

LAWRENCE FOX

The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty

The attempts by some in the Bar to compromise client loyalty on the altar of law firm profits per partner is both unceasing and depressing. The proposals from many law firm General Counsels to change the Model Rules of Professional Conduct are particularly unflattering to the proponents and undermine this most important fiduciary duty. This Essay describes these calls for change and explains why they should be rejected.

INTRODUCTION

When thirty-three of the best and brightest General Counsels (GCs) of AmLaw 100 law firms got together on a major professional project, one would hope it would be to strengthen the attorney-client privilege, to challenge an overreaching Justice Department, to defend a lawyer's duty of confidentiality, to enhance pro bono representation for the indigent, to strengthen the organized bar, to improve retention and training of young lawyers, to address the profession's efforts to improve diversity, or to achieve other lofty goals. After all, these brilliant individuals are the consciences of their respective organizations, leaders of our profession, and guardians of the fiduciary obligations we owe our clients. It is they who are lawyers to their law firms and, just like special counsels of other organizations, it is they who are to provide wise counsel, sage advice, and independent perspective to their too often headstrong, misguided clients. But, alas, the project these great lawyers

undertook¹ was not that at all. Rather, the American Bar Association (ABA) Commission on Ethics 20/20 received from this “Gang of Thirty-Three” the very antithesis of what one would have hoped.

Claiming they are doing it for their clients²—a misstatement if there ever was one—these General Counsels provide a curious definition of a sophisticated client³ and then propose, with nary a blush, to systematically strip those clients—probably numbering in the millions—of any entitlement to loyalty or other central protections our profession proudly offers.⁴ We must defend these entitlements if we, in turn, should be entitled to call ourselves a profession at all.

I. BACKGROUND

Just as with any other morality play, it might help the gentle reader if I provide some important background for the drama to follow.

1. The Profession. The Janus-like collection of lawyers we call the legal profession is engaged in a constant struggle over whether it is a profession or a business when, of course, it is both, complete with an ongoing intramural struggle over which of these two characterizations will prove more accurate. It is the author’s sad view that the inexorable forces of law as business threaten to overwhelm those aspects of the practice that permit us to call ourselves a profession.

2. The ABA Model Rules of Professional Conduct. The ABA first promulgated ethics rules for the profession in 1908 with the adoption of the Canons of Professional Ethics, modeled on earlier canons adopted by the State of Alabama. The ABA, acting through its House of Delegates (a legislative body that includes representatives from the ABA, each state and every state bar

1. Law Firm General Counsel Roundtable, *Proposals of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients*, ABA COMM’N ON ETHICS 20/20 (Mar. 2011), http://www.abajournal.com/files/ABA_Ethics_Commission_Proposals_-_3-8-11.pdf [hereinafter Law Firm Proposals].

2. *Id.* at 2 (“[W]e seek to maximize the ability of sophisticated clients to structure their relationships with their lawyers in ways that best serve their needs and best accommodate the reality of law firms that are required to deliver services across state lines and international borders.”); *id.* at 6 (“In today’s legal market, large commercial clients expect and demand that legal services be delivered in an increasingly efficient and cost-effective manner. It is critical that the law firms that serve such clients have the flexibility to respond to their legitimate needs and expectations.”).

3. *Id.* at 2-3.

4. *Id.* at 3-4.

in the country, and representatives of any other legal organization with more than 2000 members), has continued to adopt new codes since then. The most recent revision was produced by the Ethics 2000 Commission, whose rewrite of the Model Rules was adopted by the House in 2002.

When the ABA House adopts rules, all that really happens is the publication of a booklet. Nonetheless, the ABA's influence in this area has been profound. Today, every state save California has adopted some version of the ABA Model Rules albeit with small variations. As a result, any changes that the Ethics 20/20 Commission can convince the ABA House of Delegates to adopt could have a profound effect on the continuing development of professional ethics rules.

3. Ethics 20/20. This is a Commission of the ABA established in 2009 by then-ABA President Carolyn Lamm to review the ABA's Model Rules of Professional Conduct, with a particular eye to technology, the internationalization of the practice of law, and other important developments that had occurred since the ABA last revisited the Model Rules in 2002.⁵ Ethics 20/20 called on the profession to offer comments and suggestions for change.

4. The Law Firm General Counsel Roundtable. This organization brings together the GCs of about 40 of the AmLaw 200 law firms in the United States—that is the 200 largest firms by size and revenue—for education, improving the effectiveness of their role, and other worthy purposes of mutual benefit in counseling these very large businesses. My law firm's General Counsel is a member of the Roundtable.

5. The Proposals. Thirty-three law firm General Counsels, all members of the Law Firm General Counsel Roundtable,⁶ submitted proposed amendments to the ABA Model Rules. The proposals were directed particularly at the key principles of client loyalty found in the present iteration of the rules. It is the author's response to those proposed amendments that became the opening salvo in this dialogue.

6. The Author. I have been involved in the swirling debates regarding the rules of professional conduct and the broader law governing lawyers for over thirty years, going back to the original adoption of the ABA Model Rules in the early eighties. My views have been characterized, charitably, as antediluvian. I

5. The Commission, in its own words, "will perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments." *ABA Commission on Ethics 20/20*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Mar. 27, 2012).

6. My firm's General Counsel did not sign the proposal.

appeared before the Ethics 20/20 Commission at its first hearing and urged it to disband quickly and leave well enough alone. That plea was ignored.

II. OUR DUTY OF LOYALTY—A SACRED TREASURE

Before addressing the merits of these proposals, recognition of the profession's present duty of loyalty and how important it is to the functioning of a healthy lawyer-client relationship is in order. Quite simply, lawyers' duty of loyalty is the most fundamental of all fiduciary duties the legal profession owes to its clients.⁷ From the beginning of the profession, lawyers have owed an unwavering duty of loyalty to their clients, a duty that is recognized in the common law of every jurisdiction of the United States⁸ and codified in every American code of legal ethics ever promulgated.⁹

It is from this wellspring that the integrity of the attorney-client relationship emerges. The duty of loyalty creates the trust that enables effective representation. All other aspects of the attorney-client relationship, a relationship whose constitutional dimensions the Supreme Court has repeatedly recognized and defended,¹⁰ derive from and reinforce the lawyer's primary duty of loyalty. Yet once the loyalty wellspring is poisoned, every aspect of the relationship, and the representation itself, is suspect.

As a case in point, consider conflicts of interest. Conflicts are different in degree and in kind from other failures of representation because they infect every aspect of the attorney-client relationship. As the Supreme Court observed in *Holloway v. Arkansas*, "the evil [of a conflicted representation] . . . is in what the advocate finds himself compelled to refrain from doing," leaving an impoverished record for later courts to review based on no more than speculation.¹¹

7. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (describing the duty of loyalty as "perhaps the most basic of counsel's duties").

8. See, e.g., *Williams v. Reed*, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,733) ("An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. . . . When a client employs an attorney, he has a right to presume . . . that he has no interest, which may betray his judgment, or endanger his fidelity.").

9. See, e.g., ABA CANONS OF PROF'L ETHICS Canon 6 (1908); see also MODEL CODE OF PROF'L RESPONSIBILITY Canon 5 (1980); *id.* DR 5-101; *id.* DR 5-105.

10. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

11. 435 U.S. 475, 490 (1978); see also Brief of Legal Ethics Professors and Practitioners and the Ethics Bureau at Yale as Amici Curiae in Support of Petitioner, *Maples v. Thomas*, 132 S. Ct.

As *Holloway* suggests, a breach of the duty of loyalty is not only worse than other ethical breaches because it is a breach of the most fundamental fiduciary duty owed to a client, but it is also a substantively different type of breach because it affects—and it does so surreptitiously—every decision in the representation. Depending on the conflict and the representation, this breach can blunt a lawyer’s advocacy, undermine a lawyer’s independent professional judgment, inhibit a lawyer’s creativity, and compromise a lawyer’s zeal. Though addressing fiduciary duty in a different context, in the author’s view, Justice Benjamin Cardozo said it best when he observed,

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.¹²

Every state bar has an ethical rule prohibiting a lawyer from undertaking a representation that involves a conflict of interest.¹³ Virtually all of these rules are derived or copied from the ABA’s Model Rules of Professional Conduct. And while ethics codes may vary in their particulars from jurisdiction to jurisdiction, they all reflect the same important values.

III. THE RULES THEMSELVES

Our duty of loyalty to clients is a fiduciary duty that existed long before, outside of, and beyond any ethics code. The common law imposes the obligation of loyalty, and the violation of that fiduciary duty can give rise to a

912 (2012) (No. 10-63) (condemning a law firm’s continued representation of a capital defendant in light of conflict of interest preventing firm from pursuing client’s interest whole-heartedly).

12. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

13. See generally STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 93-96 (2005) (noting state variations on the model rules); *Legal Information Institute: American Legal Ethics Library*, CORNELL UNIV. LAW SCH., <http://www.law.cornell.edu/ethics> (last visited Mar. 27, 2012) (listing all state rules of professional conduct).

claim against the lawyer.¹⁴ The Gang of Thirty-Three cannot do anything about the common law except, I suppose, argue in individual cases that it should be narrowed into extinction. What they can do—and have in fact done—is seek to change the applicable rules of professional conduct, which are intended, in part, to enforce the lawyer’s duty of loyalty. As a result, our review of what those rules require is an important predicate to addressing their proposal.

First, the fundamental rule, one that is absolutely essential to ensuring a duty of loyalty, is Rule 1.7(a),¹⁵ which provides that lawyers may not take a position directly adverse to a present client of the lawyer. That rule is intentionally unbounded. Even if the conflicting matter involves a transaction that is tiny or totally unrelated to the matter the lawyer is handling, he is barred from taking on that representation without the client’s informed consent confirmed in writing.¹⁶

14. The duty of loyalty has long occupied a privileged place among American legal traditions. By 1824, then-Judge Story had already articulated the principle with clarity:

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

Williams v. Reed, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,733). Since then, courts have consistently reiterated the importance of the duty of loyalty. *See, e.g.*, *Grievance Comm. v. Rottner*, 203 A.2d 82, 84 (Conn. 1964) (“When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attacked by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed . . .”); *Blough v. Wellman*, 974 P.2d 70, 72 (Idaho 1999) (“The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity.”).

15. MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2011).

16. *See Flatt v. Superior Court*, 885 P.2d 950, 955-56 (Cal. 1994) (“A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All legal technicalities aside, few if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances. As one commentator on modern legal ethics has put it: ‘Something seems radically out of place if a lawyer sues one of the lawyer’s own present clients in behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer’s *sense of loyalty* is askew.’ It is for that reason, and not out of concerns rooted in the obligation of client confidentiality, that courts and ethical codes alike prohibit an attorney from

Second, Rule 1.9 reflects the loyalty we owe to former clients.¹⁷ It provides that lawyers may not take a position directly adverse to a former client in the same or a substantially related matter without the client's informed consent confirmed in writing.¹⁸ It does so not only to assure that the lawyer does not undermine the work for which the lawyer was originally retained, but also to guarantee that the confidential information of the former client remains protected. The substantial relationship test is a stalking horse for the protected confidential information, which we do not want the former client to be forced to reveal in order to protect it.

Third, and equally fundamental, is Rule 1.10, the rule establishing imputation.¹⁹ This rule provides that the conflicts of one lawyer in a law firm²⁰ shall be imputed to all other lawyers in that law firm.²¹ This important rule assures a client that while that client is being represented by Lawyer *A* at Caldwell & Moore, Lawyers *B*, *C*, and *D* at Caldwell & Moore are not taking positions directly adverse to the client without the client's informed consent. It also assures the client that if Lawyer *A* could not take on a matter adverse to a former client, neither could colleagues *B*, *C*, or *D*.

Some have asserted that their partners would “relish” the opportunity to take positions directly adverse to present or former clients of their firms. They would argue that only their colleagues who actually worked on the client's matters owe any debt of loyalty. Rule 1.10 rejects that notion, standing as a bulwark against such delight at the expense of those current or former clients of the firm. For how will the client feel once it learns the colleague of its trusted lawyers is seeking to appear directly adverse to it across the negotiation table or, far worse, in the courtroom, committed to extracting every advantage from the very clients whose fees they enjoy receiving and sharing?

simultaneously representing two client adversaries, even where the substance of the representations are unrelated.” (quoting CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 350 (1986)(emphasis added by *Flatt* court)).

17. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2011).

18. *Id.*

19. *Id.* R. 1.10.

20. *Id.* R. 1.10 cmt. 1 (“[T]he term ‘firm’ or ‘law firm’ denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”).

21. *Id.* R. 1.10.

Fourth, the Model Rules stipulate that a client can provide, under certain circumstances, informed consent to a conflict of interest.²² If the client does so, then the lawyer or lawyers subject to the conflict of interest are free to take on any adverse matters as to which consent has been properly secured. This rule, however, comes with a very important caveat, often overlooked by practicing lawyers, but nonetheless critical to the informed consent process. The caveat is that a lawyer may not ask for informed consent to a conflict of interest if a reasonable lawyer—not the drooling lawyer seeking consent—would be unable to conclude that the lawyer could provide competent and diligent representation to each affected client.²³

With these rules in mind, the reader now has the necessary background to consider the proposals of the Gang of Thirty-Three.

IV. DEFINING THE SOPHISTICATED CLIENT

A. *The Mythology of the Sophisticated Client*

The myth of the sophisticated client has been a clarion call of the Gang of Thirty-Three's ilk for decades. The very firms that have prospered from the demand for their services are the first to assert that sophisticated clients are not entitled to the benefits that less sophisticated clients apparently are still welcome to enjoy. They do so because it drives them crazy that their intake committees are forced to turn down literally millions of dollars of business each year, maybe even each month, because of conflicts of interest.

But why do I call it a myth? Because when these law firms talk about sophisticated clients they are talking about organizations, largely corporations, that are indeed often extremely sophisticated, though even more often hopelessly naïve. And their sophistication relates to finding new drugs, designing electric vehicles, developing the iPad, merchandising for the masses or the sophisticated elites, running a restaurant, selling automobiles, or providing valuable services such as actuaries and accountants. It has little or nothing to do with our profession, our skill sets, or our rules of professional conduct. In order to be sophisticated about those matters we say you need

22. See, e.g., *id.* R. 1.7(b)(4). This rule is one of several where client protection is so important that waiver of the protection can only be secured by informed consent, a new requirement defined as follows: “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.* R. 1.0(e).

23. *Id.* R. 1.7(b)(1).

three years of law school, passage of a bar examination and the Multistate Professional Responsibility Exam, and years of experience practicing law. Even then, most law firms look to in-house or outside specialized legal assistance when it comes to issues of professional responsibility—ironically enough, to the very people who make up the Gang of Thirty-Three. Yet these counsel have the temerity to suggest that these “sophisticated clients” somehow have mastered all of that, and then, in the greatest leap of all, assert that because they understand all of that, they are not entitled to the protections that the unsophisticated enjoy.

B. Being Sophisticated Does Not Take Much Sophistication

Given the foregoing, there is no real reason to get into a debate about the Gang of Thirty-Three’s definition of “sophisticated.” But since that definition is so reflective of the GCs’ mindset, a short description of their approach is in order.

The Gang of Thirty-Three has adopted a six-part definition of “sophisticated client.”²⁴ But instead of stating that these clients must meet all six criteria, this definition is stated in the disjunctive. If you meet any one of the six criteria, you are reduced to second-class client status. And as you will see, it does not take much to join this not very exclusive club of those stripped of our key protections.

If you are a “repetitive user of legal services,”²⁵ whatever that means, you are a sophisticated client. Name any business and that criterion will be met. A little incorporation, one liability lawsuit, family succession and estate planning, and (before you know it) you are a repetitive user. Then there is a threshold of \$300,000 of legal services in a year²⁶ (or a little more than 300 hours of partner time at the Gang of Thirty-Three’s firms), and you are a sophisticated client. Next, if the client operates in five or more jurisdictions,²⁷ the client is sophisticated. Finally, any governmental entity²⁸—any—is deemed sophisticated. From the Zoning Board of Chester Township to the Commonwealth of Kentucky, they are all sophisticated. Not only is the definition an example of vast overreaching, but the attempts by the Gang of Thirty-Three to make sure

24. Law Firm Proposals, *supra* note 1, at 2-3.

25. *Id.* at 3.

26. *Id.* (“It has an annual budget for legal services (including expenditures for in-house and outside counsel) in excess of \$300,000 . . .”).

27. *Id.* (“It operates in at least five jurisdictions . . .”).

28. *Id.* (“It is a governmental entity with power to consent to waivers of conflicts of interest.”).

no sophisticated client wriggles free from the sophisticated client trap are particularly troubling. The Gang proposes that any client that meets any one of the six criteria is not just presumed sophisticated (that might provide some of this exalted group the ability to wiggle out of the rights-stripping category), but *irrebuttably presumed*.²⁹ Imagine the dialogue:

Sophisticated Client: “I did not understand.”

Lawyer: “Irrelevant. You used those lawyers six times last year. You are sophisticated.”

Moreover, once a client is irrebuttably presumed to be sophisticated, that status continues—irrebuttably—until the end of the representation.³⁰ Another troubling dialogue:

Sophisticated Client: “We did not use any lawyers last year.”

Lawyer: “But you did two years ago. You are sophisticated.”

Once sophisticated, always sophisticated. And entitled to all the “rights” discussed below.

V. THE PROPOSED REGIME

A. *Suing Your Client*

As the most troubling change in the Gang’s brave new world, they propose that any one of these exalted law firms should be free, without the courtesy of picking up the phone, to sue its present “sophisticated” clients for any claim (including RICO, fraud, or antitrust violations) or undertake any other directly adverse matter, so long as the conflicting matter is not substantially related to the law firm’s representation of the client.³¹ How easy it is to see how that

29. *Id.* at 2-3 (“A corporation or other entity should be irrebuttably presumed to be a sophisticated client if [any of the GCs’ six criteria are met].”).

30. *Id.* at 3 (“A client that is a sophisticated client at the beginning of any attorney-client relationship should remain a sophisticated client for the duration of such relationship, notwithstanding that circumstances occur during the relationship to alter its status, unless the parties otherwise agree in writing.”).

31. *Id.* at 4 (“In a new matter that is not the same or substantially related to a matter for which a law firm is currently engaged by a sophisticated client, the firm should be permitted to be adverse to such client without the client’s consent, so long as the law firm (i) holds no material confidential information of the client regarding the new matter and (ii) provides effective measures to screen the lawyers working on the two matters from each other.”).

serves the “needs”³² of the clients! One can hardly wait to see the phalanx of sophisticated clients picketing the ABA House of Delegates to be sued by their lawyers. How liberating is that notion?

You see, in the eyes of these GCs, these sophisticated clients are way too busy with more important matters to possibly be bothered to decide on their own, on a case-by-case basis, whether they want to be sued by their own lawyers. Rather these GCs have concluded that these sophisticated clients would much rather delegate to their lawyers whether and when they are entitled to the level of loyalty that every other client in America enjoys, a choice they enshrine in a rule that requires this result unless the so-called sophisticated client bargains for better treatment.³³

What they are doing is borrowing the level of loyalty lawyers owe former clients (Rule 1.9) to decimate the loyalty lawyers of sophisticated clients owe their present sophisticated clients. And what they really have decided is that their clients cannot be trusted to give them conflict waivers when their lawyers seek them.

As one thinks about this matter, pure sarcasm does not begin to convey the danger inherent in this approach. If this rule were adopted (heaven forbid), any time one of these exalted law firms—representing one of these benighted sophisticated clients—were presented with a new matter adverse to a present sophisticated client of the firm, both the obligation to determine whether the new matter presented a conflict that was waivable and the obligation to seek the informed consent of the conflict could be jettisoned completely. And in their place these long suffering law firms—with their million dollar-plus profits per partner³⁴—would have a very flattering partners meeting in which the words loyalty and trust would cross no one’s lips. Rather, the discussion would be whether the prospective client presents their firm with a more lucrative opportunity than the one their old girlfriend provides.

And there might—just might—be a discussion of how likely it is their original client will fire the firm. This is because the firm, presented with this delicious question, will not be dropping its old client. That presumably

32. *Id.* at 1.

33. *See infra* Section VI.A.

34. The AmLaw 100 Survey reports averages profits per partner of \$1,400,000, results that at least some of these firms apparently vastly overstate, in another assault on the Rules of Professional Conduct. *See* Vanessa O’Connell, *Law Firms’ Profits Called Inflated*, WALL ST. J., Aug. 22, 2011, <http://online.wsj.com/article/SB10001424053111903639404576518580053527362.html>.

remains prohibited.³⁵ Rather, the firm will simply put the old client in a totally betrayed position with no recourse but to fire the lawyers, an ironic remedy to assure client loyalty that makes the profession's promise of a robust fiduciary duty of commitment to the client a hollow one indeed.

Moreover, even if, after the ultimate betrayal, the client wishes to fire the lawyer as a remedy, clients are not necessarily able or willing to pursue that mockery of a solution. Because courts uniformly require court permission to withdraw, if the conflict arises in a litigated matter, the court often will not let the law firm out.³⁶ Moreover, it may be too close to trial or closing to get someone else up to speed, to say nothing of the slippage in time and additional expense involved in finding substitute counsel. Finally, the client may really like the lawyers (if not the law firm) working on the matter.

In any event, two things are clear: first, this proposed rule results in the most unsavory decisionmaking within the law firm; and second, this rule results in the most unfortunate predicament for the sophisticated client, the very antithesis of lawyer ethics as the codification of client protection and support.

B. Prospective Waivers

But the GCs' reforms do not end with this extraordinary proposal. They actually have the temerity to give the sophisticated client "the right" to consent to an open-ended, undefined-in-any-way, prospective waiver of any current or future client conflict uncabined as to (a) the nature of the matters involved (RICO, treble damages, bet-the-company litigation), (b) when in the future the conflict might arise, (c) whether the conflict is even waivable under the applicable rules or notions of fiduciary duty, (d) how long after the waiver is secured the waiver might be enforced, (e) what has happened to the lawyer-

35. *E.g.*, *Merck Eprova AG v. ProThera, Inc.*, 670 F. Supp. 2d 201, 209 (S.D.N.Y. 2009) ("[C]ounsel may not avoid a disqualifying conflict by dropping the less desirable client like a 'hot potato.'"); *see* *Folsom v. Menard, Inc.*, No. 3:09-cv-94-RLY-WGH, 2011 U.S. Dist. LEXIS 40406 (S.D. Ind. Apr. 13, 2011); *Fujitsu Ltd. v. Belkin Int'l, Inc.*, No. 10-CV-03972-LHK, 2010 U.S. Dist. LEXIS 138407 (N.D. Cal. Dec. 22, 2010); *El Camino Res., Ltd. v. Huntington Nat'l Bank*, 623 F. Supp. 2d 863 (W.D. Mich. 2007); *Eastman Kodak Co. v. Sony Corp.*, No. 04-CV-6095, 2004 U.S. Dist. LEXIS 29883 (W.D.N.Y. Dec. 27, 2004).

36. *See* *Alzheimer's Inst. of Am., Inc. v. Avid Radiopharmaceuticals*, No. 10-6908, 2011 WL 6088625 (E.D. Pa. Dec. 7, 2011); *United States v. Allen*, No. 06-40056-01, 2008 WL 2622872 (D. Kan. 2008); *In re Tutu Wells Contamination Litig.*, 164 F.R.D. 41 (D.V.I. 1995); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2011) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

client relationship in the interim, and (f) what confidential information the client shared with the law firm.³⁷ Again, how lucky are those sophisticated clients? Imagine being given such an important “right” by a generous and grateful profession.

Why didn’t the ABA give these clients that right earlier? The nerve of the ABA to be so parsimonious with clients’ rights. Are we not fiduciaries putting the clients’ interests ahead of our own? If that is what the clients want (the right to sign an impregnable prospective waiver), we should give it to them. And despite the deafening clamor of sophisticated clients demanding their just deserts, the profession has ignored these clients’ pleas. Indeed, one must wonder why only sophisticated clients should be given this right. We can surely rectify that and let all clients provide their lawyers with these waivers.³⁸

Make no mistake about it. Like the first proposal, this one is solely for the benefit of the lawyers. Availability of an enforceable prospective waiver yields the identical unseemly conversations:

Partner 1: “If we use the waiver, the client might fire us.”

Partner 2: “Well, how likely is that, and which client would we prefer to remain?”

Having the right as a client to be the subject of such a discussion makes the client feel all warm and fuzzy. Just as the thirty-three GCs apparently intend.

Why would a sophisticated client ever want to grant an open-ended prospective waiver? The answer from the GCs is because the clients are sophisticated and understand the risk they are running. But no matter how “sophisticated” a sophisticated client may be, the client is not clairvoyant. The client does not have any idea—at the time the prospective waiver is snared—where the representation will go, how many other matters the rights-granting law firm will take on, or how much confidential information of the client will have been shared with the law firm. Yet years down the road, the prospective

37. Law Firm Proposals, *supra* note 1, at 4 (“A sophisticated client should have the right, at any time during or in connection with any engagement of outside counsel, to consent to the advance waiver of any, all, or some specified future conflicts of interest on the part of outside counsel, including but not limited to direct adversity both during or after the conclusion of the engagement, provided that the client’s confidences and secrets are protected by effective screening measures.”).

38. In fact, many law firms are systematically seeking such waivers in every retainer letter that goes out. The classic example was the prospective waiver sought, without any attempt to get informed consent, in a four-page, single-spaced retainer letter by a prominent law firm, from my eighty-eight-year-old mother, a waiver she would have undoubtedly agreed to if her “extremist” son had not read the letter first.

waiver may be pulled out of a drawer where the waiver clause is found buried in a dense multi-page retainer letter and brandished like a sword to permit a law firm to take on a matter directly adverse to a present client.

I suppose what the GCs are telling the ABA and their clients is that this is in the client's best interest because these lawyers will be better able to compete in their rarefied world if their business were not shackled by the concept of loyalty. And they are also saying, I suppose, that once again the great law firms will be invited to have the unseemly opportunity to decide which client is more lucrative: the client who wants to sue the first client or the original client. After that discussion takes place, it will be easy for the firm to decide where its loyalty lies.

C. *Suing Your Client's Family*

But the GCs are not done yet. Not even close. Just in case their proposal to sue their own clients for RICO or securities law or antitrust violations does not get adopted, and the lock-tight prospective waiver is not enthroned in our rules for sophisticated clients, they offer what has to be a lesser included offense. Under this regime, the firm that represents a subsidiary of another company could sue the parent of the lawyer's client without a nod at the effect such a move might have upon the client.³⁹ One must recognize that this proposal is totally unnecessary if they succeed on either of the first two, which, because those proposals permit suing the client, a fortiori would permit suing the rest of the client's family. To proceed against the parent, siblings, or subsidiaries of their clients is a more "modest" proposal, but one almost as disloyal.

This proposal penalizes clients for adopting a corporate structure that, ironically, the very same lawyers probably recommended or advised their clients was required for regulatory reasons. It also ignores the fact that the organization is completely integrated; that the parent includes the results of all its subsidiaries on its Report on Form 10K; that everyone in the subsidiary receives stock options in the parent; that the GC of the parent provides legal services through her staff to all the subsidiaries; that the subsidiary receives all its bank financing based on parent guarantees; that the enterprise is indifferent to whether it loses \$500,000 in a subsidiary or at the parent because the

39. Law Firm Proposals, *supra* note 1, at 4 ("For conflict of interest purposes, when a law firm is engaged to represent a sophisticated client, absent express language to the contrary in the engagement agreement or other writing between the law firm and the client, the law firm should be deemed to represent only the particular legal entity that engaged it and for which it is providing legal services, and should not be deemed to represent any parent, subsidiary, or affiliated entity of the client.").

bottom line effect is identical; and the myriad of other connections that are found in a “sophisticated” company’s corporate structure. You get the idea.

It is true that today, over this author’s strenuous objections,⁴⁰ the Model Rules approve, in a comment to Rule 1.7, the taking of positions adverse to the corporate family members of so-called sophisticated clients. But that comment carefully (but not carefully enough) circumscribes when this might occur.⁴¹ Even those limitations would be thrown in the dustbin of history if the members of the Gang of Thirty-Three have their way.

VI. THE “DEFENSE” OF THE PROPOSED RULES

The Gang of Thirty-Three does not just offer these rules as much hoped for “improvements” to the profession. They also offer three reasons why these rules should be adopted. Examination of each only compounds the dismay provoked by the rules themselves.

A. *Sophisticated Clients Can Protect Themselves: Let the Bargaining Begin*

This reason is the most troubling because it reflects an antipathy to our values and, more importantly, to our clients that has no place in a world of dedicated professionals. Why, we are asked by the proposals, should we amend lawyers’ practice rules governing the fiduciary duty of loyalty? Because sophisticated clients are “fully capable of protecting their own interests.”⁴² What does that mean? Why should clients have to protect themselves? And from, of all people, their lawyers?

One must conclude, sadly, that the Gang of Thirty-Three seeks a regime in which, as each new engagement begins, the lawyer and client open a round of negotiations in which the client seeks to protect itself from the lawyer, a lawyer who—more likely than not, if the Gang’s views are embraced—is determined to give the client as little loyalty as possible. Thus the client—if the

40. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-390 (1995) (discussing conflicts of interest in the corporate family context).

41. The Comment provides three exceptions to the ability to take a position directly adverse to a client’s corporate affiliate: (1) “the affiliate should also be considered a client of the lawyer,” (2) “there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates,” or (3) “the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.” MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 34 (2011).

42. Law Firm Proposals, *supra* note 1, at 2.

“sophisticated” client really understands how the game is to be played and what protections the client should seek – bargains to receive what is considered the gold standard found in the present rules. At the same time the lawyer, committed to the Gang’s cramped view of loyalty, threatens to withhold services without important loyalty concessions. All of this leaves the client wondering whether it can find any lawyer willing to meet its needs in that respect.⁴³ Or maybe under this system, the lawyer may hope to avoid addressing the topic altogether, praying that the client will not try to protect itself at all.

Is not this the most unseemly start to a professional fiduciary relationship one can imagine? The lawyer bargains directly against the interests of the client, and – while the client allegedly has the ability to protect itself – the client will fail to do so or, at worst, will accept some vastly diluted version of what it would otherwise receive if it were not “sophisticated.”

B. It Is in the Interests of the Client

This is the defense that launched this diatribe.⁴⁴ We are told, right from the outset, that these proposals are being submitted because “the current regimes of lawyer regulation in the U.S. are no longer adequate to serve the legitimate needs and expectations of large business clients that are the drivers of our national (and global) economy.”⁴⁵ For sure, in these parlous times, tying any proposal to the health of the nation’s, to say nothing of the world’s, economy is a great strategy. If we only would change our rules of professional conduct, then the world economy would be unleashed to achieve its full potential, taking the U.S. economy along the same wave, to say nothing of these AmLaw 100 law firms whose economies will also soar because no new business will ever again need to be turned away. In other words, the propositions are without foundation; and for the Gang of Thirty-Three to tie these proposals to even the “needs” and economic health of their clients, let alone the nation and the world, is for sure a bridge too far.

One notes with more than passing interest that, at least to this author’s knowledge, no clients (sophisticated or otherwise) signed onto their proposal and, since its inauspicious launching in March 2011, not a single in-house

43. One wonders whether the Gang thinks other protections of the rules – for example, of the right to reasonable fees or of the right to protect confidential information absent informed consent – are similarly subject.

44. See *supra* note 2.

45. Law Firm Proposals, *supra* note 1, at 1.

counsel or sophisticated client has lent one word of support. Instructively, the Association of Corporate Counsel did offer support for the Gang's proposal, not addressed here, for more uniform admission standards.⁴⁶

C. The Client Choice Defense

We are also told our present rules restrict client "choice."⁴⁷ That is certainly true. Every client in America may not select any lawyer or law firm in America. But every time anyone advances that as a reason why the rules should be changed, the following flaw in the argument must be highlighted. It is true that Client *A* does not have the choice to hire Law Firm *B* to sue *C* if *C* is a present client of Law Firm *B*, or if *C* is a former client whose matter is substantially related to *A*'s new matter. But our rules do this to protect Client *C*, who clearly is entitled to know that *C*'s law firm will not sue it without *C*'s informed consent. So one client's choice is another client's protection. And exalting this desire to choose any firm in the country over real client protection is not only bad for our existing clients (the dates who brought us to the party) but a disaster for our ability to call ourselves professionals.

VII. POSTSCRIPT

A. The Words They Use

Reviewing the response of Jim Jones and Anthony Davis on behalf of the Gang of Thirty-Three⁴⁸ demonstrates that not only has this group embarked on a campaign to destroy the values of our profession, but also that they are unembarrassed, indeed proud, of the effects their proposals would have. If you review their Essay carefully, you will see that the concept of loyalty is never addressed except as an outdated concept to be placed in a museum next to typewriters and incandescent light bulbs. Indeed, the idea that we owe a duty

46. *Response of the Association of Corporate Counsel to the Request for Comment on the Proposals of ABA Commission on Ethics 20/20 Working Group—Inbound Foreign Lawyers*, ASS'N OF CORP. COUNSEL (July 2010), <http://author.acc.com/legalresources/resource.cfm?show=979603>.

47. *Law Firm Proposals*, *supra* note 1, at 3 ("Indeed, the application of the existing rules to sophisticated clients has sometimes had the perverse effect of unnecessarily denying such clients their choice of counsel.").

48. 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 (2012), <http://yalelawjournal.org/2012/03/27/davis&jones.html>.

to our clients that goes beyond the individual lawyer's handling of a particular matter is nonexistent.

Similarly, they fail to acknowledge that the rules, as they propose them, would give lawyers unbounded opportunities to take positions directly adverse to their clients. Even if the matters were bet-the-company transactions or lawsuits, even if they involved the assertion of claims for punitive damages, or sanctions, or treble damages, or reputation-destroying results, or share price plummeting engagements, the Gang of Thirty-Three would endorse a rule that countenanced those directly adverse engagements.

We do, however, hear about “underlying realities,”⁴⁹ the “realities of modern law firms,”⁵⁰ and the “realities of the world in which they live.”⁵¹ What are those realities? The Gang of Thirty-Three dares not speak their name. But we know what they are: those realities are the inconvenience of checking for conflicts and the dismay caused by sending work to other law firms. And the failure of the proponents to have the temerity to define the realities speaks volumes about how embarrassing the reality claim really is.

B. Client “Needs”

The response also unashamedly continues to rely on some extraordinary notions that this is for the good of the clients. We are told that the ethical rules “do not adequately address the needs [and] changing expectations of many clients.”⁵² Similarly, they assert that “[t]he proposed changes address the mutual needs of sophisticated clients and their lawyers.”⁵³ But we are never told what the needs of the clients are, and—as noted in Part V of this Essay—I cannot imagine that there is a client in the world who “needs” its lawyer to sue the client or sue a client's subsidiary. Indeed, I dare say, there has never been a client who begged its lawyer to be given the “opportunity,” let alone the right, to sign an open-ended prospective waiver of all conflicts, forever and ever.

C. Motions To Disqualify Are Pretextual

The Gang of Thirty-Three enlists the notion of pretextual motions for disqualification as a reason to end such motions, but they do so without

49. *Id.* at 590.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 591.

defining the term quite properly. Permit me to explain what it is. A pretextual motion for disqualification is one that is brought against your law firm. A meritorious one is a motion you bring on behalf of your present client against its former law firm. Resenting and disparaging present and former clients for enforcing their absolute right to loyalty has been raised to a high art form by those who violate our rules.

The courts have come up with ample tools to handle those who lie in wait and only bring a motion to disqualify at the most inappropriate time. But, having spent years addressing motions to disqualify, I know that by far the vast majority of such motions are brought to vindicate the totally unremarkable proposition that the client's present or former law firm should not have taken on an adverse representation without picking up the telephone and, if the conflict is waivable, seeking a waiver of the conflict of interest on informed consent.

D. Extremism in the Defense of Loyalty Is No Vice

We learn quite a bit when Jones and Davis accuse me of “extremism” as a result of my “unbridled version of the doctrine of imputation.”⁵⁴ This ridiculous doctrine, we are told, has no “utility”⁵⁵ in big firms. Rather, they advance an Orwellian definition of loyalty that permits them to assert with sincerity that law firms “as institutions are capable of being ‘loyal’ to different clients through different lawyers,”⁵⁶ though, in an Orwellian sense, perhaps some clients are treated to the firm's loyalty more equally than others.

Of course, these lawyers all want to share in their law firm's prosperity, offer clients the resources of every one of their offices, every one of their specialized departments, every one of their talented lawyers wherever located, and all of the firm's experience and knowledge bases wherever they may be found. But they think, nonetheless, that it is perfectly appropriate to accept those fees from Client A and at the same time have the law firm's very own lawyers suing Client A for treble damages. Doesn't sound like loyalty to me.

One need only look at the website of any one of the thirty-three firms to understand this point. I have selected, on a random basis, just three of them to demonstrate how inconsistent the Gang's definition of loyalty is by reference to the way each of these firms touts the advantages of hiring these law firms as institutions.

54. *Id.* at 594.

55. *Id.*

56. *Id.*

[O]ur more than 800 legal and consulting professionals provide the depth and breadth of expertise necessary to solve complex business challenges. . . . [W]e recognize that optimal results are driven by a spirit of collaboration and a team approach to service. With that understanding, we collaborate with clients—and each other—every day to handle the complex transactions, regulatory matters and litigation that businesses face.⁵⁷

* * *

Our focus on providing strategic, pragmatic and responsive legal counsel in each of our core practices has made us the firm of choice for clients seeking to structure transactions, manage risk, protect and develop assets, pursue remedies and resolve disputes. Clients value our guidance on sophisticated matters ranging from multidistrict litigation to complex, cross-border transactions. With fully integrated offices throughout the United States, Europe and Asia, [our firm] protects and advances the interests of clients wherever they do business.⁵⁸

* * *

[Our firm] is a leading global law firm providing our diverse client base with national and cross-border solutions to all of their legal requirements. We have also earned a reputation for our deep firm-wide experience in numerous sectors, including energy, financial services, insurance and technology.

With more than 1,100 lawyers in 26 offices spanning major financial markets around the world, we are one of the largest law firms in New York City and one of the largest US firms located in London.

As a firm that frequently advises our clients on assignments that span multiple practice areas and jurisdictions, we have well-established strengths in the emerging markets.⁵⁹

One must wonder how these descriptions will be altered if, in fact, the Gang's proposals governing loyalty were adopted. My guess is they won't be altered at all.

57. *About Us*, FAEGRE BAKER DANIELS LLP, <http://www.faegrebd.com/About-Us> (last visited Mar. 27, 2012).

58. *About Dechert*, DECHERT LLP, <http://www.dechert.com/about> (last visited Mar. 27, 2012).

59. *Firm*, DEWEY & LEBOEUF LLP, <http://www.deweyleboeuf.com/en/Firm> (last visited Mar. 27, 2012).

Moreover, what the Gang ignores is that this “extremism” is, in fact, the present rule in every American jurisdiction except Texas. And in Texas, the definition of “loyalty” makes a mockery of that fiduciary duty, permitting, as it does, the law firm to be “loyal” to its client by gleefully collecting the firm’s lofty hourly rate, while at the same time suing the client for an uncabined number and type of unrelated matters, leaving a client that is in search of loyalty from its lawyers with only the remedy of firing the lawyer.⁶⁰

In any event, I gladly embrace the accusation of extremism because, for me, it calls to mind Judge Cardozo’s earlier quote: “Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty,” because, “[o]nly thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.”⁶¹ I like the extremist company I am in. Indeed, what was demanded in 1928 is even more important in the twenty-first century because compromising loyalty is merely another way of compromising the right to counsel.

CONCLUSION: THE BIGGER PICTURE

As one can see, all of these issues are terribly important. If the proposals of the Gang of Thirty-Three were adopted, the results would systematically destroy the concept of loyalty and the fiduciary duty owed by law firms to so-called sophisticated clients. But what is far more important is what the highly public offering of these proposals reflects. It is one thing for lawyers, in the privacy of their own offices, to gnash their teeth at the loss of new business due to conflicts or to vent their frustration at the need to resign a professional representation because it runs afoul of our rules. That is to be expected. Every lawyer in the land—including this writer—is disappointed when a potential new matter must be rejected or a longstanding old one must come to a premature conclusion because of the requirements of professional obligations reflecting our overall duty of loyalty.

60. Instructively, the federal courts in Texas refused to apply the Texas rule from its inception. See *In re Dresser Indus., Inc.*, 972 F.2d 540 (5th Cir. 1992). In *Dresser*, the court was asked to deny a motion to disqualify under the Texas Disciplinary Rule 1.06. The court, however, observed that neither the ABA Rules of Professional Conduct, nor the predecessor ABA Code of Professional Rules, nor the Restatement of the Law Governing Lawyers permitted a lawyer to bring a suit against a client without the client’s consent. *Id.* at 544-45. Finding that there could be no social interest to be served by such a representation that could outweigh its impropriety, the court granted disqualification of the law firm, which had advanced that position. *Id.* at 545-46.

61. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

It is quite another to ostentatiously call for the destruction of the entire loyalty edifice, particularly when that is done transparently and solely for financial reasons, costumed as proposals that are in the best interests of the client, that offer clients rights, and that fulfill clients' needs. Apparently it is just not enough that the firms who are offering these proposals enjoy prosperity beyond anything these lawyers could have ever anticipated when they came to the bar. Rather, for them, if the cost of increasing profits is a fundamental compromise of what we thought it was that made us professionals, that is a result they are willing to embrace. In doing so, however, they ignore the fact that under their regime these firms' profits will likely increase very little because they will no longer be the lucky recipients of the matters that would have previously been rejected by their colleague firms due to conflicts of interest.

Whether these proposals are ever adopted, in no small measure the damage to the profession's public image has already occurred simply in the process of offering them. Let us at least hope that the Ethics 20/20 Commission refuses—emphatically—to lend any credit to these proposals as it proceeds with its important deliberations about our critical, but obviously fragile and threatened, professional responsibilities.

Lawrence Fox is the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School and a partner of Drinker, Biddle & Reath LLP. He is a former chairman of the ABA Standing Committee on Ethics and Professional Responsibility and a former chairman of the ABA's Section of Litigation.

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