators seem to focus exclusively on the client's interests and the attorney-client relationship. Model Rule 1.7(a), for example, covers the *Klemm* type of situation in which the lawyer is asked to represent clients who are direct adversaries.[113] If the clients consent, the sole issue the lawyer must consider is whether the representation of one client will "adversely affect *the relationship* with the other client."[114] Rule 1.7(a) does not require the lawyer to consider either whether waiving the conflict is wise from the client's perspective or whether a waiver would adversely affect any systemic interests in partisan representation.

Model Rule 1.7(b) covers less direct conflicts in which a lawyer's representation may be limited by her obligations to other clients.[115] Here, the issue for the lawyer is whether she reasonably believes "the *representation* will . . . be adversely affected."[116] The "representation," however, includes limitations to which the lawyer and client have agreed under Model Rule 1.2.[117] The rule therefore does not preclude representation in which the client

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112. *See supra* note 77 and accompanying text.

113. *See supra* Part IV.

114. MODEL RULES, *supra* note 2, Rule 1.7(a)(1) (emphasis added).

115. *See id.* Rule 1.7(b).

116. *Id.* Rule 1.7(b)(1) (emphasis added).

117. Under Model Rule 1.2, a lawyer and client may agree to "limit the objectives of the representation if the client consents after consultation." MODEL RULES, *supra* note 2, Rule 1.2(c). With some exceptions, this includes the right to limit the means by which the representation is to occur. *See* David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS (forthcoming 1998) (manuscript at Part IV, on file with *The Yale Law Journal*) (identifying areas in which lawyers and clients may limit objectives). The case law tends to honor most such agreements and the codes do as well, provided the basic

agrees to limitations that keep the lawyer from optimizing the representation.[118] Model Rule 1.7(b)(2) does require the lawyer to explain the implications and risks of a conflict waiver, but it does not require the lawyer to steer the client away from consenting.[119] Indeed, the rule specifically requires the lawyer to identify the advantages of common representation as well.[120] And, again, Model Rule 1.7(b) does not require lawyer or client to take into account systemic interests in independent representation.

When read together, the current California rule, the ABA provisions, and cases like *Klemm*[121] illustrate that a single rule cannot adequately embody the separate interests of clients, lawyers, and the system.[122] One rule is needed to identify those situations in which clients may not waive a conflict even if

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competence of the lawyer is not threatened. For a full discussion of this issue, see Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay for?*, 11 GEO. J. LEGAL ETHICS (forthcoming 1998) (on file with *The Yale Law Journal*) [hereinafter Zacharias, *Performance Agreements*], and the ensuing debate in Hyman & Silver, *supra*, and Fred C. Zacharias, *Reply to Hyman and Silver: Clients Should Not Get Less Than They Deserve*, 11 GEO. J. LEGAL ETHICS (forthcoming 1998) (on file with *The Yale Law Journal*) [hereinafter Zacharias, *Reply*].

118. For example, the lawyer and client may agree not to pursue particular claims because of their effect on third parties.

119. Arguably, failing to guide the client adequately can be conceived of as failing to assure "informed" consent and therefore a breach of the lawyer's obligation. The rules themselves, however, simply require the lawyers to provide the client with information.

120. *See* MODEL RULES, *supra* note 2, Rule 1.7(b)(2) ("[T]he consultation shall include explanation of the implications of the common representation and *the advantages* and risks involved." (emphasis added)).

121. *See* cases cited *supra* note 9.

122. Issues of autonomy and client waiver arise in many legal contexts and in many substantive areas other than law. *Cf. supra* note 26 and accompanying text (noting the presence of these issues in the medical context). Not all contexts, however, involve the same countervailing considerations that are found in the legal ethics arena. In evaluating issues of patient consent to medical treatment, for example, scholars focus mainly on the patient's interests and on what makes consent informed, rather than on separate societal interests in disallowing consent. *But cf.* BROCK, *supra* note 31, at 33-34 (arguing that patients have a moral duty not to delegate medical decisions). Only in a few medical contexts, such as abortion and physician-assisted suicide, have scholars or the courts even considered overriding a patient's voluntary decision to accept or refuse treatment.

With respect to waivers of rights in other legal contexts in which the exercise of autonomy generally is honored—for example, the contract and criminal contexts—courts have deemphasized the issue of whether a waiver benefits a litigant in favor of a free-market approach that focuses almost exclusively on whether a waiver was "voluntary" or "knowing and intelligent." *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973) (holding that the key for consent to police searches is whether the consent was voluntary); Miranda v. Arizona, 384 U.S. 436, 492 (1966) (holding that a waiver of the right against self-incrimination must be "knowing and intelligent"); Clark v. West, 86 N.E. 1, 5 (N.Y. 1908) (defining a proper waiver of a contractual condition as "the intentional relinquishment of a known right"). Unlike in legal ethics situations, society sometimes happily accepts the most stupid of waivers, so long as the consenting party is informed. *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39-40 (1996) (holding that a consent to a search was valid even though the defendant did not realize he was free to go without a search); Moran v. Burbine, 475 U.S. 412, 424 (1986) (requiring only that the defendant "understand the nature of his rights and the consequences of abandoning them" for a waiver of the right against self-incrimination to be valid); *see also* 5 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 685 (3d ed. 1961) (noting that a contractual waiver is "knowing" as long as the party is aware of the relevant facts, even if the party is ignorant of their legal effect). In these contexts, independent societal interests in regulating the conduct of participants in the transaction are implemented through separate doctrines, rather than through assessments of whether the waiver was valid. *See infra* note 123.

waiver might benefit the client.[123] A separate rule should shape the parameters of informed consent—identifying the information clients need in order to exercise their autonomy in a meaningful fashion.[124] A third provision must focus on the lawyers themselves. It should provide guidance as to how lawyers should approach the issue of client waiver—encouraging lawyers to consider systemic interests where waiver is impermissible and only the clients' interests where consent is allowed.[125] A perfect rule also would provide enforceable standards for lawyer behavior in the consent context.

VI. A MODEL WAIVER PROVISION

The following pages propose three rules to govern actual and potential conflicts of interest among concurrent clients. In jurisdictions like California, which seek to honor client autonomy in all respects,[126] the bracketed portions of the proposed rules would not be appropriate. Jurisdictions following the general ABA approach should be willing to adopt the three provisions in full.

The first rule identifies conflicts of interest that are nonwaivable because of systemic interests in having independent counsel.[127]

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123. Employing an independent rule distinguishing nonwaivable from waivable conflicts is consistent with society's approach to autonomy in other contexts. It is commonplace for society to identify specific areas in which citizens' autonomy will not be honored because society disapproves of particular choices. Typically, this disapproval takes the form of outright legal prohibitions. Laws forbidding suicide, abortion, dueling, driving without a seatbelt, and the like fit within this category.

In a few areas, society has expressed a general preference in favor of free will but has specified limited circumstances in which independent societal interests outweigh individual rights. In contract cases, for example, independent societal interests are implemented through the rubric of separate doctrines of "public policy." *See, e.g.*, Cudahy Junior Chamber of Commerce v. Quirk, 165 N.W.2d 116, 118 (Wis. 1969) (declining to enforce a promise to pay off on a dare on the grounds that gambling is against public policy). In criminal cases, societal interests generally are enforced through the imposition of constitutionally derived rules to curb police misbehavior. *See, e.g.*, *Miranda*, 384 U.S. at 479 (establishing a prophylactic rule limiting custodial interrogations). Unlike the current legal ethics codes, however, contracts and criminal law for the most part implement the independent societal interests directly, rather than under the guise of evaluating the quality of the party's waiver. This Essay's proposals follow that approach.

One significant exception in criminal law bears mentioning; namely, the U.S. Supreme Court's "scrupulous" scrutiny of a defendant's consent to interrogation after the right to counsel has been asserted. *See, e.g.*, Michigan v. Mosely, 423 U.S. 96, 101 n.7 (1975) (citing *Miranda*, 384 U.S. at 474) (holding ineffective a consent to interrogation after counsel has been requested). The justification for this special hurdle to the exercise of the defendant's choice is similar to the California court's apparent rationale in *Klemm*: society's interest in maintaining respect for the adversarial process (i.e., a defendant acting through his advocate) once litigation begins. *See* Michigan v. Jackson, 475 U.S. 625, 626 (1986) (reaffirming Edwards v. Arizona, 451 U.S. 477 (1981)) (noting the importance of protecting the accused's choice to communicate through counsel).

124. This has been the focus of the medical and legal scholarship addressing the issue of "informed consent." *See* sources cited *supra* notes 4, 26.

125. *See* Zacharias, *supra* note 1 (manuscript at 8-9) (suggesting, in passing, the need to create a separate rule that provides guidance to lawyers).

126. *See supra* note 18 and accompanying text.

127. Although the precise reasons for its rule are not clear, Texas applies a narrower, but similar, provision forbidding consent to multiple representation in cases involving "opposing parties to the same litigation." TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.06(a) (1997).

> RULE 1. A lawyer may not accept or continue representation in any matter in which:
> (a) a tribunal is scheduled to decide or is likely to decide the matter; and
> (b) the lawyer's ability to present evidence or to make arguments to the tribunal is reasonably likely to be limited by the lawyer's obligations to a person[128] other than the lawyer's client.

Rule 1 focuses on litigation, because that is where the societal interests in adversarial process come into play.[129] Transactional matters may give rise to associated concerns when a transaction becomes the subject of litigation; subsection (a) takes those concerns into account by covering matters that are "likely" to be decided in court. There also may be reasons unrelated to litigation why lawyers should not represent two clients in a particular transaction, such as each client's need for loyalty.[130] However, because transactions typically are contractual in nature and are framed by each client's desires, informed client consent suffices to govern the choice of representation and the choice of contract.[131] In other words, until public dispute resolution processes are implicated, society has no interest in independent representation that is separate from the clients' own interests.[132]

Rule 2 and its accompanying comment would govern waivable actual and potential conflicts of interest among concurrent clients. It identifies, as well as possible, the nature of the information that clients must receive before being allowed to consent. Subsection (c) adds the ABA requirement of an objective determination by the lawyer that joint representation is feasible.

> RULE 2. A lawyer may not accept or continue representation in any matter in which the interests of the lawyer's client in the matter conflict or potentially conflict with another client's interests in the matter unless:

128. "Person" refers to any legally recognizable body or institution.

129. *See supra* notes 55-69 and accompanying text.

130. *See, e.g.*, Flatt v. Superior Court, 885 P.2d 950, 955 (Cal. 1994) (using loyalty concerns as a reason for disallowing multiple representation).

131. Thus, for example, even in cases in which the California courts would forbid a client waiver at the trial stage, *see supra* text accompanying note 94, the courts apparently would allow joint representation at an earlier stage. *See, e.g.*, Davidson v. Davidson, 204 P.2d 71, 77 (Cal. Dist. Ct. App. 1949) (allowing joint representation in drafting divorce settlements).

132. This aspect of Rule 1 has important implications for a lawyer who acts as a mediator for two parties. To the extent the lawyer's very function is to bring about settlement, Rule 1 is inapplicable even though the two parties are direct opponents. Under the ABA's Model Rule 1.7(a), the mediator-lawyer considering such joint representation would need to evaluate her "relationship" with the two clients. MODEL RULES, *supra* note 2, Rule 1.7(a). This consideration is still relevant in ABA jurisdictions under proposed Rule 2(c). But the more significant question for the lawyer under this Essay's proposals (i.e., Rule 3(d)) is whether mediation is reasonably consistent with each client's best interests, a decision that the ABA approach does not explicitly require the lawyer to make.

(a) the lawyer has fully informed both clients of the concurrent representation, including all foreseeable disadvantages[133] to the clients stemming from the concurrent representation and all foreseeable advantages to the clients that would accrue if they obtained independent representation;
(b) both clients consent[; and
(c) the lawyer reasonably believes the representation will not adversely affect the relationship with either client].

COMMENT: In determining whether a client has an "interest in the matter" for purposes of this rule, the lawyer shall consider:
(1) whether the client, or any person or organization related to the client, is a party;
(2) whether the client has a significant personal or economic relationship with a party; and
(3) whether the client has a significant economic stake in the outcome of the matter.
A general interest in the legal issues to be decided, alone, should not be deemed to constitute an interest in the matter. If, however, the legal decisions in the case are likely to become controlling authority in a separate matter or matters involving the second client, the lawyer must comply with Rules 2 and 3.

It is significant to note that Rule 2 eliminates the distinction between actual (or direct) and potential conflicts that is found in Model Rule 1.7(b).[134] In potential conflicts cases, Model Rule 1.7(b) changes the focus of the lawyer's inquiry from the likely effect of the concurrent representation on the relationship with the clients to its likely effect on "the representation" and the lawyer's "judgment."[135] Under proposed Rule 2(c), the maintenance of the relationship with the clients remains important to the consent issue; the

133. The Model Rules require lawyers to advise clients of the *advantages* of joint representation. *See* MODEL RULES, *supra* note 2, Rule 1.7(b)(2). My proposal does not include such a requirement on the assumption that lawyers will offer this information in any event, because it may help them keep the client. Nevertheless, any jurisdiction wishing to add the requirement can do so without adversely affecting the proposal.

134. The Oregon rule, discussed *supra* notes 20-24 and accompanying text, emphasizes the distinction between actual and potential conflicts even more than the ABA rules do. Primarily for reasons of process and paternalism, Oregon would consider actual conflicts nonwaivable and potential conflicts waivable. *See* Jarvis & Tellam, *supra* note 1, at 172-76 (defending the Oregon rule).

The distinction is deemed less important under this Essay's proposals. The proposed rule already carves out the category of cases that should, as a theoretical matter, truly be considered nonwaivable. For the situations that the Oregon rule anticipates, the proposed rule leaves uncovered only those actual conflict situations in which clients are informed and waive the conflict but in which there are sound reasons not to trust the waiver.

Oregon's approach to these cases relies upon an overbroad, bright-line rule that forbids all consent. This Essay's proposal is more deferential to client autonomy. It protects clients by requiring full advice to clients who wish to consent and by requiring lawyers to engage in separate introspection that includes an independent judgment by the lawyer that a waiver is in the client's best interests.

135. MODEL RULES, *supra* note 2, Rule 1.7(b).

absence of a trusting attorney-client relationship may undermine the lawyer's ability to advise the client on whether to consent.[136] The separate considerations of the effects on the representation and the effects on the lawyer's judgment remain relevant to the information the lawyer must give the clients and to the lawyer's personal decision of whether to accept the representation under Rule 3. Those factors, however, no longer are considered a basis for discounting the informed or intelligent nature of a client's consent.

Rule 3 provides separate guidance to the lawyer on the question of whether the lawyer should agree to represent clients who have waived an actual or potential conflict. The rule starts from the generally accepted presumption that clients ordinarily are best served by independent representation. Like most existing rules, it posits that lawyers should not be willing to engage in conflicted representation unless they are satisfied that a client's waiver is informed *and* intelligent. Rule 3, however, goes further in attempting to help lawyers understand when they should accept or decline the engagement.

> RULE 3. In deciding whether to accept or continue representation under Rules 1 and 2, a lawyer should decline the representation unless:
> (a) the lawyer has fully informed the client(s), orally and in writing,[137] of the possible negative effects of any actual or potential conflict of interest on the representation or the lawyer's judgment;
> (b) the lawyer has fully informed the client(s), orally and in writing, of the benefits of obtaining independent representation;
> (c) the lawyer reasonably believes each potentially affected client understands the disadvantages of retaining the lawyer;
> (d) the lawyer reasonably believes that each potentially affected client has made the decision to consent to the representation of his or her own free will;
> (e) the lawyer reasonably believes that the client's decision to consent to the representation is reasonably consistent with the client's best interests in the matter[; and
> (f) the lawyer reasonably believes that the client(s) would not receive better representation by an independent lawyer].

Because a lawyer has a fiduciary responsibility not to favor her own interests in representing the client over the client's interests,[138] subsection 3(e)

136. *Cf. supra* notes 77-80 (discussing a lawyer's obligations in advising a client on whether to consent).

137. The requirement of written information is a prophylactic requirement currently employed by some jurisdictions to ensure that clients receive the necessary advice and to protect lawyers who are subsequently accused of failing to provide full information. Forcing the lawyer to commit the advice to writing also makes her focus on doing a good job in the information-giving process. Hence, this Essay's proposal includes a writing requirement in Rule 3, which is to guide lawyer behavior, but not in Rule 1, which is more concerned with defining the content of the advice. Different jurisdictions could reasonably incorporate a writing requirement into Rule 2 or eliminate it altogether.

requires the lawyer to consider whether the decision to waive a conflict is reasonably consistent with the client's best interests. In California, which emphasizes autonomy, the decision that the waiver is *reasonably consistent* with the client's interests should suffice to honor the client's choice. In jurisdictions following the ABA's preference for allowing a lawyer's determination to override the client's,[139] subsection 3(f) adds the requirement that the lawyer agree with the client that she can supply representation at least as good as the client could obtain elsewhere, given the client's resources.[140] The ABA approach would not automatically honor the client's decision that mere cost savings justify lesser representation.

Together, these three rules produce several advances over the current California rules and ABA models. First, as in the *Klemm* case,[141] they identify when systemic interests absolutely forbid a conflict waiver. Second, they avoid the blurry distinction between actual and potential conflicts of interest. Third, the rules clarify the information that clients must receive before waiving a conflict and the basis upon which clients are authorized to waive; they assure that a client's waiver decision is both informed and intelligent. Fourth, and perhaps most importantly, the proposed framework provides separate guidance to lawyers who, for personal reasons, are tempted to seek or accept a client's decision to waive. Such guidance is particularly important in cases like the hypothetical involving representation of joint criminal defendants, in which there are both valid and unsatisfactory reasons for clients to waive independent representation.[142] Rule 3 reminds lawyers that their

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138. Conflict-of-interest rules like Model Rules 1.7 to 1.9 are designed, in part, to codify lawyers' fiduciary obligations to their clients. *See, e.g.*, Goldman v. Kane, 329 N.E.2d 770, 772-73 (Mass. App. Ct. 1975) (imposing a strict standard of fiduciary care upon lawyers); RESTATEMENT, *supra* note 25, § 28 cmt. b ("A lawyer is a fiduciary."). As I have discussed elsewhere, the lawyer's obligation to prioritize her client's interests over her own extends to the retainer stage of the representation. *See* Zacharias, *Performance Agreements*, *supra* note 117 (manuscript at 18, 45) (noting a lawyer's duty to make sure the client is signing a reasonable retainer agreement).

139. *See, e.g.*, sources cited *supra* notes 45-47.

140. The comment to Model Rule 1.7 puts the determination in terms of whether a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances . . . ." MODEL RULES, *supra* note 2, Rule 1.7 cmt. para. 5; *see also* Fairfax Sav., F.S.B. v. Weinberg & Green, 685 A.2d 1189, 1213-14 (Md. Ct. Spec. App. 1996) (implementing the Model Rules comment).

141. In *Klemm*, discussed *supra* Parts IV and V, the current California rule appears to allow the litigants to waive the conflict. Under the ABA approach, the lawyer cannot accept the waiver if she believes the representation will "adversely affect [her] relationship" with either client, MODEL RULES, *supra* note 2, Rule 1.7(a), or if she believes "the representation will . . . be adversely affected." *Id.* Rule 1.7(b). Although the clients' consent might overcome the first hurdle, it probably fails under the second test; the representation of at least one client *is* likely to be adversely affected (though the client might reasonably believe that bearing the costs of the negative effect is warranted).

Under the rules proposed in this Essay, the result is straightforward. *Klemm* falls within Rule 1's nonwaivable conflict category. There is no need to weigh the advantages and disadvantages to the clients or to evaluate the nature of the consent because societal interests in the adversarial process trump autonomy concerns.

142. *See supra* text accompanying note 10. This hypothetical scenario implicates all of the possible reasons for allowing and overruling consent. A trusting relationship between a lawyer and her client typically is critical in the criminal context. *See, e.g.*, Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 169-70 (1996) (describing and questioning the traditional characterization of helpless and dependent criminal defendants). The client's right to choose a particular attorney also seems especially important. *See, e.g.*, Caplin &

decision to represent a client is separate from the client's decision to forgo independent representation. The lawyer's decisionmaking must be exercised in light of the lawyer's continuing duty to act in the client's best interests.

Quite apart from clarifying the resolution of conflict issues, adopting the proposed rules would have significant practical effects on the various actors in the legal system. Except in the small universe of nonwaivable conflict cases, courts would play a smaller role in deciding whether representation may proceed.[143] Once a lawyer consults with her clients and the lawyer agrees to proceed, the rules leave in the clients' hands the decision as to whether concurrent representation is in the clients' interests.[144] The only issue into which a court reasonably might inquire is whether a client was, or could be,[145]

Drysdale v. United States, 491 U.S. 617, 626 (1989) (recognizing a limited constitutional right to retain one's choice of counsel); Wheat v. United States, 486 U.S. 153, 159 (1988) (same). At the same time, however, the danger of unintelligent (or incompetent or coerced) waivers and the risk that one client's interests will be subordinated to those of the other are at their height. In the hypothetical scenario, it is likely that the lieutenant's interests will be subordinated to the kingpin's interests, either because the kingpin is paying for this privilege or because that subordination is part of the lieutenant's job description. Even in less dramatic circumstances, one of two codefendants usually can improve his lot by making a deal that incriminates the other. Moreover, independent systemic interests in requiring separate representation clearly come into play. *See supra* note 68 (discussing the interest in preventing stonewalling by the defendants and in preserving the proper functioning of the evidentiary process).

The California rule, again, leaves the choice to the defendants, as long as they are properly informed. Model Rule 1.7(b), in contrast, forbids the representation unless the lawyer can honestly conclude that neither client's representation will be adversely affected—as, for example, in situations in which stonewalling is likely to improve the lot of both clients. *See* MODEL RULES, *supra* note 2, Rule 1.7(b).

This Essay's proposed rules would divide the scenario into two kinds of cases. When the possible defenses at trial are different for the two defendants and partially inconsistent, Rule 1(b) would forcefully take the line that the Supreme Court has cautiously adopted. *See Wheat*, 486 U.S. at 159-60 (recognizing that the client's interests, though important, may need to give way to the societal interest in the proper administration of justice); *see also Caplin & Drysdale*, 491 U.S. at 626 (finding that a criminal defendant's right to the counsel of his choice is limited); Morris v. Slappy, 461 U.S. 1, 14-15 (1983) (holding that a client's right to the counsel of his choice sometimes must give way to the court's interest in the efficiency of trials). The system's interests govern. Joint representation is impermissible.

When, however, the actual trial defense of the two defendants is consistent and the only conflict involves possible cooperation and plea bargaining, Rule 1 does not apply. In ABA jurisdictions, Rule 2(c) may forbid the representation, because the lawyer's relationship with one defendant can be affected by the other defendant's interest in plea bargaining (or lack thereof). But when push comes to shove, the major issue under the proposed rules involves the application of Rules 3(e) and 3(f). The lawyer must decide whether the representation is reasonably consistent with the client's best interests and, in ABA states, whether one client would be better served by independent representation. If the answer is affirmative, then the lawyer must honor her fiduciary obligation to implement her client's interests by declining the representation. The resolution of this issue probably turns on whether stonewalling is likely to be the best approach for both clients.

143. *Cf.* Green, *supra* note 43, at 72-73 (arguing that the disqualification of lawyers for an alleged conflict ordinarily is "not an appropriate sanction" and should be reserved for cases in which the disqualification is necessary to prevent harm to the client); James Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 419, 423, 429 (arguing that the professional requirements requiring lawyers to avoid conflicts should be strict but that courts should not overuse these requirements to disqualify lawyers in litigation).

144. *Cf.* John F. Sutton, Jr., *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 REV. LITIG. 491, 493 (1997) ("A pressing but inadequately probed issue is the extent to which legal standards for conflicting interests should vary according to the remedy being sought.").

145. The question of whether the client "could be" adequately informed encompasses three main issues: first, whether the client has the mental wherewithal to comprehend the situation; second, whether the subject matter is so complex that comprehension becomes impossible, *see supra* note 47 and

adequately informed. The number of motions to disqualify counsel should therefore decrease dramatically.

That does not mean, however, that clients are unprotected from lawyer misconduct if they proceed with concurrent representation.[146] The proposal would shift the focus to the initial decision made by the lawyer to accept the case—a decision Rule 3 requires the lawyer to make with the clients' interests in mind. Failure of the lawyer to abide by this requirement—for example, in the real estate transaction hypothetical[147]—may subject the lawyer to discipline,[148] malpractice liability,[149] or a loss of fees.[150] The clients' "rights" thus become more a matter between lawyer and client than a subject of satellite litigation prompted by adversaries who are using the conflict rules for tactical advantage.[151]

Finally, as a theoretical matter, the proposed rules serve an educational function for lawyers.[152] By separating the issue of whether clients may consent

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accompanying text; and third, whether the lawyer-client relationship is sufficiently stable that the client can accept the information the lawyer provides and evaluate the lawyer's advice fairly. This Essay's proposals address the first and second issues in Rules 2(b) and 3(a)-(c) and the third issue in Rules 2(c) and 3(d)-(f).

146. *See* Epstein, *supra* note 35, at 579 ("To get a conflict-of-interest question wrong may . . . well expose the errant lawyer to a wide range of sanctions, including . . . forfeiture of fees, disciplinary proceedings, and perhaps in extreme cases even criminal sanctions.").

147. *See supra* note 11 and accompanying text. In the example of the representation of the buyer and seller of real estate, Rule 1 is inapplicable unless litigation over the matter is likely to occur. The system's interests in a properly functioning adversarial process do not come into play.

In situations like the real estate example, clients who have the information and capacity to understand the situation have the right to exercise their free will in the matter. So long as the lawyer fully informs the clients and, in jurisdictions following the ABA approach, reasonably believes her relationship with both clients is adequate to withstand the information-giving process, Rule 2 would allow the waiver.

That does not end the inquiry, however, for there is still the lawyer's role to consider. Rule 3 requires the lawyer to consider whether, given her function, she can in good conscience represent both sides. Most importantly, under Rule 3(e), she must consider whether the clients' decision is "reasonably consistent with [their] best interests in the matter," taking all cost and other considerations into account. In ABA states, Rule 3(f) would require her to make the further judgment of whether, realistically, the client or clients would be better off being represented by independent counsel.

148. *See, e.g.*, *In re* Dolan, 384 A.2d 1076 (N.J. 1978) (imposing professional disciplinary sanctions upon an attorney for representing a buyer and a seller in a single real estate transaction).

149. *See, e.g.*, Simpson v. James, 903 F.2d 372 (5th Cir. 1990) (upholding malpractice liability judgment for negligence caused by a lawyer's conflict of interest in representing concurrent clients); Ishmael v. Millington, 50 Cal. Rptr. 592, 595-96 (Ct. App. 1966) (noting the possibility of malpractice liability for representation tainted by a conflict of interest).

150. *See, e.g.*, Electro-Wire Prods. v. Sirote & Permutt, P.C., 40 F.3d 356 (11th Cir. 1994) (remanding a case for disgorgement of fees received, due to a serious conflict of interest ignored by a lawyer); Financial Gen. Bankshares v. Metzger, 523 F. Supp. 744, 762-63 (D.D.C. 1981) (relying on a conflict of interest in deciding a fee dispute), *vacated on other grounds*, 680 F.2d 768 (D.C. Cir. 1982); Goldstein v. Lees, 120 Cal. Rptr. 253, 255 (Ct. App. 1975) ("It is settled in California that an attorney may not recover for services rendered . . . in contradiction to the requirements of professional responsibility.").

151. *See, e.g.*, Green, *supra* note 43, at 74 (noting court's wariness of tactical disqualification motions); Lindgren, *supra* note 143, at 430, 434-36 (arguing that "disqualification is not the same as discipline"); O'Toole, *supra* note 70, at 314 nn.5-10 (cataloguing cases involving tactical disqualification motions).

152. To quote Nancy Moore's evaluation of the conflict-of-interest rules proposed in the Model Rules, the significance of new ethics regulation "is not limited to a change in the basis, or even

from whether the lawyer should accept the representation, the rules remind a lawyer of her role as a client representative and inform her that the role extends to the retainer stage of the representation.[153] The fact that violation of the rules can lead to discipline or malpractice liability is only of minor significance; the number of conflict cases that will give rise to punishment probably is small.[154] Far more significant is the guidance the proposed rules may provide to lawyers who, though willing to abide by professional norms, nonetheless have come to equate permissible conduct with appropriate conduct in the conflict-of-interests realm.

VII. CONCLUSION

This Essay has used California's unique conflict-of-interest rules as a starting point for analyzing the nature of consent and waiver in conflict-of-interest cases. Rulemakers in California and elsewhere have based current provisions on assumptions about client autonomy that are not clearly expressed. Likewise, some jurisdictions have unthinkingly limited client autonomy in ways that can undermine clients' ability to protect their own interests.

All modern conflict rules share California's fundamental respect for client autonomy. The ABA approach balances the interest in autonomy against the benefits of paternalism. As *Klemm* suggests, however, limits on client autonomy also may stem from independent societal interests that simply outweigh client rights. Or, they may encompass a distrust of lawyers' willingness to discharge their fiduciary obligations to clients.

In the process of promulgating rules to identify when waiver is permissible, virtually all the rulemakers have neglected to guide lawyers. All modern legal ethics codes fail to provide standards to govern the lawyer's decisionmaking regarding whether to accept a conflict-laden engagement.[155] Inevitably, this omission encourages lawyers to base their decisions on self-interest.

It is therefore fair to conclude that the conflict provisions in all American jurisdictions could stand improvement. This Essay's proposal attempts to distill the three necessary elements of a complete waiver rule: protecting client

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frequency, of attorney discipline—it should also educate the honest practitioner." Moore, *supra* note 1, at 212.

153. *See* Zacharias, *Performance Agreements*, *supra* note 117 (manuscript at 45) (arguing that lawyers are obligated to protect a client's interests even at the retainer stage); Zacharias, *Reply*, *supra* note 117 (manuscript at 5) (same).

154. *See, e.g.*, F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. LEGAL F. 193, 212-13 (citing a study of client complaints showing that, in one jurisdiction during 1970, only 13 of 2031 client complaints alleged a conflict of interest); *cf.* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.7:103, at 227-28 (1998 Supp.) (noting that professional discipline for engaging in conflicted representation has been rare but predicting an increase in disciplinary activity).

155. Of course, some codes do state when lawyers must reject particular client waivers, but that is not the same as informing lawyers when they *should* accept a case that a client may offer them. *See supra* text accompanying notes 136-140.

autonomy in an appropriate way, safeguarding societal interests that outweigh autonomy, and guiding lawyers in fulfilling their role as servants of client interests. More radical methods of implementing these elements are possible. One might write specialized rules tailored to particular areas of practice,[156] types of lawyers,[157] or different clienteles.[158] Whatever approach rulemakers adopt, however, the core message of this Essay's proposal remains the same: Code drafters need to remember the multiple purposes their rules are designed to serve.

In analyzing these conflict-of-interest issues, this Essay has taken a traditional route to reform. It addresses state authorities that are responsible for drafting professional rules within their jurisdictions. Again, more radical alternatives are available. The ABA's Ethics 2000 project, which is designed to revisit and react to flaws in the model professional codes,[159] might consider revamping the model waiver rules.[160] Yet even without national attention to the issues, the proposed waiver rules are sufficiently narrow and limited that

156. As I have discussed at length elsewhere, there are categories of specialized practice that give rise to special ethical dilemmas. *See* Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 190-204 (1997). For example, the conflict-of-interest issues that arise in elder law and corporate situations often seem distinct from those that arise in ordinary practice, both in their nature and frequency. *See id.* at 195-96 (describing special considerations that distinguish elder law and corporate practice).

157. For example, there may be reasons to distinguish between solo or small-firm practitioners and large-firm lawyers, either because of the nature of the lawyers' resources or the types of clients they represent. *See id.* at 188 (distinguishing various settings of practice for the purposes of writing professional rules). The difficulty in identifying conflicts of interests in large firms is magnified because a firm's lawyers may not be aware of the past and present clients represented by other lawyers in the firm. They may not be familiar with the legal issues implicated by the cases of other firm lawyers. At the same time, mechanisms for screening conflicts in large firms may be relatively sophisticated. It may also be possible to separate conflicted lawyers within a firm through a "Chinese Wall"—something that is not possible for solo or small-firm practitioners.

158. This Essay has already noted some characteristics that distinguish clients in small towns and those who do business in specialized fields. *See supra* text accompanying note 42. The nature of particular types of clients—particularly their mental capacity and sophistication—is another important factor in evaluating the validity of waivers. Rulemakers might consider drafting specialized conflict and waiver rules for particular types of clients. *See* Zacharias, *supra* note 156, at 186-90 (discussing the possibility of categorizing ethical roles according to a lawyer's clientele).

159. *See ABA Starts "Ethics 2000" Project for Sweeping Review of Rules*, ABA/BNA LAWYERS' MANUAL OF PROFESSIONAL CONDUCT: CURRENT REPORTS (May 28, 1997), at 140 (describing the goal of the Ethics 2000 project as "undertak[ing] an in-depth review and assessment of ethics rules during the final years of the second millennium").

160. The recently-adopted *Restatement* presented an opportunity for reform. As promulgated, however, the proposed *Restatement* purports to restate existing state law and, with some clarifying wrinkles, it does just that. *See* RESTATEMENT, *supra* note 25, §§ 201-02, 206, 209-11. *See generally* Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541 (1997) (analyzing the proposed *Restatement* provisions relating to conflicts of interest).

In one respect, the *Restatement*'s clarification foreshadows this Essay's proposals. Section 202(2) directly forbids representation with respect to certain nonwaivable conflicts, including situations in which "one client will assert a claim against the other in the same litigation" or in which "it is not reasonably likely that the lawyer will be able to provide adequate representation." RESTATEMENT, *supra* note 25, § 202(2). This provision has the virtue of highlighting the existence of nonwaivable conflict situations. But to a large extent, the provision continues the Model Rules' failure to tailor its rule adequately to the reasons why consent should not be honored.

each state should be able to evaluate them independently.[161] The rules can fit any state's conception of what constitutes a conflict of interest. The rules' terms can easily be modified to fit special preferences of individual states.

This Essay's analysis should not be interpreted as denying the very real differences between California and the ABA regarding conflicts of interest and conflict waivers. The two approaches to client consent reflect a substantive disagreement about the emphasis legal ethics should place on autonomy and the degree to which lawyers should act paternalistically towards clients. Nevertheless, as *Klemm* illustrates, California's bright-line rule probably overemphasizes the proautonomy position.[162] The ABA anticonsent provisions seem equally exaggerated in that they purport to forbid clients to waive conflicts even for good reasons.[163]

The flaws in both approaches stem from the code drafters' failure to analyze the meaning of autonomy and their failure to confront the real dangers of client waivers. These are dangers that impose costs not only on clients, but also on the legal system and the legal profession. This Essay has attempted to bring these unspoken considerations to light.

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161. I have suggested elsewhere the possibility of federalizing legal ethics. *See* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994). The main difficulties recurring with respect to conflicts-of-interest rules, however, do not relate to disuniformity in state regulation or to peculiarly federal issues. Thus, congressional legislation would not seem to be the most appropriate means of addressing the issues discussed in this Essay.

162. *See supra* text accompanying notes 108-111.

163. *See supra* text accompanying notes 111-120.