A Clumsy Couple: The Problem of Applying Model Rule 1.7 in Transactional Settings

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INTRODUCTION

The American Bar Association's Model Rules of Professional Conduct ("Model Rules") have long addressed conflicts of interest, with fluctuating degrees of stringency.[1] For as long as the rules have been in place, legal scholars have grappled with how lawyers can work within the confines of the rules to serve their clients best, as well as how the rules might better align with what clients seek and expect from their legal representation. In their current form, the Model Rules address conflicts of interest in Rule 1.7. However, both this rule and the Model Rules more generally are not one size fits all. The Model Rules were written largely with litigators in mind, and thus applying them to transactional matters is often awkward and tenuous.[2] In this Note, I will argue that Model Rule 1.7 should be amended to account for the differences in the ways that litigators and transactional attorneys should and do conceptualize conflicts of interest in their practices. Part I outlines the history of Rule 1.7 and its predecessors, and walks through Rule 1.7 and the comments as they exist today. Part II details the reasons that legal scholars argue Rule 1.7 is a valuable and necessary rule. Part III describes the incongruities between Rule 1.7's parameters and the realities of transactional lawyering. Part IV discusses solutions that have been put forward to make up for the drawbacks of Rule 1.7 in its current iteration. Finally, Part V offers my proposed solution to the problem of applying Rule 1.7 to transactional matters: amend the rule and create subparts that pertain specifically to transactional lawyers, who have less need for a ban on conflicts of interest.

I. THE MACHINATIONS OF RULE 1.7

Over a span of decades, the model rules and codes have evolved to accommodate the realities of the legal profession. The 1908 Canons of Professional Ethics addressed only direct conflicts, stating that a conflict of interest results "when, on behalf of one client, it is [the lawyer's] duty to contend for that which duty to another client requires him to oppose."[3] Rather than proscribing such conflicts, the relevant canon only required "express consent of all concerned given after a full disclosure of

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1. *See infra* Section I.
2. *See infra* Section IV.
3. CANONS OF PROF'L ETHICS, Canon VI (AM. BAR ASS'N 1908).

the facts."[4] The 1969 Model Code again did not forbid simultaneous representation of clients with conflicting interests in separate matters, leaving the work of evaluating such potential conflicts to the discretion of the lawyer in each scenario.[5] It was initially unclear whether the 1974 amendment to the Model Code forbade lawyers from representing clients with conflicting interests in unrelated matters; the amended rule stated that representation "likely to involve the lawyer in representing different interests" was conflicted representation.[6] Despite this characterization, the ABA did not "explicitly interpret" the rule to forbid representation of conflicted interests in unrelated matters until 1982.[7]

Today, proscription of conflicted representation is codified as Rule 1.7 in the Model Rules of Professional Conduct. Rule 1.7 forbids what it deems "concurrent conflicts of interest," which occur when, as expressed in Rule 1.7(a):

> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[8]

The phrases in Rule 1.7(a) that demand interpretation, and upon which a clear understanding of concurrent conflicts rest, are "directly adverse" and "materially limit." Comment 6, which deals with the meaning of direct adversity, more restates than defines the term, declaring that a lawyer "may not act as an advocate in one matter against a person the lawyer represents in some other matter."[9] The comment further notes that two clients with economically opposed interests, such as two clients competing in the same market, do not harbor a conflict that rises to the level of "directly adverse."[10]

Comment 7 explicitly addresses how a directly adverse conflict may arise in a transactional setting, offering the example of a lawyer who represents a seller in one matter and who simultaneously is representing the buyer in a separate matter.[11] While these tidbits provide a bit of interpretative assistance, the ground they cover is minimal in the face of the many ways conflicts can surface[12]; therefore, it remains largely up to the lawyer in each situation to determine when direct adversity exists between two clients—and thus, when simultaneous representation is forbidden.[13]

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4. *Id.*
5. Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEGAL ETHICS 207, 216 (2012).
6. *Id*. (quoting Model Code R 5-105(A) (1974).
7. *Id.* at 216–17.
8. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N) [hereinafter Model Rule 1.7].
9. Model Rule 1.7, *supra* note 8, cmt. 6 (AM. BAR ASS'N).
10. *Id.*
11. Model Rule 1.7, *supra* note 8, cmt. 7.
12. For examples of conflicts of interest in transactional settings, see John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 502–05 (1993).
13. *See id.* at 472.

The comments to Rule 1.7 are even less helpful in defining material limitation, using the term itself in the definition. Comment 8, in part, reads:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.[14]

The comment does provide factors to consider when evaluating whether material limitation exists. However, in this list of factors, the term "material limitation" is all but used again to define itself:

> The critical questions [in evaluating whether material limitation exists] are the likelihood that a difference in interests will eventuate and, if it does, whether it will *materially interfere* with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[15]

Once again, it is ultimately up to the lawyer to determine what scenarios warrant abstention from representation. And of course, with such vast interpretive leeway comes vast opportunity to circumvent the rule's requirements.[16]

Even in the face of a concurrent conflict, a lawyer can undertake both representations if, as Rule 1.7(b) lays out:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.[17]

The Model Rules refer to representations that can be resolved through informed, written consent as "consentable."[18] Per the language of Rule 1.7(b)(2) and (3), only two scenarios lead to conflicts that are clearly not consentable: when a lawyer represents adverse parties in the same litigation, and when the representation is

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14. Model Rule 1.7, *supra* note 8, cmt. 8.

15. *Id.* (emphasis added).

16. *See* Dzienkowski, *supra* note 11, at 475 ("[A]s long as the lawyer or law firm can determine that [the conflict] will not have a material effect on the lawyer's conduct in the other representation, the [] conflict never rises to a conflict of interest that must be disclosed to the client.").

17. Model Rule 1.7(b), *supra* note 8.

18. Model Rule 1.7, *supra* note 8, cmt. 15.

forbidden by law.[19] In all other scenarios, whether a conflict is consentable is a question that must be answered on a case-by-case basis.[20]

Since 2002, with the revision of Rule 1.7 and its comments, advance consent to future conflicts of interest has been presumed valid, so long as it adheres to a few guidelines.[21] In order for consent to be effective, a lawyer must inform her client of "the relevant circumstances and of the material and reasonably foreseeable ways" that a conflict could interfere with the client's interests.[22] It is essential that the lawyer be as specific and comprehensive as possible about the nature of the conflicts that could arise and the implications of those conflicts; consent is void if it is too general to give the client an idea of the material risks involved.[23] The lawyer must also inform her client of the "reasonably available alternatives" to the proposed course of conduct.[24] Moreover, a lawyer must seek and obtain consent a second time if an unanticipated conflicting situation arises.[25]

A consent letter contains a number of components and safeguards: information about the nature of any conflicts already present; an expression of the lawyer's belief that the representation will not adversely affect the client's interests; a description of how the firm plans to maintain confidentiality; a list of the precise ways in which conflicts could occur during the course of the representation, and what action the lawyer will take in such an event.[26] As of 2000, the informed consent must be confirmed in writing.[27] However, the writing need not be confirmed by the client—a writing from the lawyer "confirming an oral informed consent" suffices.[28]

II. TRADITIONAL JUSTIFICATIONS FOR RULE 1.7

Caselaw and scholars of the Model Rules note that the main reason most proponents of Rule 1.7 support it is not because they believe that lawyers will be tempted to treachery without it; rather, proponents worry that, without realizing it, lawyers representing two adverse interests at the same time will be drawn to one client or interest and thus more dedicated to that representation.[29] A 1978 Third Circuit case, *IBM Corp. v. Levin*, illustrates this point well. The *Levin* court expressed worry that, in conflicted representation, a lawyer would subconsciously be more

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19. *Id.* at cmts. 16 and 17.
20. *Id*. at cmt. 15.
21. Lauren Nicole Morgan, *Finding Their Niche: Advance Conflicts Waivers Facilitate Industry-Based Lawyering*, 21 GEO J. LEGAL ETHICS 963, 967 (2008).
22. Model Rule 1.7, *supra* note 8, cmt. 18.
23. *Id.* at cmt. 22.
24. *Id.* at cmt. 20
25. *Id.* at cmt. 22.
26. Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 151 (2003).
27. Carl A. Pierce, *Ethics 2000 and the Transactional Practitioner*, 3 Transactions: Tenn. J. Bus. L. 7, 12 (2002).
28. *Id.*
29. Bussel, *supra* note 5, at 217.

loyal to one client than the other.[30] *Levin* is often interpreted as placing a wholesale ban on representing clients with adverse interests in unrelated matters, unless informed consent is present, in order to curb lawyers' potential to distribute their work unjustly—whether consciously or unconsciously.[31]

Moreover, proponents emphasize that manifestations of loyalty matter deeply to clients. As Susan Shapiro notes: "Clients generally fail to understand, appreciate, or sympathize with the nuances and loopholes of the conflict-of-interest rules that bind their lawyers. But they have clear conceptions and expectations of loyalty . . . and many redistribute their legal business accordingly."[32]

Model Rule 1.7 most elegantly applies to litigation settings. In litigation scenarios, where interests are naturally and diametrically opposed, conflicts are easier to detect. Conflicts also threaten more damage in litigation settings, where only one party's interests will be upheld, as opposed to in transactional settings, where the parties' interests overlap. That being said, Shapiro points out that in many transactions, enough differences in priorities and goals exist to warrant applying Rule 1.7.[33] In transactions, for example, terms such as the price, interest rate, disclosure obligations, terms of payment, and collateral are all matters on which the parties will disagree and in which they will want to protect their interests.[34] Shapiro goes so far as to say that, "[i]n some instances, there is actually more at stake and more variation in the potential outcome of a deal than in a routine piece of litigation," and that there is no such thing "as a fair or friendly deal, a neutral agreement, or a mechanism for balancing loyalty."[35]

Shapiro has noticed that transactional lawyers have mixed feelings about conceptualizing the deals they close as fundamentally adversarial.[36] She points out that, a few decades ago, it was common to go so far as to represent multiple parties in the same transaction.[37] In contrast, in the contemporary legal landscape, many lawyers will not represent even one party to a transaction if they represent another of the parties in any unrelated matters, "especially when the deal is significant, the stakes are high, and the preexisting clients on both sides of the transaction are important."[38] This carefulness ensures that all clients feel that their lawyers are loyal to them at the exclusion of others—which keeps some clients coming back.

III. PROBLEMS WITH RULE 1.7 WRIT LARGE

While Model Rule 1.7 certainly solves some ethical, practical, and financial problems for lawyers, it also opens the floodgates to other potential problems. For

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30. *IBM Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978).

31. *See* Bussel, *supra* note 5, at 220.

32. *See* Model Rule 1.7, *supra* note 8, cmt. 6 ("The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.").

33. Shapiro, *supra* note 26, at 105–06.

34. *Id.*

35. *Id.* at 101.

36. *See id.*

37. *Id.* at 102.

38. *Id.*

starters, proscribing concurrent conflicts encourages wily, wealthy clients to exploit the parameters of the rule. The rule incentivizes clients with means to segment and strategically dole out their legal work, handing it out to multiple firms so that it is difficult for clients with adverse interests to find lawyers able to represent them.[39] Obviously, this problem is massively compounded by a global, mobile legal culture.[40] When clients chop up their workloads and distribute their business across a legal market, the number of concurrent conflicts exponentially rises. As Susan Shapiro details:

> Where, in the past, law firm ABC may have handled virtually all of the legal work of corporation XYZ, it now handles 10% of the legal work of corporation XYZ as well as a tenth of the work of nine other corporations. With ten times more clients than in the past, firm ABC has many more interests to honor and faces escalating probabilities that some of these interests will collide.[41]

As Eli Wald points out, clients may also target specific firms to represent them just to block competitors from representation, or file motions to disqualify conflicted or near-conflicted lawyers, piling on litigation costs for their opponents.[42] As a result of these measures, the growth of individual firms is stunted, as firms are prevented from taking on certain clients, kept from hiring desirable laterals, and conflicted out of merging with other firms.[43] In her survey of diverse law firms across Illinois, Susan Shapiro asked law firms how much business they were forced to turn away each year because of concurrent conflicts.[44] She found that "[r]espondents from two very large firms estimate that, because of conflicts, their firm turns away a third to more than half of all cases; another two large firms are conflicted out of tens of millions of dollars of business annually."[45]

And the economic effects of conflicts of interest are not just felt by large firms. Shapiro found that "[a] few firms in the 35–100 lawyer range decline hundreds of thousands to a few million dollars in fees each year . . . Even a 10-lawyer firm in a small town loses $100,000 to conflicts each year."[46] It is easy to imagine that once a client begins dispersing its business to a number of firms in the market, firms in small towns and in hyperspecialized legal markets feel the effects particularly acutely.

Not only are the unintended consequences of Rule 1.7 harmful to lawyers and law firms, but they also disproportionately affect less wealthy clients. As Bussel notes,

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39. Bussel, *supra* note 5, at 223.

40. For a thorough introduction to the implications of a rapidly mobilizing legal market, see James M. Fischer, *Large Law Firm Lateral Hire Conflicts Checking: Professional Duty Meets Actual Practice*, 36 J. LEGAL PROF. 167 (2011).

41. Shapiro, *supra* note 26, at 110.

42. Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths* 251 (Univ. of Denver Sturm Coll. of Law, Working Paper No. 08-01, 2008).

43. *Id.* at 250.

44. Shapiro, *supra* note 26, at 150.

45. *Id.*

46. *Id.*

the rule incentivizes firms to "resolve" concurrent conflicts by dropping the poorer of their conflicted clients.[47]

Finally, complying with Rule 1.7 costs many lawyers and law firms a great deal of time and human resources. When Shapiro asked lawyers to estimate the time they spend ascertaining and handling conflicts of interest, she found that one-fifth of lawyers she surveyed spent at least one hour a month dealing with conflicts of interest, while another fifth spent at least one hour a week.[48] About another quarter of respondents, most of whom worked in large firms, reported spending anywhere from one hour to over two hours a day managing conflicts.[49] Additionally, over half the firms Shapiro interviewed hired third parties to mediate the client acquisition process.[50]

While there are clearly numerous practical reasons to think twice about the benefits of Rule 1.7 and avoiding concurrent conflicts, scholars also posit justice-oriented reasons to reconsider the rule. Bussel emphasizes that lawyers are the only American professionals with a professional rule forbidding concurrent conflicts.[51] For example, priests can spiritually advise two people in a separation or a fight, and accountants can represent two rival businesses in different financial matters, and such "conflicted representation" is seen as in the nature of the profession.[52] In addition, European lawyers abide by no such rule to avoid concurrent conflicts.[53] James W. Jones and Anthony E. Davis support this point, noting that abiding by unusually stringent rules of conflicted representation could, as a result, constrain American lawyers in the global legal market.[54] After examining the incongruities in the ways the American legal profession treats conflicts of interest, Bussel compellingly posits that there is not a clear reason why this profession in particular has been singled out for such rigorous rules about conflicted representation.[55]

IV. THE CHALLENGES OF APPLYING 1.7 TO TRANSACTIONAL WORK

So far, all of the problems this Note has examined about Rule 1.7 have applied to lawyers and law firms generally. However, there are particular—and particularly strong—reasons that applying Rule 1.7 in its current iteration to transactional work specifically is inelegant, impracticable, and, I argue, at least partly unnecessary. It is clear throughout the Model Rules and their comments that the rules were written with litigators in mind. As Eli Wald states, "[W]hile reform efforts have often been couched in terms of broadening the reach and application of the *Rules,* many continue to understand the *Rules* as applying inherently to litigators. As a result, the *Rules* often leave non-litigators without guidance and their clients without necessary

47. Bussel, *supra* note 5, at 222.
48. Shapiro, *supra* note 26, at 133.
49. *Id.*
50. *Id.* at 148.
51. Bussel, *supra* note 5, at 209–20.
52. *Id.* at 211.
53. *Id.*
54. *See* James W. Jones & Anthony E. Davis, *In Defense of a Reasoned Dialogue About Law Firms and their Sophisticated Clients*, 121 Yale L.J. Online 589, 598 (2011).
55. *Id.* at 213.

protections."[56] Rule 1.7 is no exception to this trend. As Carl A. Pierce notes in his report of the ABA's 2000 Ethics meeting, the difficulty of applying Rule 1.7 to transactional conflicts starts to become clear in the comments to the rule itself.[57] Recall that comment 6 to the rule cites as an example of a directly adverse transactional conflict a scenario in which a lawyer represents the seller in Transaction A, while also representing Transaction A's buyer in Transaction B. Pierce points out that this example rests on a few assumptions that are in no way guaranteed to be borne out by reality:

> [F]or the purposes of identifying representations that are directly adverse to a client, this Comment equates the representation of buyers or sellers in buy-sell transactions with the representation of plaintiffs or defendants in lawsuits. This equation must be premised either on the assumption that there is the same amount of adversity in buy-sell transactions as in litigation, or at least sufficient adversity that the client will feel so betrayed that the client-attorney relationship will be so impaired that the lawyer will not be able to effectively represent the client.[58]

The author calls this analogy between transactional parties and litigation parties "at least thought-provoking and perhaps even a bit troubling."[59] Pierce continues, "[i]t does not seem reasonable to assume that a client will be as troubled if her lawyer helps someone to dance with her at a different party as she would be if the lawyer were trying to beat her to a pulp in a different ring."[60] Wald agrees that the Model Rules in general and Rule 1.7 in particular have a strong litigation bias, noting that "the litigation bias is so evident on the face of Rule 1.7 that Comment 7 explicitly states what is apparently less than obvious: 'Directly adverse conflicts can also arise in transactional matters.'"[61] For all the challenges inherent in detecting directly adverse transactional matters, even less guidance exists regarding how to detect materially limiting transactional conflicts.

It is clear why this litigation bias matters. Transactional matters are simply less adversarial than litigation ones, and thus the interests of the parties overlap to an extent that renders concurrent conflicts less potent and problematic—and leaving Rule 1.7 less necessary to patrol lawyer-client relationships. It is certainly true that, as previously discussed, the terms of a transactional deal are often hotly contested, both parties have interests to protect and further, and deals are not entirely neutral. And yet, at bottom, the fact that both parties in a transaction seek to work together symbiotically is fundamentally opposed to the zero-sum nature of litigation conflicts; consequently, litigation clients have much greater reason to expect loyalty from their lawyers and to feel betrayed by them in the event of concurrent representation.[62]

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56. Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 246 (2014) (emphasis in original) [hereinafter "Resizing the Rules"].

57. *See* Pierce, *supra* note 26, at 13.

58. *Id.*

59. *Id.*

60. *Id.* at 14.

61. Wald, *supra* note 56, at 246.

62. *See* Pierce, *supra* note 27, at 14 (stating that the motivating question in applying 1.7 to transactional conflicts is "[w]hether the prohibition against directly adverse representation

Moreover, in transactional conflicts, there are no motions to disqualify for conflicts of interest to add financial pressure, pressure to settle, and reputational damage into the mix.[63]

Conflicts of interest are also simply more difficult to detect in transactional settings, eating up firm assets and lawyers' valuable time. As previously noted, the only directly adverse conflicts that Rule 1.7 unequivocally forbids exist solely in litigation scenarios: representing both sides in the same piece of litigation and representing a new client suing a present client in an unrelated matter.[64] Comment 27 offers an example of concurrent conflicts in transactional matters, but the example is limited in scope: it is only about estate planning.[65] Thus, in the vast majority of transactional scenarios, it is up to the lawyer to determine whether a conflict may exist. Comment 26 offers a number of factors to consider in evaluating the potential for material limitation: the "duration and intimacy of the lawyer's relationship" with each client; the "functions performed by the lawyer"; and the "likelihood that disagreements will arise and the likely prejudice to the client from the conflict."[66] This list of factors is only minimally helpful. Most of the factors are speculative and depend on individual clients' priorities and dispositions. Additionally, it is not clear which of these factors deserve the most weight and which ones, if any, are dispositive. Because these factors are so vague and subjective, they cease to provide a reliable route to predictable and foolproof determinations about what situations rise to the level of transactional conflicts of interest.

Perhaps the most persuasive reason to rethink applying Rule 1.7 in its current formulation to transactional settings is that the facts tend to suggest that doing so is unnecessary. Because transactional conflicts are not adversarial in nature, conflicts of interest can often be solved with informed consent. Thus, transactional matters are less needful of Rule 1.7's oversight. In a 2010 paper, Professor James M. Fischer interviewed twenty-three law firms, twenty-one of which were AM LAW 100 firms.[67] He asked these firms for details about their lateral-hiring and conflicts-checking procedures.[68] Fischer found that "[i]n general, interviewees said that the transaction conflicts were commonly mitigated by consents, whereas litigation consents were more difficult to obtain."[69] Thus the "hot potato" problem—when a firm drops the representation of one of the conflicted clients in order to continue representing the more "desirable" client—is less of an issue in transactional conflicts than in litigation ones.[70] The fact that all transactional conflicts are consentable at least on the face of the Model Rules, combined with the fact that most transactional

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should ever be applied to transactional matters—even the buy-sell transactions used as the example in the Comment—in which the opposing parties are seeking each others' consent to a transaction from which both expect to benefit?").

63. *Id.* at 126.

64. Dzienkowski, *supra* note 12, at 474.

65. Model Rule 1.7, *supra* note 8, cmt. 27.

66. *Id.* at cmt. 26.

67. Fischer, *supra* note 40, at 190.

68. *Id.* at 192.

69. *Id.* at 207.

70. *See* John Leubsdorf, *Conflicts of Interest: Slicing the Hot Potato Doctrine*, 48 SAN DIEGO L.J. 251, 253–54 (2011).

conflicts are in fact consented to, reveals two important points. First, both legal scholars and lawyers themselves see litigation conflicts as more problematic and more difficult to resolve—and thus more needful of Rule 1.7's guidance. Second, the legal profession does, in day-to-day practice, *treat* litigation and transactional conflicts differently.

V. SOME PROPOSED SOLUTIONS—AND THEIR PROBLEMS

In the face of so many difficulties in applying Rule 1.7 to the realities of the legal landscape, legal scholars have posited a number of solutions or adjustments to bring the expectations upon lawyers more in line with the contours of their day-to-day practices. Daniel Bussel is so vexed by the disparity between the idea of Rule 1.7 and its execution that he proposes tossing out Rule 1.7 altogether and allowing lawyers of all kinds to engage in concurrent conflicts.[71] In his view, it is actually fairer for firms to be able to represent adverse parties in unrelated matters because doing so prevents lawyers from being bossed around by their clients, claiming them and cutting them off from other opportunities.[72] As he states:

> An attorney, in the best traditions of the legal profession, is not merely a creature of the client, wholly subordinate to its will. He is an independent professional, whose obligation of loyalty to the client is fixed by the scope of his retainer, the law, and professional norms.[73]

While abandoning Rule 1.7 would prevent mercenary clients from manipulating the legal market to their advantage, as well as saving time and resource by eliminating conflicts committees, to throw out the rule altogether would be to overcorrect. It is clear that Rule 1.7 does provide utility by preventing lawyers from representing clients on both sides of litigation proceedings, which would create major confidentiality and loyalty problems that would drag down clients' trust in the legal profession.[74] It would seem that a more nuanced solution than one that throws the baby out with the bathwater is called for.

One potential way to keep Rule 1.7 in place while addressing some of its practical problems is to outsource conflict management to third parties or nonlawyer law firm employees that perform conflict checks and build and maintain conflicts databases. Shapiro notes that many firms already do this in order to both free up lawyers' time and ensure that a uniform and thorough conflicts-management process is in place.[75] However, this option is only available to firms with the dispensable resources to enact it. Thus, this solution is an incomplete one. What is more, it puts smaller and less wealthy firms at a disadvantage by creating a system in which lawyers at such firms spend more billable time checking and managing conflicts.

While the above solutions may partially solve the problems created by Rule 1.7, they both replace the solved problem with other conundrums. Moreover, neither

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71. Bussel, *supra* note 5, at 208.
72. *Id.* at 236.
73. *Id.*
74. *See* Model Rule 1.7, *supra* note 8, cmt. 6.
75. *See* Shapiro, *supra* note 26, at 134.

solution addresses the concern that the nature of transactional conflicts is different enough from that of litigation conflicts to warrant different treatment under ethical guidelines.

VI. MY PROPOSED SOLUTIONS

In 2011, lawyers and risk managers from over thirty large firms submitted a proposal to the ABA's Commission on Ethics. The proposal, called "Proposals of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients,"[76] suggested that sophisticated clients be able to determine, with their lawyers, how to handle the following three issues: binding advance waivers of conflicts; conflicted representation resulting in direct adversity to the client without prior consent; and waivers of conflicts that could potentially disqualify laterals from being hired.[77] Under these proposals, "in cases involving sophisticated clients, the presumptions under the conflict rules . . . would be reversed, *unless the parties specified otherwise*."[78] In other words, under the proposals, allowing conflicted representation would be the norm in relationships between law firms and "sophisticated clients," with the goal of bringing representation in line with what clients and lawyers want from the legal representation.

I suggest flipping the presumptions of Rule 1.7 in a similar way, only instead of dividing the world of representation into sophisticated and unsophisticated clients, I would suggest flipping the presumptions of the rules for transactional lawyers, while leaving Rule 1.7 in place as it is for litigators. I propose differentiating between transactional and litigation matters under Rule 1.7 by adding subparts to 1.7 that apply only to transactional lawyers—subparts that would streamline the process of seeking and obtaining client consent by eliminating troublesome guesswork. These subparts would differ from the already-existing rule in two ways. First, in directly adverse transactional conflicts, informed consent (including advance consent) through general waivers—waivers to potential undefined conflicts—would be the norm, rather than the exception. Second, the "material limitation" rule would be eliminated for transactional lawyers. Instead of determining what conflicts might be materially limiting (whatever that means in transactional settings), and thus determining what warrants disclosure, disclosure of all possible conflicts would be part of an informed consent package.

Before we venture too far into these proposals, I offer some limitations on my arguments. I propose these rule amendments only for conflicts of interest in unrelated matters. Advance consent to "substantially related matters" is a subject of much debate, which is beyond the scope of this Note.[79] Additionally, my arguments only contemplate relationships between clients and their lawyers who work exclusively on transactional matters. Lawyers who perform both transactional and litigation work

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76. Jones & Davis, *supra* note 54, at 589–93.

77. *Id.*

78. *Id*. at 596 (emphasis in the original).

79. For an introduction to the chaos that is determining a "substantial relationship" between matters and the scholarly disagreements over whether consent is a possibility in these scenarios, see Morgan, *supra* note 20, at Part IV.B.

face other potential conflicts that are the subject of scholarly deliberation elsewhere.[80]

The argument for eliminating the material limitation rule in transactional settings is simple. For starters, it is enormously difficult even to imagine what these conflicts may look like in transactional settings—thus, ascertaining such conflicts is a waste of lawyers' time and resources. More importantly, under my proposed additional subparts, a material limitation rule becomes unnecessary. If all directly adverse conflicts are resolved through informed consent, materially limiting conflicts, which are less serious than directly adverse conflicts, are implicitly resolved, too.

The argument for informed consent, particularly advance consent (consent obtained for future conflicts rather than current ones), is more complex and warrants more detailed discussion. In advance consents, lawyers ask clients to waive the right to take action against the firm for taking future opportunities that are adverse to the client's interests but *unrelated* to the present representation.[81] In its Formal Ethics Opinion 05-436, the ABA emphasized that advance consent is not unethical, even though "the lawyer is unable to predict or identify the exact nature of the future conflict at the time of the waiver."[82] What the lawyer must do is disclose the information "reasonably at the lawyer's disposal at the time the client signs the waiver."[83] Shapiro noted that written consent from clients was the exception rather than the norm among the Illinois firms she interviewed; it was, however, common among larger firms.[84] In fact, three-quarters of large firms that she interviewed used advance consent routinely.[85] Shapiro notes that advance consent saves law firms—and thus clients—money by doing the work upfront of obtaining consent, rather than dealing with the consequences of conflicted representation.[86]

The ABA's Formal Ethics Opinion 05-436 suggests that general waivers are typically only valid in relationships with "sophisticated clients."[87] Both Shapiro and the Law Firm Proposals agree.[88] Yet, none of these sources define the category "sophisticated clients." Dividing the world of clients into "sophisticated" and "unsophisticated" leads to two problems. First, it brings about a line-drawing problem: which clients are sophisticated clients? What are the metrics for determining sophistication—size, industry, experience, or something else? Second, users of the term do not offer concrete evidence that less sophisticated clients, however the term is defined, are less capable of understanding that lawyers can be loyal to multiple parties and represent all parties' interests capably. And anyways, the ABA itself, in Formal Ethics Opinion 05-436, noted that general waivers are valid for any clients that are "familiar with the potential conflicts, understand all material

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80. For a brief introduction to conflicts of interest that occur when a lawyer or firm performs transactional work for one client and adverse litigation for another client, see Dzienkowski, *supra* note 11, at 504–05.

81. Shapiro, *supra* note 26, at 153.

82. Morgan, *supra* note 21, at 969.

83. *Id.*

84. Shapiro, *supra* note 26, at 153.

85. *Id.* at 154–55.

86. *Id.* at 152–53.

87. Morgan, *supra* note 21, at 969.

88. Shapiro, *supra* note 26, at 154 n.86; *see generally* Jones & Davis, *supra* note 54.

risks," and give consent to unrelated matters.[89] The ABA adds that whether the client is represented by independent counsel may also be a factor.[90]

It seems clear, then, that as long as clients are given all the information available at the time—and information sufficient to form a clear picture of the risks they assume by consenting to future conflicts—they should be able to sign a general waiver.[91]

I argue that a better way of deciding when to use general, advance waivers is to look at the nature of the work being done, not the nature of the client. For a number of reasons, advance waivers make the most sense in transactional lawyer-client relationships. We already know from Fischer's research that many transactional clients happily give informed consent to conflicts.[92] Transactional clients, especially those in small markets, know that law firms will be providing transactional services to at least some of their competitors. This is especially true since, as Ronald Gilson and Robert Mnookin noted in 1989 and as is prevalent today, "the practice of corporate law firms has changed from one characterized by longstanding relationships with continuing clients to one in which one-shot transactional work for a succession of clients is of growing importance."[93] Moreover, advance waivers also benefit transactional lawyers within the context of long-term lawyer-client relationships by allowing lawyers to represent their clients in more matters than they would otherwise be able to. As Morgan points out, "[a]dvance waivers may help ensure that longstanding clients are secure in their existing representation, and that new clients are not rejected simply because their interests may be adverse to a firm's other clients at some undetermined point in the future."[94]

While many scholars argue that advance consent is too vague to be meaningful, advance consent is, in a way, *more* informed, because it gives clients an idea of most of the issues that may arise before representation even begins. Thus, advance consent gives clients a comprehensive view of the types of conflicts most likely to arise, enabling them to understand more fully the nature of the lawyer-client relationship and encouraging lawyer-client dialogue. It is true that advance general waivers are not valid in unforeseeable conflicts that the advance consent did not contemplate.[95] However, these situations will be the exceptions rather than the norm. As lawyers grow in experience and share resources, they will be better able to develop advance consents tailored to different types of clients that contemplate the conflicts likely to

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89. Morgan, *supra* note 21, at 969.

90. *Id.*

91. Courts often use a four-factor test to determine the validity of an advance waiver. The factors are: (1) the specificity with which the waiver is limited to unrelated matters; (2) whether the waiver is limited to unrelated matters; (3) whether the consenting client is "sophisticated"; and (4) and whether the client is represented by independent counsel. Gregory C. Sisk, *Client Consent to Conflict of Interest—Advance Conflict Waivers*, 16 IA. Prac., Law & Jud. Ethics § 5:7(e)(5) (2007).

92. Fischer, *supra* note 40, at 207.

93. Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 592 (1989).

94. Morgan, *supra* note 21, at 973.

95. Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rules on Ethics*, 29 HOFSTRA L. REV. 701, 717–18 n.75 (2001).

arise in each mode of representation. Because many clients in transactions between multiple represented parties willingly give informed consent to conflicts, asking for advance consent is not a conceptual jump for those clients to make. Moreover, many smaller transactional clients who need help with covenants, leases, business formation, or similar services have less occasion for conflicts to arise because their legal matters involve only one party seeking legal counsel; thus, signing an advance consent should not be an unnerving idea.

In transactional situations, having the trust of clients whose interests are directly adverse could, far from decreasing client confidence, actually make for more thorough, well-rounded, and cordial representation of both parties—especially since transactional matters do not generally bear the adversarial and contemptuous weight that litigation settings do.

CONCLUSION

The law is a field grounded in the interface between justice and practicality. For all of the legal profession's image problems, clients have always both trusted their lawyers to represent them zealously and understood that most lawyers do not pay the bills by making the same arguments over and over. Representing a client in a discrete matter—or even in repeat matters over a long period—does not mean signing on to everything the client believes such that the lawyer is incapable of taking other positions when the circumstances call for it. It is time we trust the public and our clients to be able to hold in the balance their trust in us as counsel and their understanding that other clients have a right to that same trust. While conflicts of interest can lead to major problems for clients and lawyers alike, the nature of transactional matters does not require a strict ban on conflicts—especially conflicts as defined by a rule focused on litigation settings. A model rule that accommodates for the realities of transactional representation by creating a culture of informed consent will enrich the legal landscape in multiple ways. It will allow lawyers to take on more and diverse clients, build up their portfolios, cultivate their expertise, and become more and more the professional advocates that clients trust them to be.