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In Defense of a Reasoned Dialogue About Law Firms and Their Sophisticated Clients

This Essay argues that the current ethical rules governing U.S.-based law firms are no longer adequate to meet the needs of commercial clients operating in multiple jurisdictions and that what is required is a single and uniform regulatory system for lawyers practicing in the United States. The Essay supports the Proposals submitted to the ABA 20/20 Commission by a group of law firm general counsel that sophisticated clients and their outside counsel should be able to enter binding and enforceable agreements governing such issues as advance conflicts waivers, a narrower definition of current client conflicts, and limitations of liability. The Essay broadly responds to and rejects the critique of the Proposals propounded by Larry Fox.

INTRODUCTION

We write in support of the “Proposals of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients,”¹ submitted by the general counsel and risk managers of more than thirty large law firms to the American Bar Association (ABA) Commission on Ethics 20/20 in March 2011 (which we will hereinafter refer to as the “Law Firm Proposals” or “Proposals”), and in response to Larry Fox’s essay roundly condemning that submission.² Sadly, Fox’s diatribe in response and opposition

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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. Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567 (2012), <http://yalelawjournal.org/2012/03/27/fox.html>.

to the Law Firm Proposals was not only unpleasant in tone but, more importantly, unhelpful in its failure to address the underlying realities on which the Proposals were premised. Many of the propositions that he states as verities of proven and virtuous antiquity simply do not stand up to scrutiny—either as to their substance or their provenance. And the world of legal practice that he envisions bears little resemblance to the realities of modern law firms or the regional, national, and global clients they serve.

As persons who were directly involved in the preparation of the Law Firm Proposals, we know that they were generated in the hope of promoting a reasoned discussion on a topic of fundamental importance to clients as well as to their outside lawyers. The Proposals were based on two underlying premises: first, a conviction that the current ethical rules governing U.S.-based lawyers and law firms do not adequately address the needs or changing expectations of many clients or the lawyers who serve them; and second, that the lack of a single and uniform regulatory system for lawyers across the country is harmful to both clients and their outside counsel.

I. A BRIEF REVIEW OF THE PROPOSALS

Before we address the deficiencies of Fox's arguments, it might be helpful to summarize briefly the actual Proposals that the group of law firm general counsel submitted to the ABA. Before doing so, however, it is also important to recognize the reasons the group felt compelled to make such a submission. The signatories to the Law Firm Proposals are all senior lawyers whose responsibilities within their firms are focused on ensuring compliance with the varied and often inconsistent rules of practice in the numerous U.S. and foreign jurisdictions in which their firms operate. Their task is made frustratingly difficult not only by the lack of a single, uniform set of rules governing professional conduct across the country—a lack that often results in conflicting, inconsistent, and unpredictable results from one jurisdiction to another—but also by a prevailing set of regulatory norms that simply do not match the realities of the world in which they live.³

3. An excellent example of the inconsistency in results that can obtain from one jurisdiction to another is the starkly different outcomes pertaining to the attempted disqualification of the former 650-lawyer global litigation firm Howrey LLP in companion patent disputes between two U.S. pharmaceutical companies, Wyeth and Boston Scientific. On essentially the same facts, a U.S. district judge in Delaware ruled that Howrey could continue its representation of Boston Scientific in that state, while a U.S. magistrate judge in New Jersey disqualified Howrey from continuing to represent the same client in a proceeding there. While the District Court in New Jersey subsequently set aside the magistrate judge's

In the words of the Proposals, the rules governing lawyer conduct imposed by the several states

are primarily designed to protect individual consumers of legal services who may lack the experience or sophistication to protect themselves against unethical or otherwise improper conduct by the lawyers who represent them. While such rules may be perfectly sensible when dealing with such unsophisticated clients, the strictures and presumptions they impose do not work well when applied to relationships between large commercial enterprises and their outside counsel.⁴

Accordingly, the Proposals suggest modifications to the current rules of practice governing (1) the relationships between law firms and sophisticated commercial clients and (2) the ability of lawyers to engage in practice across jurisdictional lines. Specifically, they recommend changing certain presumptions in the substantive rules insofar as they apply to sophisticated clients and offer a working definition of what might constitute a “sophisticated client.” The proposed changes address the mutual needs of sophisticated clients and their lawyers to be able—*by mutual consent and when they choose*—to determine with certainty how the conflict of interest rules should apply in their relationships. Thus, sophisticated clients and their outside lawyers could agree to permit:

- Binding advance waivers of conflicts;⁵
- Direct adversity by the outside lawyers to the clients without prior consent, so long as the law firm (1) held no material confidential information of the client regarding the new matter and (2) provided effective measures to screen the lawyers working on the two matters from each other;⁶ and
- Waivers of potential disqualifications based on conflicting representations of laterally hired lawyers by the outside firm, so

disqualification order, the case exemplifies the way unpredictable inconsistencies can arise, often causing disruption and additional expense in the litigation process. Compare *Bos. Scientific Corp. v. Johnson & Johnson Inc.*, 647 F. Supp. 2d 369 (D. Del. 2009), with *Wyeth v. Abbott Labs.*, 692 F. Supp. 2d 453 (D.N.J. 2010).

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

5. *Id.* at 4.

6. *Id.*

long as concurrent representations were not in the same or substantially related matters.⁷

Additionally, the Proposals suggest that sophisticated clients should be able to agree with their outside lawyers to limit the liabilities of such lawyers or to indemnify them in connection with the engagement.⁸ This would enable lawyers and their clients to agree in advance to the nature or extent of the lawyers' potential liability to the client in connection with a given transaction or engagement, "the time within which the client may assert any claims against the lawyers, the forums where any disputes should be heard and determined, or the extent or kinds of damages for which the lawyers should be liable."⁹

II. FUNDAMENTAL FLAWS IN THE FOX CRITIQUE

A. Loyalty

The lynchpin of Fox's strident rejection of the Law Firm Proposals is an extreme view of client loyalty that is simply unworkable when wedded to the extreme view of imputation that he also embraces. While no one would dispute that a lawyer owes an unwavering duty of loyalty to his or her client, the nature of that duty is not as universally agreed upon—or nearly as unbounded—as Fox suggests. Although frequently invoking the traditions of the common law to support his position, Fox fails to acknowledge that the Proposals advanced by the law firm general counsel—for example with respect to outside lawyers being able to act directly adverse to an existing client in an unrelated matter—are fully consistent with the English common law and with rules of practice in England and Wales (as well as in Europe and much of the rest of the world).¹⁰

7. *Id.*

8. *Id.* at 4-5.

9. *Id.* The Law Firm Proposals also endorse the paper submitted by the Association of Corporate Counsel (ACC) in July 2010 to the ABA Commission on Ethics 20/20 Working Group—Inbound Foreign Lawyers. See *id.* at 5-6 (citing *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>). While we support the proposals of the ACC, they were not addressed directly by Fox and hence we will not discuss them further in this Essay.

10. Under the Solicitors' Code of Conduct 2007, in force until recently in England and Wales, solicitors were forbidden (with certain narrow exceptions) from acting in circumstances involving conflicts of interest. Rule 3.01(2)(a) provided that "there is a conflict of interest if: you owe, or your firm owes, separate duties to act in the best interests of two or more clients

Indeed, the so-called “English rule” on conflicts of interest is the law in Texas as well.¹¹

The simple fact is that in these jurisdictions (including Texas) the concept of client loyalty is interpreted to mean that a lawyer (1) should not represent two different clients *in the same matter*, (2) should always safeguard a client’s confidences, and (3) should never use a client’s confidential information to the client’s disadvantage.¹² It does not mean that a lawyer should never be adverse in any conceivable way to anyone who is now or previously was a client.

B. Imputation

The extremism of the Fox analysis is exacerbated, however, when coupled with his embrace of an unbridled version of the doctrine of imputation—i.e., the principle, embodied in Rule 1.10 of the ABA Model Rules of Professional

in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict.” SOLICITORS’ CODE OF CONDUCT R. 3.01(2)(a) (2007) (emphasis added). On October 6, 2011, the Solicitors’ Code of Conduct 2007 was replaced by the Solicitors Regulation Authority (SRA) Code of Conduct 2011, which can be found in the SRA Handbook. SOLICITORS REGULATORY AUTH., SRA HANDBOOK (2d ed. 2011), available at <http://www.sra.org.uk/solicitors/handbook/welcome.page>. While the new rules shift from specific to outcome-focused regulation, they did not change the fundamental understanding of situations giving rise to conflicts of interest. For example, in Chapter 3 of the new SRA Handbook (dealing with conflicts of interest), Indicative Behavior 3.2 provides that generally solicitors should decline “to act for *clients* whose interests are in *direct conflict*, for example claimant and defendant in litigation.” SOLICITORS REGULATION AUTHORITY CODE OF CONDUCT R. 3.2 (2011) (second emphasis added).

11. See TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.06 (2005).
12. These obligations are well summarized, for example, in the Code of Conduct for European Lawyers, which provides in Article 3.2 as follows:
 - 3.2. Conflict of Interest
 - 3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.
 - 3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interest arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer’s independence may be impaired.
 - 3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give undue advantage to the new client.
 - 3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

COUNCIL OF BARS AND LAW SOC’YS OF EUR., CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS 15 (2008).

Conduct, that the conflicts of one lawyer in a firm should be imputed to all others, regardless of the size of the firm or the location of the lawyers.¹³ Whatever the efficacy of such a rule in a two- or five- or ten-person law firm, its utility can certainly be questioned in firms of hundreds of lawyers representing clients in dozens of offices in multiple countries around the world (including jurisdictions that do not embrace the broad view of conflicts currently incorporated in the ABA's Model Rules). The Proposals advanced by the law firm general counsel are premised on the assumption that law firms as institutions are capable of being "loyal" to different clients through different lawyers and that sophisticated clients are capable of understanding that. Whether one ultimately agrees with that view or not, it is certainly a topic worthy of serious debate. At a time when the *average* size of the 250 largest law firms in America is 497 lawyers and when the country boasts more than a dozen firms of 1000 lawyers or more,¹⁴ surely it is not frivolous to suggest that the time may have come to reconsider the appropriateness of the imputation rule, at least insofar as sophisticated commercial clients are concerned.

C. *Consistency of Proposals with the Current Rules of Professional Conduct*

Another major flaw in the Fox analysis of the Law Firm Proposals is that he overlooks the fact that—with the exception of the suggested consensual limitation on liability—there is *nothing* in the Proposals that is currently prohibited under the ABA's Model Rules or the rules of the several states based on the Model Rules.¹⁵ All of the suggestions respecting conflicts of interest can,

13. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2011).

14. Out of the 250 largest U.S.-based law firms, the largest firm has 3738 lawyers, while the smallest firm has 160 lawyers. *The NLJ* 250, NAT'L L.J., Apr. 25, 2011, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202489565842>.

15. This is true even for advance conflict waivers, a practice for which Fox seems to have particular disdain. What is being suggested in the Law Firm Proposals is neither radical nor new. Courts have recognized the validity of future waivers. For example, in a case decided recently, *In re Shared Memory Graphics LLC*, Misc. Docket No. 978 (Fed. Cir. Sept. 22, 2011), the U.S. Court of Appeals for the Federal Circuit, in upholding the validity of an advance waiver contained in a joint defense agreement, noted as follows:

Even in attorney-client situations, general rules of professional legal conduct recognize that in certain circumstances it is not only proper but beneficial for parties to contractually consent to a waiver of future conflicts of interest. Moreover, courts applying California law, which governs motions to disqualify counsel [relevant in the case pending before the court], have generally recognized the enforceability of advanced waiver of potential future conflicts, even if the waiver does not specifically state the exact nature of the future conflict.

Id. at 7-8 (citations omitted).

for example, already be voluntarily agreed to by clients and their lawyers, *at least theoretically*. But, therein lies the problem. The ABA's Model Rules—as well as the state rules that reflect them—are premised on the assumption that clients are unsophisticated consumers of legal services who require the protection of the rules to shield them from unethical or otherwise improper behavior by their lawyers. Adopting this premise, courts are often inclined to interpret the rules very strictly, even in cases where a sophisticated client may have agreed to a different result.¹⁶ This *approach* leads, unfortunately, to inconsistent and unpredictable results, leaving both clients and their outside counsel uncertain whether the terms they negotiated will be honored.¹⁷ It also provides fertile ground for pretextual motions for disqualification, a serious problem that most courts would readily acknowledge.¹⁸ The fact is that a significant number of disqualification motions and conflict complaints filed in

16. For example, in *Celgene Corp. v. KV Pharmaceutical Co.*, Civ. No. 07-4819, 2008 WL 2937415 (D.N.J. July 29, 2008), the court granted a motion to disqualify Buchanan Ingersoll & Rooney PC as counsel for defendant KV Pharmaceutical Co. because of the firm's representation of Celgene Corp. in an unrelated matter. Although Buchanan Ingersoll had obtained two advance waivers from Celgene, the court found that neither sufficed. Pointedly, the court stated: "Celgene may have been a very sophisticated client, but that does not mean that Buchanan is excused from the obligation to obtain informed consent. [N.J. Court Rules] RPC 1.0(e) makes no exception for sophisticated clients or clients who are independently represented by counsel." *Id.* at *12. In *Brigham Young University v. Pfizer, Inc.*, No. 2:06-CV-890, 2010 WL 3855347 (D. Utah Sept. 29, 2010), the court upheld the disqualification of Winston & Strawn LLP despite an advance waiver signed by the plaintiff. Again reflecting a bias toward strict interpretation of the rules, the court noted:

For a consent to be interpreted as validly waiving the client's right to exclusive representation, [l]anguage in a contract of release . . . would have to be positive, unequivocal and inconsistent with any other interpretation. Where the terms are not explicit, the client should not be held to the terms of the document.

Id. at *2 (quoting from the Magistrate Judge's findings).

17. See the example of inconsistent results from different courts in essentially the same matter, both involving the Howrey firm *supra* note 3.
18. In *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), Justice William Brennan recognized this problem explicitly: "[T]he tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation." *Id.* at 441 (Brennan, J., concurring). Many other courts have echoed the same sentiment. See *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir. 1989); *Optyl Eyeware Fashion Int'l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985); *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 584 (D. Del. 2001); *Sanchez-Caza v. Estate of Whetstone*, No. Civ.A. 02C-08-002, 2004 WL 2087922, at *4 (Del. Super. Ct. Sept. 16, 2004); *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990); see also Comment, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863 (1987) (reviewing the case law and proposing denial of third party standing as a means of limiting unmerited strategic disqualification motions).

U.S. courts today are simply tactical attempts to gain an advantage in litigation rather than genuine efforts to protect client confidences or loyalty. The end result of these tactical schemes is often to inflate the cost of litigation, to delay the resolution of disputes, and to deny litigants the counsel of their choice.¹⁹

Under the Law Firm Proposals, in cases involving sophisticated clients, the presumptions under the conflict rules and certain other rules would be reversed, *unless the parties specified otherwise*. Thus, if a sophisticated client agreed to an advance waiver with a law firm to permit direct adversity on unrelated matters, or to provide waivers of conflicts resulting from lateral partner moves, there would be a strong likelihood that such agreements would be honored more uniformly by jurisdictions than under the present regulatory framework. Contrary to Fox's suggestion, however, no client would be forced to accept any of these results and could easily avoid them simply by stipulating to the contrary.²⁰ Moreover, it is important to remember that, insofar as sophisticated clients are concerned, the discussion between client and outside counsel is almost always a discussion *between lawyers* and not between outside lawyers and uninformed lay people. Large commercial clients typically have sophisticated and experienced in-house counsel who are more than capable of representing these clients' best interests and fully understanding the agreements they reach.

D. *Sophisticated Clients*

Another line of attack by Fox is to belittle the notion that any client might actually be a sophisticated client, suggesting that we really have no choice but

19. See *Manning v. Waring, Cos, James, Sklar & Allen*, 849 F.2d 222, 224-25 (6th Cir. 1991) ("Unquestionably, the ability to deny one's opponent the services of capable counsel, is a potent weapon."); see also Mark F. Anderson, *Motions To Disqualify Opposing Counsel*, 30 WASHBURN L.J. 238 (1991) (noting the increased frequency of tactical disqualification motions).

20. Although not mentioned by Fox in his critique of the Law Firm Proposals, a question could be raised whether it is necessary to reverse the presumptions of the current rules (respecting conflicts and other matters) as applied to sophisticated clients rather than merely enabling such clients and their lawyers to override existing presumptions if they so choose. Although this is certainly a debatable point, we are inclined to agree with the judgment reached by the law firm general counsel endorsing the Proposals that a reversal of the underlying presumption is the better course. First, it is in our view cleaner and more logical to have "default rules" governing relationships that are suitable and appropriate to the relationships themselves rather than requiring a laundry list of exceptions to which parties must agree. Second, and more important, we are concerned that, without a reversal of the underlying presumptions, some courts might remain inclined to interpret the rules so conservatively as to frustrate the legitimate intentions of the parties. See cases cited *supra* note 16.

to view all clients as inexperienced and incapable of making intelligent decisions in respect of their legal rights, even with the assistance of experienced in-house counsel. In other words, he asserts that the rules governing lawyers must always be pegged to the lowest common denominator and that this denominator is always the unsophisticated client needing protection from his or her lawyer. As pointed out in the Law Firm Proposals, however, the notion of drawing distinctions between sophisticated and unsophisticated consumers of services is hardly novel. Examples of such distinctions in federal law can be found in the Consumer Credit Protection Act,²¹ the Consumer Leasing Act,²² and Regulation D of the Securities and Exchange Commission.²³

Moreover, the Law Firm Proposals clearly acknowledge that reasonable people can certainly differ on the definition of a sophisticated client suggested in that submission.²⁴ The important point is that the criteria used to identify sophisticated purchasers of legal services should be realistic and easily and objectively measureable. Surely, Fox would not deny that *some* clients are sufficiently sophisticated in dealing with outside counsel as to justify the conclusion that they are fully capable of protecting their own interests without the need for artificial presumptions tilted in their favor in the interpretation of applicable rules of practice. If Fox has a better suggestion for how the rules might define such clients, then he should put it forward for discussion.

**CONCLUSION: THE NEED FOR INTELLIGENT AND PRODUCTIVE
DEBATE**

The suggestions set out in the Law Firm Proposals are grounded in the realities of today's complex and highly competitive market for legal services. They seek to draw from and respond to the needs of major commercial clients and the law firms that serve them. Justice Holmes famously remarked, "The life of the law has not been logic; it has been experience."²⁵ Just like the law itself, the rules governing the conduct of lawyers must change with the times, always finding ways to preserve key values in the evolving marketplace in which lawyers actually live and work. A system that loses touch with the realities of the working environment in which its rules must be applied quickly loses both its credibility and its moral force. The Law Firm Proposals are

21. 15 U.S.C. § 1603(1) (2006).

22. *Id.* § 1667(1).

23. 17 C.F.R. § 230.501(a) (2011).

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

25. OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (Harvard Univ. Press 2009) (1881).

intended to launch a serious conversation within the legal profession about steps that need to be taken to ensure that our rules of practice remain relevant and vibrant.

Another serious concern also underlies the Proposals. The burdens of unnecessarily restrictive regulations on the practice of law are currently being swept away in many parts of the world, most notably in England.²⁶ Those changes will liberate clients with global businesses and law firms not constrained by the U.S. regulatory structure to engage with each other in many new ways—including all of the ways covered in the Law Firm Proposals. Unless the rules governing the practice of law in the United States can be modified to bring them more in line with the prevailing norms in the rest of the world, U.S.-based and qualified lawyers are likely to be constrained in their ability to compete globally for legal business. That, in our view, would be a serious setback—both for American lawyers and their clients.

In presenting their Proposals, the law firm general counsel make clear that they do not intend to undercut in any way the current rules of practice with respect to unsophisticated clients or to challenge the overall structure of lawyer regulation in the United States as it applies to such clients. Rather, they seek to maximize the ability of sophisticated clients to structure their relationships with their lawyers in ways that best serve their needs while accommodating the real needs of law firms that are increasingly required to deliver services across state lines and international borders.

We hope that those interested in this important topic will consider the Law Firm Proposals on their merits. We look forward to engaging in an intelligent and productive debate with anyone genuinely interested in addressing the actual issues raised in the Proposals. Meanwhile, after having a chuckle at Fox's misplaced hyperbole, we also hope that thoughtful readers will close the lid on his noisy and unhelpful rant.

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26. See Legal Services Act, 2007, c. 29 (U.K.).

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