Editor’s Note:
The article on advance conflict waivers by Mary Strother and Dyane O’Leary in the summer issue of the Boston Bar Journal has inspired a spirited discussion. The Journal published a response in the Fall issue, in which Peter Katz argued that advance waivers are generally contrary to clients’ interests and should be understood as a waiver of otherwise generally understood ethical obligations. In the article below, J. Charles Mokriski asserts that there are circumstances, particularly with sophisticated clients, where advance waivers strike a proper balance between the needs of clients and firms.
The Boston Bar Journal encourages readers to challenge the positions taken in published articles, and will publish responses where we believe that the response furthers the discussion of an issue. As with all submissions, the Board of Editors reserves the right to edit submissions prior to publication. Proposals should be sent to bsashin@bostonbar.org.

Peter Katz’s comment on an earlier Boston Bar Journal piece concerning advance conflict waivers captures one half of an ongoing debate in legal ethics circles. Such waivers are one-sided affairs, Katz argues, with the benefits going to law firms at the expense of clients. This case seems easy to make in theory, since the whole notion that a client can give “informed consent”—which is what is required under Rule 1.7 of the Rules of Professional Conduct to enable a lawyer to proceed with a representation adverse to another of her clients—to a conflict of interest that might arise in the future seems a non-starter. How can such a consent be “informed” if the facts are unknown at the time it is given?

In fact, this paradox is well appreciated by the thoughtful rule-makers who have massaged Model Rule 1.7 and its official Comment 22 that addresses advance consents through the ABA rule-making process. Comment 22, and ABA Formal Opinion 05-436 that followed its adoption, confront this paradox head-on. Salient portions of Comment 22, incorporated into Opinion 05-436, state as follows:

…The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. …

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

The Comment's last clause suggests that a general and open-ended consent can be effective if it is given by an experienced user of the legal services who is independently counseled in giving the consent, and if the future matters consented to are unrelated to the subject of the representation in connection with which consent is given. Mr. Katz contends that the issue of deciding whether a matter is "substantially related" is "put into the hands of the lawyer." Not so. There is much guidance in the Rules for determining whether one matter is substantially related to another (see particularly, Comment 3 to Rule 1.9).

The unfairness of a wholesale condemnation of advance consents can be illustrated by a common example of when an advance consent makes consummate good sense for the client giving it.

Consider Law Firm A, a large diversified practice law firm. It has close relationships with several major clients of longstanding, which depend on the firm's availability to represent them in all manner of important matters. Law Firm A has a very highly regarded appellate practice, which includes the go-to appellate team in the community. Company X, which has never used Law Firm A, has a critical, bet-the-company appeal, and it needs the best representation available. Company X's in-house lawyers conclude that it wants Law Firm A's appellate team. The team is enthusiastic about the case, and urges the management of Law Firm A to let them take it on, even though it is a one-shot case, with little prospect of future business from Company X.

Law Firm A management is concerned that the appeal will drag on for a couple of years, and that the pendency of that appeal may conflict it out of any number of possible matters that might come along in which one of its major institutional clients needs its help. Any of these major clients would be shocked and dismayed if an isolated representation of Company X stands in the way of its being represented by its regular firm, on which it depends and in whom it reposes great confidence. No problem, Mr. Katz might say. When the feared conflict situation arises, Law Firm A need merely ask Company X to consent to the conflict, and Company X might do so...or not. Even though consenting may not disadvantage Company X in the least, it might refuse as a tactical gambit or out of sheer cussedness. Aware of that risk, Firm A's management tells its appellate lawyers that they can take on Company X's appeal only if Company X will consent to future conflicts in unrelated matters in which Company X might be an adverse party. Company X, advised by its in-house counsel, and desperate to have Law Firm A's appellate team in its corner, thinks this is a small price to pay to get that team working on its appeal. Should Company X and its in-house lawyers be unable to make this rational calculation and sign on to the consent? Does it afford no benefit to Company X?

In other words, the situation is not a zero-sum game between client and lawyer. Law firm A gets a challenging appellate matter, and Company X gets competent, first rate representation in its appeal. In the real world, consenting to future conflicts is not merely a concession that a powerful firm extracts from clients for its own benefit. It is a precaution it takes to protect other regular clients and potential clients who have or may have need for its services. So long as law firms do not routinely request advance conflict consents as a standard provision in all engagement letters, and so long as protections are built into advance consents by providing for mandatory ethical screens to protect confidential information, consents to future conflicts make sense in appropriate circumstances.