Ethics Opinion 309

Advance Waivers of Conflicts of Interest

Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct. Such waivers, however, must comply with the overarching requirement of informed consent. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character. Regardless of whether reviewed by independent counsel, an advance waiver of conflicts will not be valid where the two matters are substantially related to one another.

Applicable Rules

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification: General Rule)
- Rule 2.2 (Intermediary)

Inquiry

The Ethics Committee has been asked whether advance waivers of conflicts of interest[1] are permissible and, if so, whether there are requirements for such waivers additional to, or different from, those prescribed by Rules 1.7 and 1.9 for waivers generally.[2] For purposes of this opinion, the term "advance waiver" means one that is granted before the conflict arises and generally before its precise parameters (e.g., specific adverse client, specific matter) are known.[3]

Discussion

The practice of law in this country has changed markedly in the century since the ABA Canons of Professional Ethics were promulgated. As was the case then, many lawyers practice in relatively small firms, or as solo practitioners, in a single geographic location. Increasingly, though, law firms have hundreds or even thousands of lawyers, with multiple offices across the country and around the globe. In such firms, individual partners or associates may not even know one another, let alone the identities of the clients their colleagues represent or the details of the matters their colleagues are pursuing for such clients.

Moreover, the manner in which clients—particularly commercial clients—use lawyers is quite different than in the past. The days when a large corporation would send most or all its legal business to a single firm are gone. Today,

> when corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm's New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers.

ABA Formal Op. 93-372 (1993) ("ABA Opinion"), *in* American Bar Association, Formal and Informal Ethics Opinions, 1983-1998, at 167-68. This means, for example, that if the law firm hypothesized in the ABA Opinion is looking out for its own interests, it might decline the Miami representation. This in turn would deny the client's choice of a lawyer and would reduce its potential choice of lawyers generally.

One alternative is to let clients waive such conflicts if they view such waivers as being in their interest. This approach has been recognized as proper at least since the promulgation of the ABA Canons of Ethics in 1908. *See* American Bar Association, Opinions on Professional Ethics 22 (1967) (text of Canon 6); D.C. Code of Professional Responsibility, Disciplinary R. 5-101(A) (1991 ed.).[4] The District of Columbia Rules of Professional Conduct ("D.C. Rules") prescribe the conflicts of interest that prevent a lawyer from accepting and, in some instances, continuing, a representation. D.C. Rules 1.7, 1.9. Where the conflict involves two current clients, a lawyer[5] may not advance adverse positions on behalf of those clients in the same matter. D.C. Rule 1.7(a). That conflict is not waivable. *See id.*, comments [2]-[4], [6].

Rule 1.7(b) sets out four types of current-client conflicts that may be overcome by a waiver. These are conflicts in which—

> (1) in a matter involving a specific party or parties, the position to be taken by the lawyer's client is adverse to the position taken by another client of the lawyer in that matter, even though the other client is represented by a *different* lawyer;
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> (2) the representation "will be or is likely to be adversely affected by [the lawyer's] representation of another client";
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> (3) "representation of another client [of the lawyer] will be or is likely to be adversely affected by such representation"; or
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> (4) "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."

Conflicts under subparagraphs (2), (3), and (4) of Rule 1.7(b) sometimes are referred to as "punch-pulling" conflicts because they address situations where a lawyer's commitment to the adverse client, or to some personal situation related to the representation, arguably might tempt her to "pull her punches" on behalf of her client.

"The difference between Rule 1.7(a) and Rule 1.7(b) is that in the former, the lawyer is representing multiple interests in the same matter, while in the latter the lawyer is representing a single interest, but a [current] client of the lawyer who is represented by *different* counsel has an interest adverse to that advanced by the lawyer." D.C. Rule 1.7, comment [1] (emphasis added).

Where a *former* client is involved, a conflict exists only if the adversity arises in a matter that is the same as, or substantially related to, the matter in which the lawyer formerly represented that client. D.C. Rule 1.9; *see Brown v. D.C. Bd. of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc); *In re Sofaer*, 728 A.2d 625 (D.C. 1999) (decided under Rule 1.11).

As noted above, a conflict under Rule 1.7(a) may *not* be waived. *See* D.C. Rule 1.7, comments [2]-[4], [6]. A conflict under Rule 1.7(b) may be waived, however, "if each potentially affected client consents to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." D.C. Rule 1.7(c). "Consent is "a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question." D.C. Rules, Terminology, ¶ [2]. In turn, "consultation" means "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Id.* ¶ [3]. A waiver must be predicated upon disclosure sufficient to allow the client to make "a fully informed decision" and to make the client "aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation." D.C. Rule 1.7, comment [19]; *see In re James*, 452 A.2d 163, 167 (D.C. 1982) (requiring "a detailed explanation of the risks and disadvantages to the client").

A conflict of interest under Rule 1.9 (former client) also may be waived. D.C. Rule 1.9, comment [3]. Such a waiver is valid "only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client." *Id.*[6] That is, the Rules require that a client who is asked to waive an actual or potential conflict have an adequate appreciation of what protection she is giving up. This requirement is subjective, meaning that more explanation may be required to satisfy the Rules' consent and consultation criteria where a less sophisticated client is involved than where a more sophisticated client is being asked to waive its rights. *See* D.C. Rule 1.7, comment [20]; ABA Opinion at 170.

We know of no District of Columbia Court of Appeals decision that expressly permits or prohibits advance waivers of conflicts of interest.[7] The D.C. Rules are silent on whether a client may give an advance waiver as to itself, though a comment to Rule 1.7 permits an organization client to "give consent to the lawyer in advance to engage in representations adverse to an affiliate, owner or other constituent of the client . . . so long as the requirements of Rule 1.7(c) can be met." D.C. Rule 1.7, comment [17]. Similarly, this committee has not addressed the issue directly, though we have

expressed doubt about the enforceability of advance waivers, "especially where the client is not a sophisticated consumer of legal services," D.C. Ethics Op. 265 (1996), and doubt whether advance waiver of a client's right to accept a confidential settlement could have been the product of informed consent, D.C. Ethics Op. 289 (1999). Nevertheless, we do not write on a clean slate: The American Bar Association's Committee on Ethics and Professional Responsibility, the Restatement of the Law Governing Lawyers, the ABA's Ethics 2000 Commission,[8] various courts, bar associations in other United States jurisdictions, and at least one respected academic figure have said that while advance waivers are not per se improper, they will be sustained only where the client can be said to have given informed consent.

The ABA Opinion, for example, observes that "'[u]nlike the client issuing a specific waiver, the client issuing a prospective waiver cannot know what confidences he will in the future disclose or in what adverse representations the attorney may engage.'" ABA Opinion at 171 (quoting Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 Mich. L. Rev. 1074, 1082 (1981)). Accordingly, that opinion states that a prospective waiver probably will not stand unless it identifies the opposing party or at least a class of potential opponents, as well as giving the client sufficient information to appreciate "the nature of the likely matter and its potential effect on the client." *Id.* at 171. The ABA Opinion also cautions that a waiver of *conflicts* does not constitute a waiver of *confidentiality*, *see infra* n. 10, and suggests strongly that any advance waiver be in writing, ABA Opinion at 172-73.

The ABA Opinion also requires that when a conflict arises, the lawyer revisit the judgment(s) she made originally about the propriety of the waiver. *Id.* at 171. This does not apply literally in the District of Columbia because the ABA Model Rules of Professional Conduct ("Model Rules") require that the lawyer "reasonably believe[] the representation will not adversely affect the relationship with the other client" *in addition to* requiring that the clients consent after consultation. Model Rule 1.7(a). The D.C. Rules, on the other hand, permit a lawyer to seek a waiver *even though* the representation reasonably may be expected to affect adversely the relationship with the other client. D.C. Rule 1.7(b)(2)-(3), 1.7(c). We nevertheless believe that a prudent lawyer in this jurisdiction should revisit the issue when a conflict actually arises, so as to ensure that adequate disclosure will be made to the new client from whom a contemporaneous waiver of conflicts is being sought, *see* ABA Formal Op. 99-415, and that the lawyer is satisfied that she will be able to represent both clients adequately.

The Restatement does not rule out advance conflict waivers but says that they are

> subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.
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> On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts

> that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Restatement of the Law Governing Lawyers, § 122, comment *d* (2000).

The Restatement adds that if, between the time a prospective waiver is given and the time a conflict arises, "a material change occurs in the reasonable expectations that formed the basis of a client's informed consent, the new conditions must be brought to the attention of the client and new informed consent obtained." *Id.* Presumably, by "material change" the comment means something short of the change that itself creates the conflict, else there could be no advance waivers.

The changes in the Model Rules recommended by the ABA Ethics 2000 Commission include a comment on the subject of advance conflict waivers. Commission on Evaluation of the Rules of Professional Conduct, Report to House of Delegates (May 2001 rev.) ("Ethics 2000 Report"), prop. Model Rule 1.7, comment [22], available at www.abanet.org/cpr/e2k-report_home.html.[9]

The general test of such a waiver is "the extent to which the client reasonably understands the material risks that the waiver entails." *Id.* This in turn depends on the completeness of the explanation of possible conflicts and the "actual and reasonably foreseeable adverse consequences" of such conflicts. *Id.* Therefore, consent to a type of conflict with which the client is familiar is more likely to be effective than a general or open-ended consent. *Id.* Thus,

> if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

Id. The Commission's comment on "informed consent" echoes this theme:

> In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally such persons need less information and explanation than others, and *generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.*

Id., Rule 1.0, comment [6] (emphasis added).

Most courts that have considered this issue have ruled along the lines set out by the ABA Opinion, the Restatement, and the proposal of the Ethics 2000 Commission. Advance conflict waivers have been sustained where the potential adverse party was known and identified, the client giving the waiver was sophisticated, and the waiver had been reviewed by the client's in-house counsel. *E.g., United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981); *Fisons Corp. v. Atochem North Amer.,*

Inc., 1990 U.S. Dist. LEXIS 15284, 1990 WL 180551 (S.D.N.Y. 1990); *Interstate Properties v. Pyramid Co. of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982). The *Fisons* court stated that where the waiving client is sophisticated, notification of the potential conflict itself is sufficient to satisfy the requirement. *Fisons Corp.*, 1990 WL 180551, at *5. Moreover, at least one court has held that an advance waiver may be implied where the objecting client, including its in-house counsel, had extensive knowledge of the law firm's longtime representation of the other client. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977).

On the other hand, advance waivers have been struck down where they are unduly general and unsophisticated clients are involved. Correspondence with the objecting client's nonlawyer employees (claims adjusters), for example, was held insufficient to constitute "consultation" or "full disclosure." *Florida Ins. Guaranty Ass'n, Inc. v. Carey Canada, Inc.*, 749 F. Supp. 255 (S.D. Fla. 1990); *see Marketti v. Fitzsimmons,* 373 F. Supp. 637 (W.D. Wisc. 1974) (where client a labor union local, mere knowledge of second representation insufficient to constitute waiver). Similarly, an open-ended release of the lawyer from "all rights, burdens, obligations, and privileges which appertain to his [former] employment," coupled with consent for the lawyer to "engage his services pro and con, as he may see fit," was held (notwithstanding the relative sophistication of the client) grossly insufficient to justify the lawyer's subsequent activity—including disclosure of confidential information—adverse to the former client. *In re Boone*, 83 F. 944 (N.D. Calif. 1897). Instead, said the court, the release would be effective only if it were "positive, unequivocal, and inconsistent with any other interpretation." *Id.* at 956. A more recent decision held that a general advance consent covering all unrelated matters is insufficient to waive adversity in litigation unless it expressly refers to "litigation." *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

> [F]uture directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information.

Id. at 1360; *see Hasco, Inc. v. Roche*, 700 N.E.2d 768 (Ill. App. 1998) (narrow construction of advance waivers). *But see Zador Corp. N.V. v. Kwan*, 31 Cal. App. 4th 1285, 1300-01, 37 Cal. Rptr. 2d 754, 763 (Cal. App. 1995) (construing general waiver, given in joint representation context, to include litigation).

At least two major local bar associations have opined that advance waivers of conflicts are permissible, particularly where the waiving client is sophisticated. N.Y. County Lawyers' Ass'n Ethics Op. 724 (1998); Los Angeles County Bar Ass'n Formal Op. 471 (1994). The New York County opinion adopts the ABA Opinion's recommendations regarding disclosure of potential adverse clients (or types of clients) and types of adverse representations, adding that the lawyer also should disclose the steps to protect the client (e.g., erection of an ethical wall) that will be taken should a conflict arise. The ultimate issue, the opinion states, is whether "the subsequent conflict should have been

reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought." Taking cognizance of the subjective nature of informed consent, the New York County opinion observes that for

> a sophisticated client, such as a large corporation with in-house counsel, the adequacy of disclosure will be put to a less stringent test than if the client were a small business, an individual unsophisticated with respect to legal matters, a child or an incapacitated person.
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> . . . .
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> Indeed, a "blanket" waiver of future conflicts involving adverse parties may be informed and enforceable depending on the client's sophistication, its familiarity with the law firm's practice, and the reasonable expectations of the parties at the time consent is obtained. For example, a subsequent representation may be said to have been reasonably contemplated by a sophisticated client, advised by in-house counsel, who is familiar with a law firm's multi-disciplinary practice and wide variety of clients.

Finally, a prominent academic recently has suggested a "bright line" standard under which even a broad advance conflict waiver generally should be enforced "if it is unambiguous and the client is independently represented by another lawyer, including in-house counsel, at the time the waiver is given." Richard W. Painter, *Advance Waiver of Conflicts*, 13 Geo. J. Legal Ethics 289, 312 (2000) ("Painter"); *accord* Brian J. Redding, *Suing a Current Client: A Response to Professor Morgan*, 10 Geo. J. L. Ethics 487, 497-99 (1997). Professor Painter suggests using solely the "independent representation" criterion rather than coupling it to the "sophisticated client" criterion suggested by the Restatement. Painter, at 327. His approach avoids the uncertainty inherent in making the validity of the waiver depend on a subjective judgment of whether a client is "sophisticated." *Id.*

Professor Painter also suggests that the "substantially related" criterion that applies where a former client is involved, *see* D.C. Rule 1.9; *Brown*, 437 A.2d 37, should be part of the test of which conflicts can be waived in advance. Painter, at 321.

> Although loyalty and confidentiality concerns are heightened when a lawyer is concurrently representing clients with adverse interests, the sweeping prohibition of concurrent conflicts rules can sometimes be intolerable. Many lawyers respond by not taking on a new client who might in the future have interests adverse to current clients, knowing that once they begin representing a client, they will not be permitted to represent other clients in matters where the first client's interests are adverse.
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> . . . .
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> Although the risk of adverse use of confidential information is increased by a waiver that imposes the substantial relationship test on concurrent conflicts, information learned in an unrelated representation is generally of limited value and the client is furthermore still

protected by separate prohibitions on disclosure or adverse use of client information (Model Rules 1.6 and 1.8(b)).

Id.

Conclusions

Thus the modern view—held by the courts, the American Bar Association, local bar associations and the American Law Institute—is that advance waivers of conflicts of interest are permissible, within certain limits and subject to certain client protections. We conclude that the D.C. Rules are consistent with that view and that they permit advance waivers under Rules 1.7 and 1.9. *See United Sewerage Agency*, 646 F.2d at 1349-50. "Clients who are fully advised should be able to make choices of this kind if they wish to do so." *Id.* at 1350.

Such waivers, however, are permissible only if the prerequisites of the D.C. Rules—namely "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation"—are satisfied. *See* D.C. Rule 1.7(c). As noted above, the client must have "information reasonably sufficient to permit the client to appreciate the significance of the matter in question," D.C. Rules, Terminology, ¶ [3], and to allow the client to make "a fully informed decision" with awareness "of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation." D.C. Rule 1.7, comment [19]; *see In re James*, 452 A.2d at 167 (requiring "detailed explanation of the risks and disadvantages to the client"). Ordinarily this will require that *either* (1) the consent is specific as to types of potentially adverse representations and types of adverse clients (e.g., a bank client for whom the lawyer performs corporate work waives the lawyer's representation of borrowers in mortgage loan transactions with that bank) *or* (2) the waiving client has available in-house or other current counsel independent of the lawyer soliciting the waiver.

Further, the lawyer must make full disclosure of facts of which she is aware, and hence cannot seek a general waiver where she knows of a specific impending adversity unless that specific instance also is disclosed. *See* D.C. Rule 1.7, comment [19]; *City of El Paso v. Salas-Porras*, 6 F. Supp. 2d 616, 625-26 (W.D. Tex. 1998). A corollary of this rule is that if the lawyer cannot disclose the adversity to one client because of her duty to maintain the confidentiality of another party's information, the lawyer cannot seek a waiver and hence may not accept the second representation. D.C. Rule 1.7, comment [19] ("If a lawyer's obligation to one or another client or to others or some other consideration precludes making . . . full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue").

A conflict arising from the lawyer's appearance on both sides of the same matter is, as noted above, nonwaivable. D.C. Rule 1.7(a) & comment [1]. Because of the greatly increased potential for misuse of client confidences—inadvertently or otherwise—advance waivers should exclude from their coverage not only the same matter but also any substantially related matter. *See* Painter, at 321. For this reason, advance waivers ordinarily will not come into play in former-client situations under Rule 1.9

because disqualification under that rule extends only to matters that are the same as, or substantially related to, the initial matter.

Further, although the D.C. Rules do not require that waivers be in writing, D.C. Rule 1.7, comment [20], we join the ABA Committee on Ethics and Professional Responsibility in recommending that—for the protection of lawyers as well as clients—advance waivers be written. *See* ABA Opinion at 173. We note in this connection that the ABA Ethics 2000 Commission has proposed that the Model Rules require all waivers to be written. Ethics 2000 Report, prop. Model Rule 1.7(b)(4) & prop. comment [20].

Finally, any decision to act on the basis of an advance waiver should be informed by the lawyer's reasoned judgment. For example, a prudent lawyer ordinarily will not rely upon an advance waiver where the adversity will involve allegations of fraud against the other client or is a litigation in which the existence or fundamental health of the other client is at stake.

In accordance with the foregoing, a client not independently represented by counsel (including in-house counsel) generally may waive conflicts of interest only where specific types of potentially adverse representations or specific types of adverse clients are identified in the waiver correspondence. A client that is independently represented by counsel generally may agree to waive such conflicts even where the specificity requirements set out in the preceding sentence are not satisfied.[10]

Appendix

Sample Advance Waiver of Conflicts of Interest

Below is a sample of text for an advance waiver of conflicts of interest. The committee does not view this text as authoritative or exclusive:

"As we have discussed, the firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on _____, we have or may have clients whom we represent in connection with _____.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you."

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1. Waivers of conflicts of interest, which are the principal subject of this opinion, are different from waivers of confidentiality. See infra note 10.

2. D.C. Rule 1.8 addresses conflicts of interest arising from certain types of transactions. This opinion does not address waivers of such conflicts.

3. We accordingly view a conflict waiver given as part of an agreement for representation by a single lawyer of multiple clients, see D.C. Rules 1.7(c), 2.2, as more in the nature of a current than an advance waiver.

4. "Giving effect to a client's consent to a conflicting representation might rest either on the ground of contract freedom or on the related ground of personal autonomy of a client to choose whatever champion the client feels is best suited to vindicate the client's legal entitlements." Charles Wolfram, Modern Legal Ethics § 7.2.2, at 339 (1986).

5. Because a conflict of interest under Rule 1.7 or 1.9 is imputed to a lawyer's entire firm, D.C. Rule 1.10(a); D.C. Ethics Op. 279 (1998), "lawyer" in this discussion comprehends not only the individual lawyer but her entire firm. Thus, if one lawyer in a law firm is disqualified by reason of Rule 1.7 or Rule 1.9, the entire firm is disqualified. D.C. Rule 1.10(a); see D.C. Rule 1.7, comment [23]; D.C. Rule 1.9, comment [3]; D.C. Ethics Op. 279 (1998).

6. Where the former client is the government, issues of disqualification, imputation, and waiver are governed by Rule 1.11 rather than Rule 1.9. D.C. Rule 1.9, comment [3].

7. A 1994 decision expressly declined to rule that an advance waiver by an individual member of a business partnership of a lawyer's representation of the partnership as well as the individual partners is binding as a matter of law. Griva v. Davison, 637 A.2d 830, 846 (1994). The statement was dictum, however, and in any event is consistent with this opinion.

8. The Ethics 2000 Commission formally is known as the Commission on Evaluation of the Rules of Professional Conduct.

9. The Commission's recommendations will not become part of the Model Rules until and unless they are adopted by the ABA House of Delegates. The House of Delegates began consideration of the proposals at its August 2001 meeting but did not complete the effort and is scheduled to resume consideration of the report at its February 2002 meeting. ABA Stands Firm on Client Confidentiality, Rejects "Screening" for Conflicts of Interest, 70 U.S.L.W. 2093, 2095 (Aug. 14, 2001). Comment [22] was considered expressly at the August 2001 meeting but a proposed amendment that would have altered or deleted it was not adopted. Id. at 2094

10. Waivers permitting the adverse use or disclosure of confidential information, see D.C. Rule 1.6(c)-(d), may not be implied from waivers of conflicts of interest. Because of their considerable potential for mischief, waivers of confidentiality require particular scrutiny and may be invalid even when granted by sophisticated clients with counsel (in-house or outside) independent of the lawyer seeking the waiver. See Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 229 (7th Cir. 1978) (expressing doubt as to the efficacy of "a vague, general" advance waiver of confidentiality); In re Boone, 83 F. 944 (prohibiting waiver of confidentiality requirement). But see ABA Formal Op. 99-415 (1999) (suggesting that a more flexible standard may apply where the waiving client is sophisticated or has in-house counsel); Brian J. Redding, The "Confidential Information" Conflict—Is It Time for the ABA to Rethink its Position on Waiver?, Prof. Law., Winter 1999, at 10 (same). As with conflicts of interest, see supra note 3, we view the waivers of confidentiality that commonly are found in joint and "intermediary" representation situations, see D.C. Rules 1.7, 2.2, as constituting current, rather than advance, waivers.