

WHAT CONFLICTS CAN BE WAIVED? A UNIFIED UNDERSTANDING OF COMPETENCE AND CONSENT

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ABSTRACT

Attorneys are frequently asked to represent more than one client in the same or related matters. The request can arise in nearly every practice setting, from criminal defense, to civil litigation, to complex transactions. Regardless of the setting, attorneys face the same challenge in deciding whether the conflict of interest posed by the joint representation can be waived by the clients. Under the Model Rules of Professional Conduct, the conflict of interest can be waived if (1) the clients provide knowing, informed consent to the joint representation, and (2) the attorney's representation of the multiple clients will be competent and diligent (these latter elements are referred to collectively as "competent" or "competence"). In assessing whether the joint representation will be competent, however, the attorney encounters the enigma that has bedeviled practitioners, courts, and commentators since the adoption of the Model Rules. A joint representation hampered by a conflict of interest materially limits the services that the attorney can perform for one client because of her competing duties to the other client. Thus, the challenge: how can we know which joint representations are competent (and therefore "consentable") when nearly all suffer from material limits on the services that counsel can undertake for the clients?

Courts cannot fashion a principled standard to assess conflict waivers if they cannot reconcile the consent and competence elements of Model Rule 1.7(b). Without the guidance of a clear standard, attorneys risk discipline and malpractice claims for proceeding under a conflict waiver that a tribunal may later deem invalid. Clients, in turn, may be deprived of their choice of counsel by courts that strike down waiver consents under a standard that is more visceral than reasoned. This Article searches for principles to

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explain and unify our seemingly contradictory commitments to client choice and client protection.

Drawing on the distinction between ends and means that grounds a limited form of paternalism and the emphasis of the Model Rules on client control over the objectives of the representation, this Article proposes a new test by which courts and practitioners can honor both the consent and competence elements of Model Rule 1.7(b). An informed conflict waiver must be rejected as incompetent if limitations on the means or procedures by which the attorney pursues the matter caused by the conflict of interest are likely to defeat the client's objectives for the representation (the "client-objectives" or "proposed" test).

Under this approach, we defer to the client's objectives, long understood as the sole province of the client; we intervene when the client makes decisions about means that are likely to undermine those objectives. The test of competency is not whether the representation has a material deficiency—the very reason why client consent was necessary in the first place. Moreover, the question is not whether the client would have been better off without the consent, a decision that belongs to the client. By identifying what the client hopes to accomplish with the representation, the proposed test provides a baseline against which to measure the significance of the limitations caused by the joint representation. Not just any limits on means—even material ones—will invalidate a client's consent. When a client consents to limitations that are likely to undermine her own objectives for the representation, the representation is incompetent—by dint of the client's own more fundamental commitment. The client-objectives test accommodates both elements of Model Rule 1.7(b): competency and consent in tandem determine whether a client's consent to a joint representation should be upheld or disregarded.

In application, the client-objectives test calls for a rethinking of: the Supreme Court's approach to conflict waiver in the criminal-defense setting; the analysis of courts that have considered conflict waivers in civil litigation and transaction matters; and the approach of attorneys who are charged with determining in the first instance whether to accede to client requests for a joint representation. Given the stakes for clients and counsel, it is time we understood why and when a conflict can be waived.

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INTRODUCTION

As attorneys learn quickly in practice, prospective clients do not always arrive alone at the law office for the initial meeting with counsel. Surprisingly often, they arrive with their co-plaintiffs or co-defendants in civil litigation matters, with business partners or those with whom they propose to enter into a transaction, and—if they are at liberty to do so—with their co-defendants in criminal-defense matters. Under the *Model Rules of Professional Conduct* (“*Model Rules*” or “*Rules*”),¹ an attorney cannot represent these clients jointly unless (1) the affected clients consent to such joint representation after a disclosure of the disadvantages and limitations posed by proceeding jointly; and (2) the representation of clients will be

1. The American Bar Association promulgated the *Model Rules of Professional Conduct* in 1983, and it has amended them frequently since, including substantial revisions in 2002, based on the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”), chaired by Chief Justice E. Norman Veasey. CTR. FOR PROF'L RESPONSIBILITY AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (7th ed. 2011). The *Model Rules* are the subject of our discussion because of their widespread adoption by the states. Forty-nine states have adopted some version of the *Model Rules*, often with amendments. See Law. Man. on Prof. Conduct (ABA/BNA) 51:303 to 51:304 (Mar. 31, 2010) [hereinafter *Lawyers' Manual*] (summarizing the changes of each state in adopting the *Model Rules*). California is also considering adoption of the *Model Rules*. See *Proposed Rules of Professional Conduct*, THE ST. BAR OF CAL., <http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx> (last visited Jan. 27, 2013).

competent and diligent despite the joint representation.²

Honoring these elements, the attorney should discuss with each of the prospective clients (hereinafter “clients”) the problems posed by the joint representation, describing the material limitations on the services the attorney can provide for each client resulting from her competing obligation to the other.³ The attorney might warn the clients, for example, that she will not be able preserve the confidences of one from the other, advise one client about matters that will disadvantage the other, pursue certain claims for one client that could harm the other, negotiate on behalf of one client against the other, and describe a host of other limitations arising out the particulars of the proposed joint representation.⁴ Despite these material limitations, the clients may wish to consent to the conflict of interest because of the perceived or actual advantages of a joint representation, including the effectiveness of their chosen attorney, the tactical advantages of uniting, a belief that their transaction interests are more aligned than adverse, and a belief that joint representation will be less costly.⁵

The attorney must then turn to the second element of a valid conflict waiver under the *Model Rules*—whether the joint representation will be competent despite the material limitations that the attorney has described. This is where the attorney needs guidance. The attorney has just explained that she will not be able to provide material services and protections that the clients would have

2. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2012). In order for a consent to be valid and enforceable, the attorney must: (1) obtain the “informed consent” of the clients; and (2) “reasonably believe” that she can represent the interests of the clients “competently” and “diligently.” *Id.* This Article will generally assume that the lawyer has obtained informed consent in order to ask when and whether a conflicted representation will satisfy the demands of element (2). For convenience, this Article will use the term “competence” to refer to *both* the competence and diligence demands of element (2). *See infra* text accompanying notes 42-43. This Article principally examines joint or multiple representation conflicts of interest under Model Rule 1.7(b), i.e., whether conflicts posed by the simultaneous representation of two or more clients in the same or related matter will render the representation incompetent and therefore incurable even with informed client consent. *See id.* Model Rule 1.7(b) also allows for informed waivers of certain conflicts of interest posed by the simultaneous representation of adverse clients in unrelated matters. *See id.* While the client-objectives test proposed herein should also determine whether informed waivers of “adverse-unrelated” conflicts should be overturned on competency grounds, application of the test to these circumstances will have to await a future work. Waivers of conflicts posed by obligations to a *former* client, the subject of Model Rule 1.9(a), are outside the scope of this Article.

3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0 (e) (2012) (“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.”).

4. *See infra* notes 133-138 and accompanying text.

5. *See infra* notes 69-72 and accompanying text.

received if each were represented by separate counsel. A joint representation that poses a conflict of interest—by its very nature—materially limits the services that the attorney can perform for one client because of her competing duties to the other client. Thus, the challenge: how can the attorney know which joint representations are competent (and therefore “consentable”) when nearly all are hampered by material limits on what counsel can do for the clients?

The conflict-waiver rules would seemingly have it both ways: they allow the client to make an informed decision to retain counsel despite a conflict of interest, but would take away that choice when the representation renders the representation incompetent. When we ask what conflicting representations are incompetent, however, we realize that the distinction between a competent and incompetent representation is unclear because it lacks a conceptual foundation. In choosing to proceed with a conflicted representation, the client presumably has a right to accept material deficiencies in the representation. Otherwise, a client would be allowed to waive a conflict of interest only when there is nothing of consequence to waive. Thus, the *Model Rules* are committed to the seemingly inconsonant notions that a representation can have material deficiencies and still be competent.

Not surprisingly, these conceptual difficulties have translated into grave problems for courts in determining whether a knowing waiver of a conflict of interest should be struck down as incompetent. In *Wheat v. United States*,⁶ a leading Supreme Court case on conflict waiver in the criminal-defense setting,⁷ a defendant waived a conflict of interest posed by his attorney’s representation of other defendants in related but separate cases.⁸ The trial court rejected the defendant’s conflict waiver, requiring him to proceed at trial with other counsel, and the defendant was convicted.⁹ Assuming without discussion that the waiver was informed,¹⁰ the Court framed the issue as “when a district court may override a defendant’s waiver of

6. 486 U.S. 153 (1988).

7. See generally WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 11.9(c) (3d ed. 2011) (describing the effect of the *Wheat* decision on federal district court and state court approaches to conflict waiver in the criminal-defense setting). For recent examples of conflict-waiver questions considered by courts in the criminal-defense setting, see U.S. v. Massimino, 832 F. Supp. 2d 510, 515-16 (E.D. Pa. 2011) (co-defendants); State ex rel. Horn v. Ray, 325 S.W.3d 500, 514-15 (Mo. Ct. App. 2010) (Norton, J., dissenting) (defendant and victim); People v. Ginton, 900 N.Y.S.2d 264, 265 (N.Y. App. Div. 2010) (defendant and witnesses).

8. *Wheat*, 486 U.S. at 157.

9. *Id.*

10. See *id.* at 172 (Stevens, J., dissenting) (objecting to majority’s failure to give sufficient “weight to the informed and voluntary character of the clients’ waiver” and noting that client had separate counsel advising him on “the wisdom of a waiver”).

his attorney's conflict of interest."¹¹ The question, as the *Wheat* Court noted, implicated the Sixth Amendment right of the defendant to counsel of his choosing¹² as well as the attorney-ethics rules on conflict of interest.¹³ Citing concerns about whether the representation would be adequate in light of the conflict of interest,¹⁴ a five-to-four majority of the Court upheld the trial court's rejection of the defendant's conflict waiver.¹⁵

Although the majority and dissenting opinions in *Wheat* differed profoundly on the applicable standard and the correct outcome, they shared one telling characteristic: neither sought to justify the standard they applied in assessing the validity of the client waiver.¹⁶ In fact, Justice Rehnquist, writing for the majority, went so far as to suggest that different district courts might decide these matters differently and not be "right" or "wrong,"¹⁷ implying that the Court had nearly abandoned the search for a principled standard by which to determine when knowing waivers should be affirmed or rejected. The stakes, however, demand principles, not impressions. The District Court denied Wheat his choice of an attorney who—by the prosecution's own characterization—had already proven extremely effective in gaining the acquittal of another defendant in the alleged conspiracy.¹⁸ If we are to reject a client's choice of counsel despite an informed and voluntary conflict waiver, we need a genuine understanding of what renders a representation incompetent and therefore beyond client consent.

The problem is no less vexing in the civil litigation and transaction settings.¹⁹ Except when a court or a committee opinion has expressly declared a certain representation unwaivable,

11. *Id.* at 158.

12. *Id.* at 159.

13. *Id.* at 160 ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession . . .").

14. *Id.* at 162 (quoting *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978)).

15. *Id.* at 164.

16. See *infra* note 219 and accompanying text.

17. *Wheat*, 486 U.S. at 164.

18. *Id.* at 170 n.3 (Marshall, J., dissenting) (quoting prosecutor: "Were I in [petitioner's] position I'm sure I would want Mr. Iredale representing me, too. He did a fantastic job in that . . . trial") (alteration in original).

19. There are several examples in the civil litigation setting of conflict waivers being obtained by counsel and then later challenged. See, e.g., *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1351 (9th Cir. 1981) (litigation involving general contractor and subcontractor); *SEC v. King Chuen Tang*, 831 F. Supp. 2d 1130, 1144 (N.D. Cal. 2011) (SEC enforcement action). There are also similar examples in the transaction setting. See, e.g., *Baldassarre v. Butler*, 625 A.2d 458, 460 (N.J. 1993) (commercial real estate transaction); Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 2001-2 (2001) (corporate transaction); Illinois State Bar Ass'n Advisory Op. on Prof'l Conduct, Op. 96-05 (1996) (estate).

attorneys have no clear standard by which to determine whether a concurrent conflict of interest can be waived by the client. A confused conflict-consent standard poses fairness problems for attorneys who may face discipline or malpractice not because a standard has been flouted but because of the difficulty of predicting whether it will be invalidated on later challenge.²⁰ Unable to predict whether a tribunal will later deem the conflict unwaivable, attorneys may be less likely to provide clients with the option to accept a dual representation—even in those instances when knowing client consent *should* be sufficient. While there are often good reasons not to seek a conflict consent, incoherence in the doctrine that assesses their validity is not among them. Courts, in turn, may wrongfully deprive clients of their choice of counsel by rejecting conflict waivers without the guidance of a principled standard by which to assess their validity.²¹

Thus, whether a conflict can be waived is a concern for both courts and practitioners: courts need a standard by which to assess the competence of representations that are the subject of conflict waivers in the civil and criminal setting, and practitioners need guidance on whether to seek conflict waivers in the first place. In every setting, the problem is the same: why are some material risks posed by a conflict of interest acceptable and waivable by the client, while others render the representation incompetent and therefore warrant depriving the client of his choice of counsel?²² This Article takes up the search for a principled answer.

20. In a later malpractice claim, the former client may assert that the consent, even if preceded by full disclosure of the risks, did not cure the attorney's conflict of interest because the representation was incompetent as a result of the conflict. See *Lawyers' Manual*, *supra* note 1, at 51:308 (cautioning that analysis of competency is "critical since clients who become unhappy with multiple representation frequently claim at some point that the lawyer should not have served as joint counsel despite the clients' assent"). A breach of the attorney ethics rules may be evidence of malpractice. MODEL RULES OF PROF'L CONDUCT pmbl. and scope (2012) ("[A] lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."); Note, *Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1557-67 (1994). Ironically, the disclosure necessary to gain an informed consent under Model Rule 1.0(e)—in effect a listing of problems that can befall the client as a result of the multiple representation—may provide courts and clients (who later challenge the multiple representation despite their consent) with a host of reasons why, under the competency requirement, consent should not have been sought in the first place. See MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2012).

21. See *infra* Part IV.B.2 (arguing that the *Wheat* court wrongfully deprived the client of his choice of counsel). A confused standard may also make it easier for adversaries who seek tactical advantage to gain disqualification of opposing counsel on the grounds that the conflict waiver is invalid, a possible motive in the *Wheat* case. *Wheat*, 486 U.S. at 170 n.3 (Marshall, J., dissenting).

22. See Peter R. Jarvis & Bradley F. Tellam, *When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflicts Law*, 33 WILLAMETTE L. REV. 145, 173 (1997) (noting the difficulty of framing a clear rule to determine when conflicts are consentable).

Part I sets the stage by describing the current conflict-waiver rule, and the conceptual confusion that bedevils conflict consents. It contends that without some deeper understanding of how to integrate competency and consent, we are left either to defer to the client's informed consent or to reject the representation on competence grounds—without any basis for deciding why or when consent or competence should prevail over the other.²³ Part I finishes with a discussion of the nature of interpretation in the attorney-ethics setting, examining the various sources of interpretative insight into the *Model Rules* and the special demands and opportunities to forge a coherent account of competing demands in a codified system.

Part II undertakes the search for principles to ground a viable standard by which to determine whether a conflict can be waived. First, it asks why we allow clients to consent to *any* conflicted representation, an inquiry that highlights our profession's deep commitment to client autonomy. Part II next asks why we reject the informed decision of a client to enter into a representation that is incompetent. The goal is not only to understand why we insist on competence, but also to understand how this understanding fits with the commitment to client autonomy that undergirds the consent element. A viable standard, Part II contends, must integrate each of these elements.

Part II next identifies and turns a critical eye to the various rationales for our insistence on competency despite a knowing consent. One theory has it that an attorney can never adequately describe the risks associated with an incompetent representation, a claim that is suspect for empirical and conceptual reasons. The next rationale holds that courts insist on competent representation in order to arrive at the truth or a just outcome, a rationale that conflates a client's right to present a vigorous argument with a duty to do so, and holds no force in the transaction setting, which is also subject to the competency standard.

Part II turns next to the remaining rationale for rejecting incompetent representations despite client consent: to protect the client against his own faulty decision making—a form of paternalism. This rationale holds promise and it avoids the problems posed by other rationales but—without a deeper understanding—it is

23. See Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L. J. 407, 409-10 (1998) (stating that the conflict rules serve "contradictory purposes"); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 213 (1982) (noting that the waiver standard under the predecessor disciplinary rule, which allowed a conflict waiver only if it was "obvious" that the representation was nonetheless "adequate," was "at best, ambiguous"); Jarvis & Bradley, *supra* note 22, at 146 (suggesting that the *Model Rules* and the *Restatement* do not provide sufficient clarity for determining which joint representations cannot be waived).

insufficient to reconcile our commitment to client autonomy and our insistence on overruling client decisions on competency grounds. As a result, it does not show us how to distinguish between conflict consents that are allowed and those that are prohibited.

Part II unravels this mystery and offers a new way to understand why we prohibit client consent to an incompetent representation. It begins by distinguishing between various types of paternalism based on the nature of the intervention into another's decision making. Paternalism is typically understood as an *affront* to autonomy, and thus at odds with the legal profession's emphasis on the client's right to control the representation. Part II argues, however, that "means paternalism" explains how our intervention to protect clients can be squared with a commitment to client autonomy. Means paternalism distinguishes between a person's objectives and the means by which they are achieved. When a person has a certain goal and undertakes means that are likely to defeat that goal, intervention to prevent the person from undertaking such means can be understood as *preserving* or *enhancing* the person's autonomy. Means paternalism explains why courts should strike down conflict waivers that render the representation incompetent: it reconciles our twin commitments to client consent and competency, and it offers a basis by which to distinguish competent from incompetent representations.

Part III translates this understanding into a proposed legal standard: a conflict waiver must be rejected as incompetent under Model Rule 1.7(b) if limitations on the means or procedures by which the attorney pursues the matter resulting from a conflict of interest are likely to defeat the client's objectives for the representation (the "client-objectives" or "proposed" test). Part III elaborates on the elements of this test, showing how it resolves the paradox that has confounded court analysis of conflict waivers. The test of competency is not whether the representation has a material deficiency, the very reason why a waiver was required in the first place. Moreover, the question is not whether the client would be better off without the consent, a decision that belongs solely to the client. When a client consents to limitations that are likely to undermine her own objectives for the representation, the representation is incompetent—by dint of the client's own more fundamental commitment. Part III explains why the proposed test accommodates both elements of Model Rule 1.7(b): competency and consent *in tandem* determine when and whether a client's consent to a joint representation should be upheld or disregarded.

Part IV applies the client-objectives test across the major practice areas. It begins with the *Wheat* case, explaining how the test fundamentally changes the analysis and outcome in the case, and how it would allow us to impose an enforceable, reviewable

standard on trial courts for client waivers in criminal-defense matters. It next considers, in turn, the civil litigation and transaction settings, where a careful inquiry into client objectives and conflict limitations explains when to accept or reject an informed client consent. Part IV also discusses how the proposed test will change our approach in still another setting—the law office, where attorneys need a clear standard by which to assess the competency of a proposed joint representation.

The conclusion will provide a brief overview of the proposed test and its rationale. It will distill much of the learning from the Article into a decision guide to aid practitioners and courts in determining what concurrent conflicts of interest can be waived.

I. THE PROBLEM

A. *The Dual Role of Material Limitations*

Model Rule 1.7 sets forth the general rule on “concurrent” conflicts of interest.²⁴ Subject to the exception for consent, Rule 1.7(a) prohibits client representations that are directly adverse or present a “significant risk” that the attorney’s duties to the client will be materially limited by the attorney’s “responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”²⁵ With exceptions for assertion of claims against a current client in the same litigation matter²⁶ and representations prohibited by law,²⁷ the Rule allows representations despite a concurrent conflict if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client,”²⁸ and the client provides “informed consent,

24. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012). The *Model Rules* parse conflicts of interests into two main categories—(i) conflicts between present interests or obligations of the lawyer to other clients or herself, termed “concurrent” conflicts, which are addressed by Rules 1.7 and 1.8; and (ii) conflicts between a current and a prior client, which are addressed by Rule 1.9. This Article asks when concurrent conflicts of interest can be waived. Conflicts with prior clients present no such question because—unlike concurrent conflicts—they can be waived on the informed consent of the client without satisfying an additional competency demand. *Id.* R. 1.9(a); *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. g(iv) (2000) (“[W]hen the representation involves the same matter or the matters are significantly related, it may be more difficult for the lawyer to provide adequate legal assistance to multiple clients.”).

25. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2012).

26. *Id.* R. 1.7(b)(3).

27. *Id.* R. 1.7(b)(2).

28. *Id.* R. 1.7(b)(1). Forty-seven states prohibit conflict waivers that will render the representation incompetent, although some vary the language describing the competency element. The overwhelming majority of states have adopted the exact language of the *Model Rules* with respect to this requirement. *See* Lawyers' Manual, *supra* note 1, at 51:303-04. The *Model Code of Professional Responsibility*, which was

confirmed in writing.”²⁹ Informed consent, in turn, is defined as an agreement “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”³⁰ Thus, with exceptions, the ethics rules allow consent to cure conflicts of interest if (1) the consent is informed; and (2) the representation of each client will be “competent and diligent.”³¹

A close examination of the two conditions of consent reveals the tension encoded in the *Model Rules*. A conflict of interest is one that poses direct adversity with another client or a substantial risk of a material limitation on the work that the attorney can do for one or more clients.³² In order to elicit consent to proceed with the representation despite the conflict, the attorney must disclose these risks to the prospective clients.³³ Thus, a client who consents to a concurrent conflict has agreed to accept the material risks of a “[m]aterial [l]imitation” on the representation by direct adversity with another client.³⁴ Notwithstanding that material limitation, the attorney must reasonably believe that she can perform the representation competently and diligently.³⁵ Thus, the representation must be *objectively* competent and diligent even though it is hobbled by direct adversity or the significant risk of a material limitation.³⁶

in effect in most states prior to adoption of the *Model Rules*, provided in part that an attorney could seek consent to a multiple representation “if it is obvious that he can adequately represent the interest of each.” MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(c) (1980); *see also* Lawyers' Manual, *supra* note 1, at 51:303. Seven states have retained either the language of that provision or a variation thereof. *See, e.g.*, MASS. RULES OF PROF'L CONDUCT R. 1.7(b)(1) (2012) (providing that a conflict can be cured by consent if “the lawyer reasonably believes the representation will not be adversely affected”). These standards likewise implicate the question addressed in this Article, namely, which conflicts can be cured by consent? Only Florida, Georgia, and California impose no competency requirement on a conflict waiver. *See* FL. RULES OF PROF'L CONDUCT R. 4-1.7 (2012); GA. RULES OF PROF'L CONDUCT R. 1.7 (2012); CAL. RULES OF PROF'L CONDUCT R. 3-310 (2012) (showing omission of competency requirement on a conflict waiver). California is considering adoption of the *Model Rules*, however, and its proposed version of Rule 1.7(b) would match the competency requirement of the *Model Rules*. *See* CAL. RULES OF PROF'L CONDUCT R. 1.7(b) (Proposed Official Draft 2010), *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=7MbhFr6ih-w%3D&tabid=2161>.

29. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2012).

30. *Id.* R. 1.0(e).

31. *Id.* R. 1.7(b)(1); *see also supra* note 1 and accompanying text.

32. *Id.* R. 1.7.

33. *Id.* R. 1.8(a)(1).

34. *See id.* R. 1.7 cmt. 8 (requiring consent to a material limitation “[e]ven where” there is no direct adverseness,” implying that the latter poses even greater concern)

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

36. Ill. State Bar Ass'n Advisory Op. on Prof'l Conduct, Op. 96-05 (1996) (“Whether a lawyer ‘reasonably believes’ his dual representation will not adversely

How can a representation that suffers from direct adversity or a material limitation be “competent and diligent”?³⁷ If we cannot reconcile this seeming inconsistency, we cannot evaluate conflict waivers under Rule 1.7. Competence, which is required in all representations by Model Rule 1.1, requires in part “thoroughness . . . reasonably necessary for the representation.”³⁸ Diligence, which is required by Model Rule 1.3, requires “reasonable diligence and promptness in representing a client” or—as the comments to the Rule state—“whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”³⁹ (As noted earlier, for ease of reference, we will use the term *competence* to refer collectively to the closely related demands of competence and diligence, unless a distinction between the two bears on the analysis.) Thus the definitions shed little light on the problem: how can an attorney be said to have acted thoroughly or to have taken whatever measures are reasonably required to vindicate the client’s interests when she is, by definition, not pursuing a material element of the representation due to a conflict?

Some examples may help to illuminate the challenge posed by the dual demands of informed consent and competence. Suppose that an attorney obtains informed consent to represent:

- A criminal defendant, disclosing that the attorney will

affect his relationship is determined by an objective, not subjective, standard based upon what the ‘reasonable lawyer’ would believe.”).

37. MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(1) (2012). Let us clear away one tempting argument. Perhaps the client, in consenting to a concurrent representation, does not agree to a material limitation but merely the *risk* of such limitation rather than its eventuality. A literal reading of Rule 1.0(e), which requires disclosure of “material risks” could support this view. *See id.* R. 1.0(e). Moreover, lawyers sometimes seek waiver of potential conflicts, which might be understood as acceptance of risks that may or may not eventuate. Nonetheless, it is questionable whether a risk and its occurrence can be separated conceptually for conflict waiver purposes. If the client accepts only the risk but not the eventuality of a limitation resulting from a conflict of interest, presumably the attorney would have to withdraw or seek a new consent if and when the risk eventuates. If this is the case, then it is unclear why client consent is worth obtaining in the first place. Moreover, there would be no reason for Model Rule 1.7 to insist on competence in the representation despite the consent if the client accepted no actual (as distinct from possible) limitation, since a new consent would be required if the risk eventuated. *See id.* R. 1.7(b)(1). Moreover, the new waiver for an actual as distinct from potential conflict would be subject to the same competency demands of Rule 1.7(b), and thus the question remains: how can a representation be subject to a material limitation and still be competent? *See generally* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 10.4 (3d ed. 2001 & Supp. 2004) [hereinafter HAZARD & HODES] (noting that modern understanding of conflicts of interest emphasizes the degree of risk of harm, and that “it is no longer appropriate to speak of ‘potential’ versus ‘actual’ *conflicts of interest*”).

38. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012).

39. *Id.* R. 1.3 cmt. 1 (requiring “commitment and dedication to the interests of the client . . . with zeal in advocacy upon the client’s behalf”).

not be able to cross-examine a witness at trial because he represents the witness in the defense of related charges in a separate proceeding;

- Two clients in a suit against various tortfeasors, disclosing that the attorney cannot name either co-client as a third-party defendant even though one may have potential liability to the other arising out of the tort;
- Two parties to a shareholder agreement, disclosing that the attorney cannot counsel the clients on an individual, confidential basis; and
- The buyer and seller in a complex commercial real estate transaction, disclosing that the attorney cannot negotiate on behalf of either party or assist one party in advancing terms that may disadvantage the other.⁴⁰

While these examples range widely across the practice spectrum, their common elements expose the tension that bedevils waiver analysis. In each instance, (1) the attorney gained the informed consent of the client to a conflict of interest;⁴¹ (2) the conflicts are “concurrent,” that is, they involve an ongoing representation of two or more clients as distinct from a current and a prior client;⁴² (3) in seeking the informed consent of the clients, the attorney has disclosed that she will be unable to perform a material aspect of the representation because of the conflict (the “material limitation”); (4) the clients have chosen to retain the attorney despite the material limitation; and (5) the attorney or ultimately a tribunal is asked to determine whether the representation is competent and therefore “consentable” or “waivable” despite this material limitation.

Readers will bring a variety of intuitions to these examples. Some may reject one or more of the representations despite disclosure and consent because the quality of representation has fallen below acceptable limits. The well runs dry, however, when we probe a bit deeper into what makes one limitation acceptable and another not when both are, by definition, material limits on what the lawyer will perform for the client.⁴³ Does waiver analysis commit us to developing two standards of incompetence—one for

40. We will examine and offer solutions to these and other conflict-waiver scenarios in Part IV, *infra*.

41. In order to constitute informed consent, the disclosures would no doubt require more than the brief descriptions provided in the above scenarios. *See infra* notes 132-37 and accompanying text.

42. *See supra* note 24 and accompanying text.

43. Competency requires “thoroughness . . . reasonably necessary for the representation.” MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012). Absent a theory of how conflict consent and competency relate, it is difficult to explain how a failure to perform a material aspect of a representation can *ever* be consistent with the competency demands of Model Rule 1.1.

representations generally and another for conflicts? If so, by what rationale would such dual definition be justified, and how would we fashion a principled distinction between differing levels of incompetence without simply imposing on the client our own view of her best interests?⁴⁴

Others might focus on the quality of the disclosure that preceded the client's agreement to the representation.⁴⁵ That approach leads to a new challenge, however. If client consent is sufficient to wash away concerns about the attorney's failure to perform a material aspect of the representation, then the competence standard of Model Rule 1.7(b) has been rendered a nullity. By this light, incompetence would *never* be reason to invalidate an informed consent since the client will already have consented to the failings in the representation. While some have argued that competence should not be a concern if the client's consent is informed,⁴⁶ the *Model Rules* reject this approach by insisting on *both* informed consent and competence.

What is striking about the approaches of our hypothetical observers is their shared indifference to the concerns of the other. Each would attempt to evaluate the enforceability of the client's waiver on the basis of *either* competency or consent, but not both, a tension that is reflected in the caselaw.⁴⁷ Unless we have a theory of how consent and competence *interrelate*, courts are left to select which value to elevate over the other. An analysis based on competence or consent alone leaves us with stark poles: representations that are invalidated because of material limitations

44. For a discussion of the best-interests approach, see *infra* notes 104-08 and accompanying text.

45. Indeed, the *Restatement* notes that consents are often struck down because they are ill-informed and “[d]ecisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel, such as by inside legal counsel, rarely hold that a conflict is nonconsentable.” RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 cmt. g(iv) (2000). Why, however, should the quality of consent bear on the competency of a representation when consent and competency are distinct elements of a conflict waiver under Model Rule 1.7(b)?

46. See *infra* note 75 and accompanying text.

47. Compare *In re Jans*, 666 P.2d 830, 833 (Or. 1983) (“It is never proper for a lawyer to represent clients with conflicting interests no matter how carefully and thoroughly the lawyer discloses the possible effect and obtains consent.”), with *Unified Sewerage Agency of Washington Cnty., Or. v. Jelco Inc.*, 646 F.2d 1339, 1350 (9th Cir. 1981) (“We do not find it necessary to create a paternalistic rule that would prevent the client in every circumstance from hiring a particular attorney if the client knows that some detriment may result from that choice in a later suit. Clients who are fully advised should be able to make choices of this kind if they wish to . . .”). A third approach would be to ban joint representations altogether, regardless of circumstance or consent. See Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representations*, 32 RUTGERS L.J. 387, 456 (2001) (citing inadequacy of waiver and the “inherent dangers of joint representation” in support of a categorical ban).

despite informed consent; or representations that are upheld because of informed consent despite material limitations. The *Model Rules*, however, implicitly demand integration of consent and competence in evaluating the validity of a conflict waiver.

B. Interpretation and Coherence

While lawyers and tribunals may not agree with all of the normative commitments of the *Model Rules* as modified and adopted by their jurisdiction, they are nonetheless charged, respectively, with behaving and judging attorney behavior in accordance with their provisions.⁴⁸ As with any legal authority, however, the *Model Rules* are not self-applying—lawyers and those who would judge their behavior often have to interpret the *Model Rules* to determine what they demand under a particular set of facts.⁴⁹ When a provision of the *Model Rules* is less than determinative of a particular outcome, we must turn elsewhere for interpretative insight.

The drafters' comments offer an important source of interpretive guidance on the meaning of the *Model Rules*.⁵⁰ The evolution and history of a rule may also provide clues to its purpose and meaning.⁵¹ In addition, the framers of the *Model Rules* hoped to achieve a measure of consistency and integration by codifying a set of ethical

48. See HAZARD & HODES, *supra* note 37, § 1.16, at 30 (Supp. 2012) (“The *Model Rules*, as modified in each specific jurisdiction, have thus been elevated to a status that makes them the equivalent of rules of court. In jurisdictions adopting the *Model Rules*, these provisions of the law of lawyering therefore have the force of law.”). Moreover, most federal courts apply the *Model Rules* or those adopted by the state in which they sit to govern the behavior of attorneys before the court. *Id.* § 1.17, at 32-33 (Supp. 2012).

49. See MODEL RULES OF PROF'L CONDUCT pmb. 9 (2012) (“Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”); HAZARD & HODES, *supra* note 37, § 1.24, at 53 (Supp. 2012).

50. See MODEL RULES OF PROF'L CONDUCT scope 14 (2012) (“Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”); *id.* scope 21 (“The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”). To date, forty states have adopted the Comments to aid in interpretation of the *Model Rules*. AM. BAR ASS'N, CPR POLICY IMPLEMENTATION COMM., STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (2011), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf>; see also Brooks Holland, *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct*, 43 GONZ. L. REV. 327, 329 (2008) (noting that in Washington State the “inclusion of Model Rules-based commentary was viewed as critical because of the added substance and clarity that commentary would provide to practitioners and courts”).

51. See HAZARD & HODES, *supra* note 37, § 29.12, at 20 (Supp. 2007) (discussing the evolution of Rule 3.3).

standards.⁵² That ambition, in turn, can guide our analysis of a difficult interpretative problem arising under the *Rules*, including the challenge of reconciling consent and competence in conflict waivers.

To the extent that the drafters of the *Model Rules* satisfied their charge, we should expect the Rules to exhibit consistency and coherence. The demand of consistency is straightforward: an attorney's compliance with one rule must not contravene another rule. A modest claim for coherence is that rules reflect, at a minimum, an awareness of each other.⁵³ For example, one rule should not empty another of consequence. A stronger claim for coherence asks that related rules work to fulfill some deeper purpose. In the *Model Rules*, that purpose might be found in the drafters' comments, the history of the Rules, or it might be inferred or "constructed" from the Rules themselves, individually and in tandem. In other words, it may be possible to tease out the meaning of a provision by considering how it and related provisions work together to further a core objective.

Conflict waivers present questions of consistency and coherence under the *Model Rules*. Informed client consent to a conflict presumably accepts material limitations on the attorney's services; the competency requirement strikes down conflicting representations because they are subject to material limitations. If (1) a conflict waiver presupposes a material limitation on the representation to be waived, and (2) incompetency is understood as a material deficiency in the representation, then (3) an attorney cannot cure a conflict of interest by obtaining a client's consent without violating the competency requirement of Rule 1.7.⁵⁴ Are competence and consent consistent?

Likewise, there is reason to question whether the demands of competence and consent are coherent. Given the seeming

52. The Commission that drafted the *Model Rules* "was charged with evaluating whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law." MODEL RULES OF PROF'L CONDUCT intro. (1983). The Commission concluded that "piecemeal amendment" of the prior code would be insufficient. *Id.* After "public hearings, the Commission conducted a painstaking analysis of the submitted comments and attempted to integrate into the draft those which seemed consistent with its underlying philosophy." *Id.* The proposed final draft of the *Model Rules* was the result of this "analysis and integration." MODEL RULES OF PROF'L CONDUCT intro. (1983).

53. See Julie Dickson, *Interpretation and Coherence in Legal Reasoning*, THE STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/archives/Spr2010/entries/legal-reas-interpret/> (last updated Feb. 10, 2010).

54. See *supra* note 21 (citing concern that attorney's disclosure of material deficiencies in seeking a waiver could be used to invalidate the waiver later on competency grounds).

irreconcilability of competency and consent,⁵⁵ courts may focus on one condition to the exclusion of the other in evaluating conflict waivers, rendering one or the other element superfluous.⁵⁶ The search for a deeper rationale that explains competency and consent presents even greater challenges. On the surface, Model Rule 1.7(b) seems to embrace two distinctive and irreconcilable commitments: a willingness to allow the client to control decisions about the representation, and a refusal to embrace client decision making when the decision is unsatisfactory.⁵⁷

We must not assume, however, that these are failings of the *Model Rules*. The *Model Rules* have established the two standards by which conflict waivers are to be evaluated, and it is the role of the interpretative authority to find a way to do so. Of course, it is possible that there is *no* way to reconcile these notions into a viable account; consent and competence may serve two ideals that cannot coexist. As interpreters of the *Model Rules*, however, we must presume otherwise.

For a variety of reasons, it is the interpreter's job to listen for traces of harmony amid seeming discord—to impose order on principles that struggle to coexist. First, given the charge and objectives of the drafters,⁵⁸ an interpretation that fails the tests of consistency and coherence is unlikely to fulfill the *Model Rules'* objectives. Second, the *Model Rules* expressly direct that *both* competency and client consent be brought to bear on the enforceability of a client waiver.⁵⁹ Thus, an interpretation that enforces one element while dismissing the other flouts the express mandate of the *Model Rules*. Third, a lawyer cannot fulfill inconsistent, concurrent demands, and lawyers cannot be charged with the impossible. Reconciliation of competence and consent is thus a precondition of their enforcement.

Finally, a coherent account of the relation between consent and competence will allow courts to assess the enforceability of conflict waivers on principled grounds. We must not conflate the interpretative challenges posed by *any* rule, and those posed by dual demands that address the same conduct but do not cohere. In the former case, court⁶⁰ and ethics committee⁶¹ interpretations of the

55. See *supra* note 48 and accompanying text.

56. See *supra* notes 44-48 and accompanying text.

57. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2012).

58. See *supra* note 53 and accompanying text.

59. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2012).

60. See *generally* Lawyers' Manual, *supra* note 1, at 799:201 to 799:310 (collecting court cases construing attorney ethics rules in various jurisdictions).

61. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313 (2002) (describing the role of bar association or other ethics committees that interpret the

ethics rules can close gaps and provide real guidance to practitioners. When courts are not guided by principles, however, their decisions offer less predictability and guidance.⁶²

Because the conflict-waiver standards provide limited guidance, lawyers: (1) face the risk of malpractice and disciplinary actions despite good faith efforts at compliance; (2) have insufficient tools for determining when concerns about competence *should* trump the clients' preference to proceed under a waiver; and (3) will be less willing to proceed on the basis of a waiver even when all of the affected clients would prefer, and will not be unduly harmed by, the multiple representation. The question, therefore, is whether we can integrate two seemingly inconsonant notions—consent and competence—into a consistent and coherent evaluation of conflict waivers. Such an account will not remove the interpretative challenges for practitioners and courts; it will, however, allow courts to construct an edifice of interpretation grounded on principle rather than preference, which in turn will provide genuine guidance to lawyers.

Our inquiry must begin with a search for the principles that undergird the *Model Rules*' dual commitments to informed consent and to competence. Once we have a deeper understanding of the interests served by these two notions, we can attempt to unify these concepts into an understanding of how competence and consent can work *together* to assess client waiver.

II. THE SEARCH FOR PRINCIPLES

A. Introduction

Before we can begin to develop a theory of how consent and competence relate, we need to understand the rationale of each. We will begin with the seemingly simpler of the two questions: why do we allow clients to consent to conflicts of interest? This question will allow us to explore our commitment to client autonomy in the attorney-client relationship. Our inquiry will turn next to the question at the core of our inquiry: why do the *Model Rules* reject the informed decision of a client to enter into a representation that is incompetent?

B. Why Consent?

The traditional or agency conception of lawyering places considerable emphasis on client autonomy.⁶³ Within important

ethics rules in various jurisdictions).

62. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 26 (2009) ("Incoherence from the courts has the potential to create an unpredictability . . .").

63. See Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U.

limits, the client—as principal—decides the objectives of the representation,⁶⁴ makes the important decisions throughout the course of the representation,⁶⁵ including settlement,⁶⁶ and can terminate the representation for any reason.⁶⁷ Given the extent of their control over the representation itself, it is thus hardly surprising that clients have the authority to retain an attorney despite a conflict of interest. In the words of the *Restatement of the Law Governing Lawyers* (“*Restatement*”), “[c]oncern for client autonomy generally warrants respecting a client’s informed consent.”⁶⁸

Clients may perceive that the benefits of proceeding jointly despite a conflict of interest outweigh the disadvantages of retaining separate counsel. In the litigation setting, whether civil or criminal defense, the clients may consider their interests to be largely aligned, and see tactical advantage in cooperation rather than adversity.⁶⁹ A client may believe that one particular attorney is so effective that the advantages of representation by that attorney outweigh the disadvantages posed by the attorney’s conflicting obligations to another client.⁷⁰ Clients may believe that representation by one rather than multiple attorneys will be less costly.⁷¹ Moreover, transaction clients may believe that they are better served by a joint representation because it will emphasize the consistency rather than the tension in their interests.⁷²

The client’s power of consent is subject to important limits, however. For example, the client’s decision to retain counsel despite a conflict of interest must be informed.⁷³ If the client is not advised of the limitation or its significance, whether because of the attorney’s

PITT. L. REV. 693, 717-18 (2006) (noting that lawyer’s agency role is both a legal obligation and part of the “narrative” of the legal profession); *see also* DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 18 (1991) (emphasizing the client’s self-determination and autonomy).

64. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2012).

65. *Id.*

66. *Id.*

67. *Id.* R. 1.16(a)(3).

68. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 cmt. g(iv) (2000).

69. *See* *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting in part) (“A common defense often gives strength against a common attack.”).

70. *See* Peter W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1124 (1979). In *Wheat*, considered at length in Part IV.B. *infra*, the effectiveness of counsel in gaining an acquittal in a related case presumably motivated the defendant to retain him despite conflict concerns. *See infra* note 172 and accompanying text.

71. *See* MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 19 (2012).

72. *See id.* cmt. 28.

73. *Id.* R. 1.7(b)(4), 1.0(e).

indifference, lack of care, or overreaching, then the client's decision will not reflect the client's real intentions.⁷⁴ The insight is consistent with our understanding of informed consent elsewhere in law and ethics: informed consent is best understood not as a *limit* on autonomy, but as an assurance of it.⁷⁵ Thus, Model Rule 1.7(b) insists on informed consent in waiving a conflict to ensure that the client's decision is, in fact, her own.⁷⁶

Model Rule 1.7(b) insists on more than informed consent, however; the concurrent representation must be competent as well. Thus, the next question is why informed client consent alone is not enough to cure a conflict of interest. In due course, we will discover—surprisingly perhaps—that client autonomy can explain not only our commitment to informed consent, but competency as well.

C. *Why Competence?*

Our next question is why Model Rule 1.7(b) rejects the client's informed decision to waive a conflict of interest when the representation will be incompetent. Of course, some would prefer that the *Model Rules* place *no* restriction on the client's control over the representation, and that a fully informed consent should carry the day regardless of competency concerns.⁷⁷ The *Model Rules*, however, have already passed judgment on this question, leaving us to search for the rationale for competence that might be reconciled with the right of the client to consent to a conflict of interest.

We can identify three rationales for the *Model Rules'* insistence on competence in the representation notwithstanding the client's informed consent. The first contends that competence is a prerequisite of consent—in effect, that no client would ever voluntarily consent to incompetence. The second contends that the

74. As Justice Story wrote nearly two centuries ago, "No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel." *Williams v. Reed*, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,733).

75. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 99 (6th ed. 2009) ("Personal autonomy encompasses, at a minimum, self-rule that is free from both controlling interference by others and from certain limitations such as an inadequate understanding that prevents meaningful choice."); see also JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 12 (1986) (noting that when a person's decision "stems from ignorance . . . there are grounds for suspecting that it does not come from his own will").

76. Zacharias, *supra* note 23, at 416-17 ("A lawyer, disciplinary agency, or court that believes the client is insufficiently informed to make an intelligent choice is justified in concluding that the client's choice does not represent a fair exercise of the client's freedom.") (footnote omitted).

77. For example, the American Trial Lawyers Association proposed that consent alone should be sufficient to cure concurrent conflicts. AM. LAWYER'S CODE OF CONDUCT R. 2.4 (Discussion Draft 1980).

legal system cannot function properly unless counsel performs competently. The third emphasizes client protection. We will examine each of these rationales in turn.

1. No Informed Client Consents to Incompetence

One argument for insisting on competence despite a client waiver is that “it seems unlikely that informed rational clients will often choose representation that is ‘objectively inadequate.’”⁷⁸ The suggestion is that an attorney cannot adequately describe the risks associated with an incompetent representation.⁷⁹ Incompetency, on this view, serves as a test of the quality of the disclosure—we infer from incompetence that something was askew in the disclosure that gave rise to the client’s approval in the first place.

This rationale exhibits the structural element that is a precondition to solving the question at the center of our inquiry: it offers a way of understanding consent and competence together.⁸⁰ Consent and competence fit hand and glove under this approach—since agreement to an incompetent representation is vicarious proof that disclosure was insufficient. Under this rationale, both competence and consent fly under the banner of client autonomy: we are ensuring rather than limiting client autonomy by rejecting consents to incompetent representations.

Nonetheless, the rationale faces substantial empirical and conceptual hurdles. As an empirical matter, it is presumably *more difficult* to explain the consequences of a representation that is “incompetent”—whatever that term may mean—and thus incompetent representations may fail the informed consent test more often.⁸¹ But the claim that an incompetent representation can *never* be explained adequately, and, therefore, that all such consents are per force invalid, is suspect. If the goal is simply to view competence as a vicarious test of consent, presumably the *Model Rules* would have required only informed consent, and noted in the drafters’ comments that lawyers bear a high burden to show that the client fully understood the implications of an incompetent representation before executing the waiver. Why fuse informed consent to a competency standard that introduces a veritable hornet’s nest of interpretive problems while providing, at best, an indirect measure of whether the client understood the risks of the representation?

The rationale poses a deeper concern. Client consent to a conflict

78. Zacharias, *supra* note 23, at 422 (proffering but questioning this rationale).

79. Jarvis & Tellam, *supra* note 232, at 174 (“[I]n some circumstances, it is too difficult to explain all the potential conflicts with sufficient clarity and detail to allow the potentially affected clients to make an informed choice.”).

80. See *supra* Part II.B (explaining the importance of an integrated understanding of competence and consent).

81. See, e.g., *In re Boivin*, 533 P.2d 171, 174-75 (Or. 1975).

of interest—if it is to have any significance—presupposes a waiver of something of value. Otherwise, there would be no reason to obtain a waiver. By treating incompetence as a variety of nondisclosure, the rationale provides no insight into the central question posed by the competency standard of Model Rule 1.7(b): how are we to distinguish deficiencies in a representation that a client has a right to waive from the incompetence that no client would—by its supposition—willingly accept?

2. Competence and Justice

Another possible reason for insisting on competence, notwithstanding the client's informed consent to the contrary, is that competent representation is essential to the administration of justice. Our justice system presupposes that the truth will emerge from the clash of adversaries. If an adversary presents his case incompetently, then we have less confidence that the truth will emerge from the process. Thus, a conflict of interest that precludes counsel from competently presenting the case is likely to undermine the "truth finding" function of the court.⁸²

The drafters cite this rationale in connection with the *Model Rules'* blanket prohibition on the representation of adverse parties in the same proceeding despite client consent.⁸³ The drafters' comments note that this conflict cannot be cured by consent "because of the institutional interest in vigorous development of each client's position."⁸⁴ Because this rationale is cited only in support of the blanket prohibition on adversity in the same litigation matter,⁸⁵ it appears that the drafters did not intend this rationale to inform our understanding of the competency constraint on consent in other instances.

While the justice rationale has initial appeal, it loses force as a basis for the rejection of conflict consents when we consider its inconsistency with our understanding of client prerogatives elsewhere in the adversary process. Clients may decide not to pursue actions even when their rights have been violated; they may not name all responsible parties, present all material arguments, or call all material witnesses; and they may decide to settle a case on terms that we may not consider just.⁸⁶ While these client decisions may

82. See HAZARD & HODES, *supra* note 37, § 11.19 (Supp. 2004) ("[T]he tribunal has an interest in basing its decisionmaking on a full and vigorous presentation of the competing positions.").

83. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2012).

84. *Id.* cmt. 17.

85. See *id.* 1.7(b)(3) (stating that its rationale relates to the limitation in Model Rule 1.7(a), and that 1.7(b) operates as an exception).

86. See Moore, *supra* note 23, at 235 ("In many important situations—such as defining the lawful objectives of the representation and accepting or rejecting

well keep a court from arriving at the most accurate outcome (or any outcome at all), we do not reject client decisions in these matters to ensure that justice prevails.⁸⁷ To do so would be to conflate rights and duties.⁸⁸ We afford clients the right to pursue their case vigorously, but we do not *require* them to do so.

Moreover, when clients engage in transactions with others, there is no tribunal in search of the truth. Thus, the truth-finding rationale is of no value in explaining the decisions of courts that strike down consents in nonlitigation matters under the competency standard of Model Rule 1.7.⁸⁹ While it is possible that a rationale for striking down client consents varies across practice areas, the lack of a unified understanding suggests that we need another principle to explain our commitment to competence despite client consent.⁹⁰ In Part III, we will offer an understanding of competence and consent that holds true across all areas of practice.⁹¹

None of this is to deny that the vigorous development of positions helps courts arrive at the correct outcome. The point here is narrower: we do not *force* clients to develop their arguments vigorously as a condition of their participation in the adversary process. We afford clients the right to present their case vigorously, and trust that they and their attorneys will avail themselves of this opportunity in accordance with the client's objectives. When we suspect that an attorney is undermining her client's interests, we intervene principally to protect the client⁹²—the subject of our next

settlement offers—clients already retain the right to make unwise choices.”) (footnotes omitted).

87. For example, when a criminal defendant pleads guilty, trial judges assess whether the defendant's decision is voluntary and knowing but do inquire into whether the guilty plea is just. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970) (“An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”); Commonwealth v. Berrios, 856 N.E.2d 857, 863 (Mass. 2006) (focusing solely on whether the plea was voluntary). Likewise, Model Rule 1.2(a) requires lawyers to abide by the client's decision to settle a civil litigation or a criminal matter but does not direct lawyers to assess whether the decision is just before proceeding. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012).

88. For a classic statement of the relations between rights and duties and other “jural relations,” see WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 13 (David Campbell & Phillip Thomas eds., 2001), which notes, for example, that if landowner X has a right enforceable against Y that requires Y to stay off X's land, then Y has a *duty* to stay off the land. Thus, X's right creates a duty in Y; it does not *obligate* X.

89. *See, e.g.*, Baldassarre v. Butler, 625 A.2d 458, 467 (N.J. 1993) (representing buyer and seller of commercial real estate); *In re* Jans, 666 P.2d 830, 833 (Or. 1983) (representing employer and employee regarding employment agreement).

90. *See supra* Part I.B. (arguing that the search for a deeper rationale that unites related rules—or coherence—should inform interpretation of the *Model Rules*).

91. *See infra* Part III.A.

92. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 3 (2012) (citing client

inquiry.

3. Client Protection

Another possible rationale for insisting on competence is to protect the client. As a general matter, client protection is hardly a controversial rationale; in fact, it justifies much of the regulation of the attorney-client relationship. Our regulation is directed largely toward ensuring that the attorney serves as a proper agent of the client, who—as principal—makes the central decisions regarding the representation.⁹³ At first blush, competence might seem to be a variety of this general client protection scheme: we insist that the attorney handle a matter competently, after all, to ensure that the attorney performs satisfactorily as agent of the client.⁹⁴ The competence element of Model Rule 1.7(b) cannot, however, be understood as simply another element of agency law. Because the Rule eliminates the client's power to waive competence in the representation, it overturns the bedrock concept of agency—principal control.⁹⁵ Rule 1.7(b) is not concerned with protecting the client against the attorney's failure to work as directed; instead, it limits the directions that the client can impose on the attorney. Nor is the Rule motivated by the traditional objectives that justify limits on client choice—to protect an opposing or third party against wrongdoing.⁹⁶ Thus, while the *Model Rules'* insistence on competence may be a form of client protection, it is categorically distinct from the types of client or third-party protections that are the cornerstone of the *Model Rules*.

Perhaps we may insist on competence despite a knowing conflict waiver not to protect the client from the attorney, but to protect the client from *herself*. This rationale openly embraces the idea that—in some instances—clients require protection against their own faulty decision making. Thus understood, the rationale for insisting on competence is of a different kind of client protection—it is a form of paternalism. Paternalism might be defined as the “interference of a state or an individual with another person, against their will, and

protection but not the interest of the tribunal in explaining why the attorney must act diligently).

93. See Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 92-96 (2011) (describing “the agency or client-autonomy vision of lawyering”).

94. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012) (requiring competence in a representation).

95. A principal-agent relationship exists when one person agrees to “act on the principal's behalf and subject to the principal's control.” RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); see also *id.* § 8.09 (requiring agent “to comply with principal's lawful instructions”).

96. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2012) (prohibiting attorney from, inter alia, knowingly assisting client fraud or crime).

defended or motivated by a claim that the person interfered with will be better off or protected from harm.”⁹⁷ Clearly, the demand of competency in Model Rule 1.7(b) is a form of interference with the client’s decision making since courts must strike down conflicting, incompetent representations under the *Model Rules* notwithstanding the client’s informed consent to the conflict. Paternalistic rules are often designed to protect persons from making a decision that is “less than fully rational.”⁹⁸

The paternalistic understanding avoids the problems posed by the prior justifications for denying the client the right to consent to an incompetent representation. It does not make sweeping assumptions about the lawyer’s capacity (or willingness) to disclose the implications of a representation that is “incompetent.” It does not treat competency as another test of informed consent; instead, consistent with Model Rule 1.7, it treats consent as a distinct condition that must be satisfied in order for a waiver to be valid.⁹⁹ Moreover, it is immune from the critiques leveled at the truth-finding rationale because it does not rely on an institutional interest in vigorous representation that is best understood as a right rather than an obligation.¹⁰⁰

In addition, paternalism explains both the “informed” consent and competency elements of the *Model Rules*. Philosophers distinguish between soft and hard paternalism: the former concerns interventions to ensure that the decision maker’s actions are voluntary and the latter restrains behavior even though it is voluntary.¹⁰¹ For example, soft paternalism justifies the requirement of a prospectus before investing.¹⁰² Hard paternalism, by contrast, would justify the prohibition on the manufacturing of drugs that

97. Gerald Dworkin, *Paternalism*, *THE STAN. ENCYCLOPEDIA OF PHIL.*, <http://plato.stanford.edu/entries/paternalism/> (last updated June 1, 2010)[hereinafter Dworkin] Examples include seat belt and motorcycle helmet laws, mandatory pension contributions, and bans on swimming when lifeguards are absent. While nonpaternalistic rationales can be cited for each of these examples, a central justification of these rules on many accounts is the protection of the individual against an unwise decision. *Id.*; see also Douglas N. Husak, *Legal Paternalism*, in *THE OXFORD HANDBOOK OF PRACTICAL ETHICS* 387, 388 (Hugh LaFollette ed., 2003) (“As a rough approximation, one person *A* treats another person *B* paternalistically when *A* interferes with *B*’s freedom for *B*’s own good.”).

98. Dworkin, *supra* note 97.

99. See *supra* Part II.C.1.

100. See *supra* Part II.C.2.

101. JOEL FEINBERG, *HARM TO SELF* 12 (1986); see also Dworkin, *supra* note 97 (distinguishing soft and hard paternalism by whether consent is informed).

102. See Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 343 (1988) (the purpose of the prospectus requirement is “to give potential buyers an effective means to understand the intricacies of the transaction in which they are asked to invest”).

have not been FDA approved.¹⁰³ Model Rule 1.7(b) exhibits both forms of paternalism. It requires that the client's consent be informed—a soft intervention. By contrast, the competency element of Model Rule 1.7 is a form of hard paternalism because it prevents clients from entering into certain representations—those that are incompetent—despite being fully apprised of the implications of that decision.¹⁰⁴

Some commentators have embraced paternalism as an important justification for rejecting waivers that are not competent.¹⁰⁵ These commentators are correct in emphasizing the paternalist rationale of the conflict consent rule. As Fred Zacharias suggests, a concern for the “best interests” of the client motivates our refusal to accept client consents that render the representation incompetent.¹⁰⁶ And yet two critical concerns remain. First, given that the client accepts material deficiencies in the representation by waiving a conflict of interest, how can we know *which* material deficiencies warrant disregarding the client's consent? In other words, how can paternalism ground a principled distinction between those waivers we accept and those we reject? Second, how can we reconcile our rejection of an informed client decision with the contrary sweep of the *Model Rules*, which generally allow for client control of the representation.¹⁰⁷ Why is the client—as principal—generally given free range over the representation but deemed incapable of consenting with full disclosure to a joint representation unless it is in his best interest? We do not impose a best-interest standard on client decisions outside the conflict setting, not even decisions that are profoundly significant for the client.¹⁰⁸ An intervention that deprives the client of decision-

103. See 21 U.S.C. § 505(c) (2006).

104. One might object, however, that the *Model Rules* restrict only the behavior of *attorneys* and not clients, and thus they cannot be designed to protect the client against his own bad decisions. The distinction between “pure” and “impure” paternalism can help us understand how the paternalism goals are reflected in a rule-making scheme that applies only lawyers. A “pure” paternalistic intervention restricts the behavior of only the protected person, while an “impure” paternalistic restricts one person or group, say “X,” for the purpose of protecting another person or group, “Y,” against Y's bad choice. For example, a pure paternalistic intervention would be to prohibit minors from drinking alcohol; an impure intervention would be to prohibit liquor establishments from selling to minors. See Dworkin, *supra* note 97. The conflict waiver rule is an example of the latter: we prohibit attorneys on pain of discipline and malpractice from entering into representations that are “incompetent” despite informed client consent to protect the *client* against her own bad decision.

105. *E.g.*, Zacharias, *supra* note 23, at 417, 436 (noting that protection of clients from their “own poor choices” explains the approach of the *Model Rules* and the *Restatement*); Moore, *supra* note 23, at 236-37.

106. Zacharias, *supra* note 23, at 432-33.

107. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012) (requiring lawyer to comply with client's decisions regarding objectives of the representation).

108. See Moore, *supra* note 23, at 236 (“The obvious question is why the client

making authority, even though the client has been provided full information, faces a considerable burden of reconciliation with our principal-agency view of lawyering.

The solution lies in another critical distinction between types of paternalism, which can lead to a deeper understanding of Model Rule 1.7(b). We can distinguish paternalistic interventions by whether they limit the *means* or the *ends* of the actor. “Strong” paternalism intervenes to correct the actor’s *ends*. By contrast, “weak” paternalism defers to the ends of the agent, but is willing to intervene if the *means* the agent adopts are “likely to defeat those ends.”¹⁰⁹ “Strong” paternalists might favor laws against Russian roulette:¹¹⁰ even though a participant may privilege his enjoyment of the game over the catastrophic risks it entails, the strong paternalist would intervene on the grounds that the actor’s objectives (wanting to play a life-threatening game) are wrong. By contrast, if a driver values safety over convenience, a weak paternalist would support a seatbelt requirement on the grounds that failure to buckle up is likely to defeat the driver’s safety goal.¹¹¹

Strong paternalism is far afield from the client autonomy that grounds our understanding of legal ethics. As we have noted, in the attorney-client setting, for important reasons we are generally reluctant to interfere with or direct the *ends* that a client can seek from the representation.¹¹² The “best interests” test of competency is more akin to the strong paternalist approach. In asking whether the tradeoffs that the client has made are sensible or wise, it asks the court to focus on the *ends* that the client seeks from the representation. The client is the principal, however, and the ends or objectives of a representation are hers to define.¹¹³ By contrast, the *weak* version of paternalism—which focuses on means and not ends—is entirely compatible with our best understanding of the client’s role, and it offers powerful insight into why and when conflicts are unwaivable. It lets the client be the judge of what *goal* is best, proscribing only decisions about *means* that are likely to undermine the client’s objectives. (To emphasize the concern with means rather than objectives that grounds weak paternalism, we will refer to this form of intervention henceforth as *means paternalism*.)

protection rationale currently succeeds when the issue is conflicts of interest but not when the issue is the overall objectives of the representation or the acceptance or rejection of settlement offers; clearly, the latter are more fundamentally significant to the client because the implications of a ‘wrong’ decision could be far more severe than in most common examples of conflicting interests.”).

109. Dworkin, *supra* note 97, at 4.

110. *See id.*

111. *Id.*

112. *See supra* notes 61-65 and accompanying text.

113. *See supra* note 107.

Consider the logic of means paternalism in the conflict-waiver setting. The client wishes to accomplish an objective (O) in the representation. In waiving a conflict of interest, the client accepts (after full disclosure) limitations on the representation that prevent the attorney from undertaking certain actions on his behalf (L) that are likely to *undermine* O. By accepting L, the client has made it less likely that he will obtain O than if he had not accepted L. O is presumably (far) more important to the client than L, which—after all—concerns limits on a representation resulting from a conflict rather than the client’s desired outcome from the representation.¹¹⁴ We reject the client’s informed choice to accept L because it defeats the client’s own, (far) stronger commitment to O.

We can identify a number of rationales for means paternalism in the client setting. The respect for client objectives that grounds means paternalism is consistent with the client autonomy vision of the legal profession. It is the client’s case, after all, and the client ought to be afforded control over the objectives of the representation.¹¹⁵ The fact that the client’s choice is not the best or “optimal” choice is not sufficient reason to overrule it. While we remain concerned about the client’s best interests, the *client* identifies those interests in establishing the objectives for the representation. When a client’s decision about *means* crosses the line from *less than optimal* to *likely to defeat the client’s objectives*, the choice has moved from unwise to self-defeating, the point where intervention is more readily reconciled with our commitment to client autonomy. Moreover, given that clients typically have no special training in evaluating legal procedures or their significance, we have reason for concern when they accept procedures, even after full disclosure, that undermine their objectives. We will elaborate on these rationales in our later discussion of the *Model Rules* and their relation to the means-paternalism interpretation of Model Rule 1.7(b).¹¹⁶

Rather than constricting client autonomy, means paternalism can be understood as *enhancing* the client’s autonomy by preventing him from accepting means that will frustrate his objectives. The client’s objectives for the representation, which means paternalism

114. While it is possible that a client could elevate the means over the ends in some instances (often laudably) in representation situations, we are not referring here to means concerns generally, but to limitations on means posed by an attorney’s conflict of interest, which will rarely trump client objectives.

115. As Gerald Dworkin notes, when a person “neglects to act in accordance with his actual preferences and desires . . . there is a stronger and more persuasive argument for paternalism.” In this instance, we are not “imposing a good on another person.” Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 122 (Richard A. Wasserstrom ed., 1971) [hereinafter *Paternalism*].

116. MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2012).

seeks to protect, are typically far more important to the client than the means by which they are pursued.¹¹⁷ Moreover, the client who accepts means that are likely to frustrate his objectives for the representation is mistaken by his own lights. Thus, “there is a sense in which if I could convince him of the consequences of his action he also would not wish to continue his present course of action.”¹¹⁸ The client would in some sense *want* us to intervene to prevent him from making this mistake, since the error is undermining his objective for the representation.¹¹⁹ And finally, if inadequate understanding prevents “meaningful choice,”¹²⁰ then the client’s autonomy is arguably advanced by an intervention to cure a misunderstanding about means that will undermine the client’s objectives.

Means paternalism not only keeps us from imposing our own outcomes for the representation on the client in judging what conflicts can be waived, it also avoids the conceptual errors of the other rationales described above. First, it does not depend on the suspect empirical assertion that an attorney cannot adequately describe the risks of an incompetent representation.¹²¹ We would do well to admit that clients can, on occasion, make faulty decisions about whether to consent to a conflict of interest even after they have been provided full information. And by distinguishing ends and means, means paternalism allows us to identify those informed client decisions that are faulty—those that are likely to undermine the *client’s* desired ends.

Second, means paternalism does not require us to construct a justice-based rationale for rejecting incompetent representations.¹²² Outside the conflict setting, we do not insist on competent representation in order to ensure a correct outcome in the case, any more than we require a client to raise all material claims in litigation to ensure a correct outcome in the case. Moreover, the justice-based rationale has no bearing in the transaction setting, where Model

117. See Dworkin, *supra* note 97 (“[S]ometimes the individuals [sic] (long-run) autonomy is advanced by restricting his autonomy (short-run)”).

118. *Paternalism*, *supra* note 115, at 122; see also Moore, *supra* note 23, at 237 (“[I]t is equally arguable that paternalism is morally justifiable when the recipient would probably have agreed in advance to be protected against certain unwise future decisions.”).

119. Although the types of paternalism differ, a similar justification has been offered for restraining a person from acting on an impulse that will contravene that person’s values. See David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 473 (1981) (“[K]nowing your values, and seeing you about to give in to an impulse that violates those values, I restrain you: I force you to be free.”). By analogy, we restrict incompetent representations because the client values his objectives for the representation more than his choice of incompatible means.

120. See BEAUCHAMP & CHILDRESS, *supra* note 75, at 99.

121. See *supra* Part II.C.1.

122. See *supra* Part II.C.2.

Rule 1.7(b) also applies.¹²³

An interesting question is why courts have cited these suspect rationales for the competency element in Model Rule 1.7(b). One possibility, of course, is their superficial appeal: they reveal their deficiencies only on close inspection. A more likely reason, however, is the long shadow cast by client autonomy, a bedrock assumption of the legal profession.¹²⁴ Consciously or otherwise, courts may be loath to embrace a paternalistic rationale for the rejection of client consent to an incompetent representation for fear that it is inconsistent with client control over the representation. The error stems from the failure to distinguish among various types of paternalism. As we have noted, means paternalism is of a special variety. It is the weakest form of intervention, since it leaves the client's objectives intact and concerns itself only with means.¹²⁵ Second, in an important sense, means paternalism enhances client autonomy since it rejects only those means that undermine the client's objectives.

Means paternalism explains why we insist on competency despite a client's informed consent to a conflict of interest. From this understanding, we can develop a test of when a client's informed consent to a conflict of interest should be rejected, which we turn to next.

III. A PROPOSED TEST OF COMPETENCY

A. Introduction

In this Part, we will present and elaborate on the elements of a test to determine when a concurrent conflict of interest can be waived. Thereafter, we will ask whether the proposed test fits with the *Model Rules* and the commitments of the legal profession that inform the *Model Rules*.

B. The Test

The analysis developed above leads directly to a test for evaluating whether a knowing and voluntary conflict waiver must be struck down as incompetent under Model Rule 1.7(b). *An informed conflict waiver must be rejected as incompetent if limitations on the means or procedures by which the attorney pursues the matter caused by the conflict of interest are likely to defeat the client's objectives for the representation.* In the subsections that follow, we will elaborate on the core elements of the proposed test: (1) the identification of client objectives; (2) the limits on the means that can be undertaken by counsel as a result of the conflict; and (3) the "likely to defeat"

123. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 7 (2012).

124. See *supra* note 61 and accompanying text.

125. See *supra* note 114 and accompanying text.

standard.

1. Client Objectives

Clients retain lawyers in large part to carry out client objectives. While lawyers can offer valuable input on what the client might hope to achieve from the representation,¹²⁶ decisions about what to accomplish in the representation lie ultimately with the client.¹²⁷ Once the attorney understands the client's objectives, the proposed test offers a critical new path for defining and assessing competency. Competency is no longer a free-floating referendum on whether the representation is "good enough" despite material limitations. The clients' objectives provide the baseline against which to measure the effect or significance of the conflict of interest. Thus, under the proposed test, conflict waivers begin with the attorney's careful inquiry into the client's objectives for the representation.¹²⁸

Because the current approach to conflict waivers does not overtly distinguish between objectives and means, practitioners have not engaged in the critical first step required by the proposed test. Rather than inquiring carefully into the client's objectives to frame the waiver discussion, attorneys emphasize the limitations on the representation resulting from the conflict.¹²⁹ Courts too tend to elide this critical first question, focusing instead on the problems posed by the conflict.¹³⁰ If we are to determine whether a conflict is waivable, however, the significance of the conflict of interest must be measured against *something*. Without a clear understanding of the client's objectives, lawyers and courts are relegated to impressionistic rather than reasoned accounts of whether conflict can be waived.

126. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2012) ("In representing a client, a lawyer shall...render candid advice."). The attorney can help the client identify and assess the various objectives the client might seek from the representation, and—when the client is considering a limited objective—the attorney can explain the implications and possible disadvantages of the limited objective. See *id.* R. 2.1 cmt. 1. For an articulate case that the lawyer must not assume that the client is interested strictly in pressing her legal rights and interests regardless of the implications, see Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 132-33 (2010).

127. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012); RESTATEMENT (THIRD) LAW OF GOVERNING LAWYERS § 16 cmt. c (2000) ("The client, not the lawyer, determines the goals to be pursued . . .").

128. In Part IV.E., we will discuss how this inquiry into objectives should be conducted.

129. For an example of a CLE guide that emphasizes disclosure of risks and limitations but makes no mention of client objectives in assessing the consentability of a conflict, see Lucian T. Pera & Pamela A. Bresnahan, ALI-ABA Live Telephone Seminar, Just Sign Here: Conflict Waiver Basics (Nov. 22, 2011). Of course, these practitioner materials correctly reflect the approach of courts to the waiver question, which the proposed test would revise.

130. See, e.g., *Baldasarre v. Butler*, 625 A.2d 458 (N.J. 1993).

Moreover, by identifying the client's objectives, the proposed test allows us to tailor waiver analysis to the *client's* situation rather than some abstract concern about the "type" of representation. Different clients have different objectives,¹³¹ and a client may have a focused goal that is unaffected by the limitation posed by a conflict. A genuine understanding calls for inquiry into the client's unique, personal circumstances and objectives, rather than assumptions and generalities. Commentators and courts have long realized that whether a situation presents a conflict of interest requires a careful analysis of the particulars.¹³² It is time that a similar understanding be brought to the closely related question of whether a conflicted representation is waivable: the answer turns not on generalities about the type of representation, but on how the limitations resulting from the conflict will affect the client's particular objectives. In time, the caselaw applying the proposed test could represent a virtual catalog of varied representation objectives coupled with careful analysis of how these objectives are affected by specific conflict limitations—a genuine source of guidance for courts and practitioners alike.

2. Limitations

The second step in applying the proposed test is to identify the material limitations on the actions the lawyer can undertake for the client as a result of the conflict of interest. For example, in the litigation setting, the dual representation may preclude a lawyer from raising or counseling the clients about certain claims or defenses that affect the other client,¹³³ one client's testimony may adversely affect the other, or the attorney may not be able to cross-examine a co-client who provides adverse testimony.¹³⁴ In the transaction setting, a conflict will preclude a lawyer from negotiating on behalf of one client against the other,¹³⁵ or from suggesting

131. RESTATEMENT (THIRD) LAW OF GOVERNING LAWYERS § 16 cmt. c (2000) ("Individual clients define their objectives differently. One litigant might seek the greatest possible personal recovery, another an amicable or speedy resolution of the case, and a third a precedent implementing the client's view of the public interest.").

132. *Id.* § 121 cmt. c (offering a multi-part test focusing on "factual predicates and practical consequences" to assess whether a situation presents a conflict of interest).

133. See *Rice v. Baron*, 456 F. Supp. 1361, 1374 (S.D.N.Y. 1978).

134. For a discussion of these and other concerns in the criminal defense setting, see LAFAVE ET AL., *supra* note 7, at § 11.9(a).

135. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 32 (2012) ("When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances . . ."); see also *People v. Bollinger*, 681 P.2d 950, 952 (Colo. 1984) (disciplining attorney for favoring one client over another in a transaction); *In re Jans*, 666 P.2d 830, 833 (Or. 1983) (describing problems posed by attorney representing employer and

alternatives to one client that could disadvantage another.¹³⁶ In concurrent representations, an overriding limitation is the lawyer's inability to preserve client confidences from the co-client.¹³⁷ To identify limitations that may affect the representation, the lawyer should ask herself what services will be necessary for the client over the predicted course of the representation, and which of these services cannot be conducted because of the conflict of interest.¹³⁸

A client may request or even insist on a limitation in the representation. For example, the client may insist that the lawyer not negotiate on his behalf, or not cross-examine a particular witness, or not maintain information in confidence from his co-client. A lawyer or court may be tempted to characterize such limitation as a goal, since it originated with the client. The fact that a client prefers or even insists on a limitation does not render it a goal, however. Objectives are the ultimate ends that the client seeks from the representation.¹³⁹ Means relate to the procedures by which such objectives will be pursued.¹⁴⁰ If we conflate procedures and objectives, the client's consent to a procedural limitation would insulate the conflict consent entirely from the competency review required by Model Rule 1.7(b) and the proposed test.

Occasionally, a client will have special circumstances that warrant elevation of a procedural aspect of the representation to a client goal for purposes of the proposed test. For example, a client may not wish to sue a family member, and while the choice of defendants typically relates to means rather than ends, the special circumstance of family relation warrants elevation of this procedural concern to a goal.¹⁴¹ The question is whether the client would have insisted on this limitation regardless of the conflict of the interest. It is also incumbent on the attorney to document the grounds for treating this procedural limitation as a client-objective, as we shall

employee in connection with employment agreement); Attorney Grievance Comm'n v. Collins, 457 A.2d 1134, 1145 (Md. App. 1983) (disciplining lawyer for failure to serve as neutral adviser in representing two clients in same transaction).

136. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8 (2012) ("[A] lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others.").

137. See *id.* R. 1.7 cmt. 30 (citing confidentiality as a "particularly important factor in determining the appropriateness of common representation"); HAZARD & HODES, *supra* note 37, § 11.22 (Supp. 2004) ("[C]lients who have shared a lawyer generally cannot confide secrets that *the lawyer* may withhold from the other client.").

138. See Kevin H. Michels, *Third-Party Negligence Claims Against Counsel: A Proposed Unified Liability Standard*, 22 GEO. J. LEGAL ETHICS 143, 168 (2009).

139. See *supra* note 127 and accompanying text.

140. See *infra* notes 157-58 and accompanying text.

141. For an example, see *infra* Part IV.C.

discuss in due course.¹⁴²

3. Likely to Defeat the Client's Goal

Once we identify the client's objectives and the limitations on means resulting from the conflict of interest, the proposed test asks whether the limitations are likely to defeat the client's objectives. The "likely to defeat" standard derives from the central insight of means paternalism discussed earlier. We enhance the client's autonomy by identifying and deferring to his objectives and rejecting his decisions about means that are likely to undermine those objectives.

¹⁴³

A critical implication of the proposed test is that not all limitations on the representation resulting from a conflict—even if material—can render a representation incompetent. A material limitation may make it more difficult for the attorney to achieve the client's goal, and it may even render it less likely that the goal will be achieved. This is not enough, however, to render a conflict-waiver incompetent. It is not the job of the court to revisit the client's cost-benefit calculation, or to reject waivers because they do not maximize the client's prospects or serve the client's "best interests." It is only when the limitations reach the level where they are more likely than not to defeat the client's goal that courts have reason to intervene on competence grounds. The "likely to defeat" standard identifies the point where limitations do not merely lessen the client's prospects but become, in a real sense, self-defeating and therefore incompetent.¹⁴⁴

The "likely to defeat" standard replaces our subjective sense of whether the representation is "good enough" with an objective standard. The validity of an informed conflict waiver turns not on our visceral impressions but on a standard external to the observer—whether the limitations resulting from the conflict are likely to defeat the client's objective.

C. The Proposed Test and the Model Rules

As we have discussed, Model Rule 1.7(b) presents an enigma: how can we reconcile (i) the client's right to enter into an informed consent to a conflict waiver with (ii) the obligation of lawyers and courts, respectively, to reject and to strike down client consents that render the representation incompetent? A viable interpretation must

¹⁴² See *infra* Part IV.E.

¹⁴³ See *supra* notes 115-120 and accompanying text.

¹⁴⁴ In effect, the representation is deemed incompetent under the proposed test because the client would be more likely to achieve his objectives for the representation if he had not accepted the waiver. For a discussion of the rationale to support the "likely to defeat" standard, see *supra* notes 109-120 and accompanying text.

harmonize the seemingly disparate competency and consent elements of Model Rule 1.7(b). In addition, the interpretation should cohere with the remainder of the *Model Rules* and the deeper commitments of the legal profession that the *Rules* purport to codify.¹⁴⁵ Here, we ask whether the proposed test meets these objectives.

We begin with the paradox of competency and consent posed by Model Rule 1.7.¹⁴⁶ Informed consent requires the disclosure of the material risks and limits posed by the representation.¹⁴⁷ But how can a conflicted representation *ever* be competent if it is subject to a material limitation? In other words, if the purpose of a conflict waiver is the client's acceptance of material limitations on the representation resulting from the conflict, and if representations with material deficiencies are incompetent, how could *any* waiver withstand scrutiny under the competence standard?¹⁴⁸

The proposed test explains how. A limitation resulting from a conflict could prevent the attorney from taking certain, material steps to achieve the client's goal without being *likely to defeat* the client's goal. The question is not whether the limitations are material. We presume as much: if the limitations were not material, they would not have been the subject of disclosure and consent under Model Rule 1.7 in the first place. The question instead is whether the limitations are likely to be goal defeating. Thus, the *magnitude* rather than the materiality of the limitation determines whether a representation is competent under Model Rule 1.7.¹⁴⁹

The competency required of a representation that is subject to an informed waiver needs to reflect the fact that the client has *accepted* the limitations in question. In a standard representation, where there is no conflict of interest and the client has not accepted any limitations on the lawyer's performance, *any* material deficiency in the representation can be understood as incompetence under Model Rule 1.1.¹⁵⁰ When the client accepts limitations on the lawyer's

145. *See supra* Part I.B.

146. *See supra* Introduction.

147. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2012).

148. *See supra* notes 36-40 and accompanying text.

149. The proposed test also gives rise to a second reason why a limitation can be "material" but not justify invalidating a waiver as incompetent. Clients differ in their objectives for their representations. As a result, certain limitations resulting from a conflict that are material for a *type* of representation may present no limitation on pursuit of the client's particular objectives in a *given* representation. These limitations should not render a representation incompetent under Model Rule 1.7(b).

150. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012) (requiring competent representation to include "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); *id.* R. 1.3 (requiring diligence in the representation); *see also* R. 1.3 cmt. 1 (requiring "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and "commitment and

performance as a result of a conflict, however, those accepted deficiencies cannot render the representation incompetent simply because they are material, otherwise the client's consent will be given no force or effect. The proposed test reconciles the consent and competence elements of Model Rule 1.7: the materiality of a deficiency, standing alone, does not defeat consent; and consent, standing alone, does not sanctify all deficiencies in a representation. Limitations should render the representation incompetent only when they are likely to undermine the client's goal.

While the proposed test defers to the client's objectives for the representation, it acknowledges that even informed clients can be mistaken about the implications of a conflict of interest. A rational client who accepts means limitations that are likely to frustrate her objectives presumably misunderstands the consequences of the means limitations she has accepted. That misunderstanding is not entirely surprising given that attorneys are trained on matters of legal procedure, and clients typically are not. "Informed consent," as defined in the *Model Rules*, requires that the attorney adequately disclose the risks posed by the conflict; it does not, however, turn on the client's *understanding* of those risks.¹⁵¹ The proposed interpretation of Model Rule 1.7(b) closes this gap: it protects the client when her consent to limitations resulting from a conflict is informed—since it was grounded on full disclosure—but improvidently granted, *as measured against the client's own objectives*.

The proposed test can also help us understand the relationship between the informed consent and competency elements of Model Rule 1.7(b). Both protect client autonomy. The insistence that a waiver be "informed" is premised on the insight that an uninformed decision is not a fully autonomous act.¹⁵² The competency demand on the analysis developed earlier adds a second level of inquiry into the autonomy of the client's waiver decision: the client's acceptance of limits on the representation, even when informed, poses a real threat to the client's autonomy when the client misunderstands that he has consented to limits on the representation that are likely to defeat his objectives for the representation.¹⁵³

The next question is whether the proposed test coheres with the remainder of the *Model Rules*. The *Model Rules* expressly affirm the critical premise of the proposed test, namely that objectives and means are distinct elements of the representation, and that

dedication to the interests of the client . . . with zeal in advocacy upon the client's behalf").

151. See MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2012).

152. See BEAUCHAMP & CHILDRESS, *supra* note 75, at 99; text accompanying *supra* note 75.

153. See *supra* notes 109-20 and accompanying text.

objectives are, within ethical limits,¹⁵⁴ uniquely the client's to shape. Model Rule 1.2(a) provides that the "lawyer shall abide by a client's decisions concerning the objectives of representation,"¹⁵⁵ which is consistent with the proposed test's deference to client objectives. The *Rules* also require that the lawyer "consult with the client as to the means by which [the client's objectives] are to be pursued,"¹⁵⁶ suggesting that on matters of procedure, the lawyer has strong input.¹⁵⁷ Thus, the proposed test eliminates the apparent tension between the competency element of Model Rule 1.7(b) and the client's right to shape the objectives of the representation under Model Rule 1.2(d). The competency demand of Model Rule 1.7(b) is not a channel through which we impose our view of what is best for the client. It is a protection against the client's acceptance of means limitations that are likely to prevent the client from achieving her objectives in the representation. The competency demand of Model Rule 1.7(b) is designed to *enhance* the client's control over objectives by ensuring that such objectives are not undermined by limitations on means resulting from the conflict. And client control over objectives, in turn, is a core commitment of the *Model Rules* generally.¹⁵⁸

The proposed test likewise provides a close fit with Model Rule 1.2(c), which allows the lawyer and client to limit the "scope of the representation."¹⁵⁹ In limiting the scope of the representation under Model Rule 1.2(c), the client may not waive competent representation,¹⁶⁰ a restriction that is analogous to the competency

154. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2012) (prohibiting knowing attorney assistance of client fraud or crime).

155. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012).

156. *Id.*

157. *Id.* R. 1.2 cmt. 2 ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. e (2000) ("A lawyer has authority to take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client, unless there is a contrary agreement or instruction and unless a decision is reserved to the client."); *see also* Jones v. Barnes, 463 U.S. 745, 754 (1983) (rejecting a per se rule that appellate counsel appointed for indigent criminal defendant must raise every nonfrivolous argument requested by client). *See generally* Lawyers' Manual, *supra* note 1, at 31:304 (offering examples of tactical decisions that lawyer can make on behalf of client).

158. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.>").

159. *Id.* R. 1.2(c). As the drafters' comments note, a "limited representation may be appropriate because the client has limited objectives for the representation." *Id.* R. 1.2 cmt. 6.

160. *Id.* R. 1.2 cmt. 7 (noting that although client and lawyer have substantial latitude to limit representation, "an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation").

constraint on conflict waivers in Model Rule 1.7(b). In offering an example of a limitation that would be deemed unacceptable under the Model Rule 1.2(c), the comments implicitly adopt an objectives/means approach. The comments offer by way of example a representation in which a client seeks general advice on a matter, and the lawyer and client agree that the advice will be provided in a short telephone discussion.¹⁶¹ The comments note that such arrangement “would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.”¹⁶² In other words, because the client’s goal is advice that is reliable, a restriction on the means by which that goal is pursued (a short phone call) is void under Model Rule 1.2(c) if it undermines the client’s goal. Thus, even outside the conflict-waiver setting, the client controls the objectives of the representation, and we limit the client’s control over means when they undermine the client’s objectives.¹⁶³ Again, the proposed test of competency for a conflict waiver helps integrate the *Model Rules* into a coherent, consistent scheme.

Finally, the proposed test offers a way of understanding Model Rule 1.7(b) in accordance with the agency or client autonomy vision of lawyering that remains a core commitment of the legal profession.¹⁶⁴ It is the client’s case or transaction, after all, and the client—as principal—ought to retain control over what is pursued on her behalf. The proposed test’s emphasis on the distinction between client objectives and means squares this general commitment to client control with the refusal of Rule 1.7(b) to accept client consent to an incompetent representation—even if the consent is informed. When the means are inconsistent with the client’s goal as the result of a conflict, we have strong reason to believe that the goal, and not the means, represents the true and deepest objective of the client. When courts reject waivers on competency grounds under the proposed test, therefore, they are not superimposing their objectives for the representation on the client. Incompetence, understood through this lens, is a failure of means—limitations that are likely to prevent the attorney from undertaking the steps necessary to fulfill the client’s goal. Thus, in an important sense, we *preserve* client autonomy by refusing to accept client-approved lawyering means that undermine client objectives.

161. *Id.*

162. *Id.*

163. The reasoning developed herein in support of the proposed test presumably would warrant adoption of the same “likely to defeat the client’s objectives” standard for determining whether a limitation on the scope of the representation is “reasonable” under Model Rule 1.2(c).

164. See Gaetke, *supra* note 63, at 717; text accompanying note 63.

IV. THE PROPOSED TEST APPLIED

A. Introduction

In this Part, we will offer examples of conflict waivers and ask whether they are competent and therefore enforceable under the proposed interpretation of Model Rule 1.7(b). In each instance, we will presume that the attorney has disclosed sufficient information to gain the informed consent of the client.¹⁶⁵ The question will be whether the conflict of interest nonetheless renders the representation incompetent and the waiver therefore invalid.

We will consider conflict-waiver situations in three major areas of practice—criminal defense, civil litigation and transactions. In addition to asking how the proposed test analyzes conflict waivers in concrete situations, the hypotheticals will also allow us to refine our understanding of the proposed test, just as courts do when they develop a test and apply it in subsequent cases.¹⁶⁶ Finally, we will ask how the client-objectives test should shape the behavior of lawyers in practice, the setting where much of the day-to-day consideration of conflict waivers takes place.

Some caveats before we begin. First, in analyzing the enforceability of a conflict waiver, the proposed test directs us to determine the objectives of *each* client, and then determine whether those objectives are likely to be undermined by the limitations resulting from the conflict.¹⁶⁷ In the analysis that follows, due to space constraints, we will restrict our analysis to one of the clients in the multiple representation, unless analysis of both clients will illustrate a valuable point.¹⁶⁸ In practice, the lawyer must conclude that the circumstances of each client satisfy the proposed test before entering into the multiple representation. Finally, space constraints allow us to provide examples, but not a complete treatment, of the waiver issues arising in the practice areas that follow.

165. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2012) (requiring informed consent of client as one prerequisite of conflict waiver); see also *id.* R. 1.0(e) (defining informed consent).

166. Although the examples are organized by subject area, many of the insights from one subject area apply to the others. Part V will conclude by combining the principles learned from each of the hypotheticals into a decision guide for courts, disciplinary committees, and practitioners for determining when consent can cure a concurrent conflict of interest.

167. Under the proposed test, competency is not a general analysis of how the waiver will affect the group of clients; it is a protection that must be satisfied for *each* client.

168. Because client objectives can differ, one should not assume that the same analysis would hold for each client in the proposed dual representation.

B. The Criminal Setting

1. The Supreme Court's Approach

Consider these facts from *Wheat v. United States*,¹⁶⁹ a leading Supreme Court case on when a criminal defendant can waive a conflict of interest.¹⁷⁰ Wheat was charged with participating in a drug-distribution conspiracy. In an earlier trial, another alleged conspirator, Gomez-Barajas, was tried and acquitted on charges relating to the conspiracy. In that trial, Gomez-Barajas was represented by attorney Eugene Iredale.¹⁷¹ A prosecutor stated that Iredale “did a fantastic job” in representing Gomez-Barajas.¹⁷² To avoid charges on another matter, Gomez-Barajas pleaded guilty to tax evasion and illegal importation of merchandise, a plea that had not yet been approved by the court. In lieu of trial, another alleged conspirator, Bravo, who was also represented by Iredale, pled guilty to transporting 2400 pounds of marijuana to the residence of Victor Vidal. The government offered to “modify its position”¹⁷³ with regards to Bravo’s sentencing in exchange for his testimony in the Wheat case.¹⁷⁴

Wheat retained Iredale as his counsel, waiving his “right to conflict-free counsel.”¹⁷⁵ The government moved to disqualify Iredale, arguing that a portion of what Bravo delivered to Vidal was later delivered to Wheat. The government also argued that if the court did not accept Gomez-Barajas guilty plea, the government could call Wheat as a witness on “the sources and size of Gomez-Barajas’ income.”¹⁷⁶ Because Iredale would be unable to cross examine Wheat, he would be conflicted out of representing Gomez Barajas.¹⁷⁷ Wheat countered that he (and the others) had waived his right to conflict-free counsel, and that the allegations of conflict were “highly speculative” and designed to remove Iredale from Wheat’s defense team because he had proven so effective in defending Gomez-Barajas.¹⁷⁸

The trial court rejected Wheat’s waiver and required him to proceed with counsel other than Iredale. Wheat was convicted, and he challenged the ruling on the grounds that he was wrongfully

169. 486 U.S. 153 (1988).

170. See LAFAVE ET AL., *supra* note 7.

171. *Wheat*, 486 U.S. at 154-56.

172. *Id.* at 170 n.3 (Marshall, J., dissenting).

173. *Id.* at 155.

174. *Id.* at 156.

175. *Id.*

176. *Id.* at 155-56.

177. *Id.* at 153-56.

178. *Id.* at 156-57.

denied his choice of counsel.¹⁷⁹ The Court upheld the trial court's refusal to allow Iredale to serve as counsel, despite defendant's conflict waiver because: (1) the "[g]overnment might readily have tied certain deliveries of marijuana by Bravo" to Wheat, which would have required vigorous cross examination by Iredale that his representation of Bravo would have foreclosed; and (2) if Gomez-Barajas's pleas were rejected by the trial court, Wheat's probable testimony in that case "would create an ethical dilemma" for one of the defendants.¹⁸⁰

In the criminal defense setting, the question of how courts should treat a client's waiver of his attorney's conflict of interest is inexorably fused with constitutional questions arising under the Sixth Amendment. The Sixth Amendment entitles a criminal defendant to effective assistance of counsel in criminal prosecutions,¹⁸¹ a right that extends to the accused regardless of his ability to pay.¹⁸² When the court appoints counsel to represent a defendant, "the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."¹⁸³ While it is clear that the criminal defendant has a right to counsel who is not hampered by a conflict of interest, complexities surround client waivers of that right. The *Wheat* Court observed that trial courts "face the prospect of being 'whip-sawed' by assertions of error no matter which way they rule."¹⁸⁴ If courts accept the proposed waiver, the *Wheat* Court reasoned, they might face a later challenge from the defendant on Sixth Amendment ineffective assistance of counsel grounds. Conversely, if they reject the waiver, the defendant might claim that the court has deprived him of his Sixth Amendment right to choice of counsel.¹⁸⁵

The *Wheat* Court began by acknowledging what is no doubt correct: the right to counsel of one's choice has limits and not every waiver is enforceable.¹⁸⁶ The Court then identified five reasons that justify rejection of certain waivers. First, courts have an interest in ensuring that trials are conducted in accordance with the "ethical standards of the profession."¹⁸⁷ Second, courts have an interest "that

179. *Id.* at 157-58.

180. *Id.* at 164.

181. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

182. *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963).

183. *Glasser v. United States*, 315 U.S. 60, 70 (1942).

184. *Wheat*, 486 U.S. at 161.

185. *See id.* at 161.

186. *Id.* at 160.

187. *Id.* In support of this proposition, the Court cites the attorney ethics rules, including Model Rule 1.7, which, as discussed earlier, invalidates even knowing and

legal proceedings appear fair to all who observe them.”¹⁸⁸ Third, the “interest of a criminal defendant” may be reason to reject a waiver.¹⁸⁹ Fourth, courts may reject waivers because of “the institutional interest in the rendition of just verdicts in criminal cases.”¹⁹⁰ Fifth, courts have an interest in not having their waiver decisions overturned on appeal.¹⁹¹ *Wheat* infers from these concerns that a court may reject a proposed conflict waiver when there is an actual or potential conflict of interest.¹⁹²

The *Wheat* Court’s “standard” warrants closer scrutiny. A waiver, by definition, is a knowing acceptance of a material limitation on the representation caused by a conflict of interest.¹⁹³ If a conflict of interest is sufficient to invalidate a waiver, then every waiver is suspect. Perhaps because it had offered no viable means by which to determine whether conflict waiver should be rejected, the Court made an extraordinary pronouncement:

Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was “right” and the other “wrong”. The District Court must recognize a presumption in favor of petitioner’s counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.¹⁹⁴

Thus, after *Wheat*, whether a criminal defendant is to be deprived of his choice of counsel despite a voluntary, knowing waiver of a conflict of interest is left to the discretion of the trial court, under a standard so unrefined that it cannot distinguish “right” from “wrong,” and accepts opposing conclusions on the same question.

The *Wheat* Court offers an array of rationales for rejecting a consent—some valid, some suspect—without asking how those rationales relate to a legal standard for assessing competence. Let us review each of these rationales in turn. The Court’s concern with the appearance of fairness presupposes that an observer would not be equally troubled by the *denial* of a defendant’s choice of counsel without sufficient reason. Moreover, if an observer would deem a proceeding unfair because counsel had a conflict of interest, even

voluntary conflict waivers if they render the representation incompetent. *See supra* notes 30-34 and accompanying text.

188. *Wheat*, 486 U.S. at 160.

189. *Id.*

190. *Id.*

191. *Id.* at 161.

192. *Id.* at 163.

193. *See supra* notes 29-30 and accompanying text.

194. *Wheat*, 486 U.S. at 164.

though it was knowingly waived, then *all* waivers should be rejected—a standard that neither *Wheat* nor the ethics rules accepts. Apparently, *Wheat* imagines a more nuanced observer, who can distinguish between appropriate and inappropriate waivers. The Court, however, offers no basis for distinguishing these waivers, and in fact holds that either acceptance or rejection of the waiver on its facts would be justified.

The *interest of a criminal defendant*, as argued earlier, is the central reason to reject certain client waivers.¹⁹⁵ The challenge is to reconcile a concern for protection of clients with the rights of clients to control the representation—a question the Court does not address. Part II of this Article seeks to reconcile our commitments to client protection and client autonomy, and Part III proposes a test derived from this understanding.

The Court's concern with "the rendition of just verdicts in criminal cases"¹⁹⁶ is also problematic. In addition to the critique of this rationale developed earlier,¹⁹⁷ it is worth observing, once again, the overriding challenge posed by this and many of the other rationales offered by the Court. Unless we are to reject all waivers, the "just verdict" rationale—even if valid—would require an explanation of which waivers are consistent with justice, which ones are not, and why. If justice is our concern, and a conflict undermines justice, then why do we accept *any* waivers?

The Court's final rationale—ensuring that trial courts' waiver decisions withstand appeal—need not detain us long. The concern itself is misplaced: trial courts do not have a legitimate interest in ensuring that their decisions are upheld on appeal; they have a

195. See *supra* Part II.C.3.

196. *Wheat*, 486 U.S. at 160.

197. See *supra* Part II.C.2 (arguing that this rationale conflates the client's *right* to pursue a vigorous defense with a *duty* to do so). In *Faretta v. California*, 422 U.S. 806, 819 (1975), the Court held that criminal defendants have a sixth amendment right of self-representation. The Court's reasoning in part emphasizes the distinction between a right and a duty: "[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want." *Id.* at 833. While counsel may be necessary to ensure a fair trial, the Court held that the choice belongs to the client, "for it is he who suffers the consequences if the defense fails." *Id.* at 820. The client's choice, the Court reasoned, "must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* at 834 (Brennan, J., concurring) (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (internal quotations omitted)). The criminal defendant's decision to proceed pro se implicates different concerns than the decision to proceed with conflicted counsel, and comparisons may be facile. Nonetheless, if client autonomy outweighs the state's interest in a fair trial in determining whether an informed criminal defendant can proceed *entirely* without counsel, then the state's interest in a "just verdict" faces considerable burden in justifying the rejection of a client's informed decision to *retain* counsel subject to a conflict of interest.

legitimate interest in ensuring that their decisions are *correct*, a by-product of which is their affirmation on appeal. Thus, the solution is not to afford trial courts latitude to rule either way on a matter of critical and constitutional importance to criminal defendants. Instead, we must reconcile the competing concerns at stake into a principled, workable standard by which trial courts can determine whether a conflict waiver is valid. Efficiency at the appellate stage derives not from deference to the trial court's decisions, but from the imposition of a clear standard to guide trial courts in the first place.

Justice Marshall issued a stinging dissent, which was joined by Justice Brennan.¹⁹⁸ Marshall argued that the likelihood of the government rejecting Gomez-Barajas's plea was "speculation of the most dubious kind," and that the "most likely" occurrence was that the trial court would accept the plea.¹⁹⁹ Turning to Wheat's matter, Bravo's testimony, if relevant at all, was unlikely to implicate Wheat or warrant cross-examination: prior to the start of legal proceedings, "the two men never had heard of each other."²⁰⁰ In fact, Marshall noted, there is troubling evidence in the record to suggest that the prosecution named Bravo as a witness in order to "manufacture a conflict" in order to disqualify Iredale.²⁰¹ Marshall also rejected the Court's deference to the trial court because "[t]he interest at stake in this kind of decision is nothing less than a criminal defendant's Sixth Amendment right to counsel of his choice."²⁰² Absent such deference, Marshall noted, "a decision upholding the District Court's ruling would be inconceivable."²⁰³ Justice Stevens also dissented in an opinion joined by Justice Blackmun, arguing that the Court gave "inadequate weight to the informed and voluntary character of the clients' waiver of their right to conflict-free representation."²⁰⁴

2. The Proposed Test Applied to the *Wheat* Facts

Our first question is whether the proposed test should be applied to determine whether waivers of conflict of interest should be enforced in the criminal defense setting. The *Wheat* Court suggests that the attorney ethics rules and the Sixth Amendment analysis should align on this issue.²⁰⁵ It would be troubling indeed if the Sixth

198. *Wheat*, 486 U.S. at 165 (Marshall, J., dissenting).

199. *Id.* at 169.

200. *Id.* at 170.

201. *Id.* at 170 n.3.

202. *Id.* at 168.

203. *Id.*

204. *Id.* at 172 (Stevens, J., dissenting).

205. *See id.* at 160 (noting that the American Bar Association's Model Code of Professional Responsibility and the California Bar Association's rules have limitations on the "multiple representation of clients"); *see also id.* at 162 ("[W]hen a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's

Amendment interest in retaining counsel of one's choice required or allowed counsel to violate the ethics standards and to handle a matter that violated the competency demand for waivers under Model Rule 1.7(b).

While one could envision abandoning the ethical standard in the criminal defense setting, the strong hope is that the two will coincide—especially since the ethics and constitutional standards for waiver are animated by the same concern. The *Model Rules* allow clients to waive a conflict of interest to preserve the client's "autonomy" or control over the representation.²⁰⁶ Likewise, we allow criminal defendants to waive their right to conflict-free counsel to preserve the criminal defendant's freedom of choice.²⁰⁷ Not coincidentally, the most persuasive rationale for *striking down* a criminal defendant's waiver of his Sixth Amendment right to conflict-free counsel is, as noted above, client protection²⁰⁸—the rationale that grounds the proposed test's approach to waivers under Model Rule 1.7(b).²⁰⁹ In both contexts, the challenge is therefore the same: to understand when client control over the representation should give way to client-protection concerns. Thus, the client-objectives test should allow us to assess when a client waiver of a conflict of interest should be upheld under both the ethics rules and under the Sixth Amendment.²¹⁰

Our next question is how a court might apply the proposed test in determining whether to uphold the client's conflict waiver under the facts of *Wheat*.²¹¹ With respect to the first element of the proposed test, *Wheat*'s goal for the representation was self evident—acquittal.²¹² Turning to the second element, it is clear that Iredale

chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant." (quoting *United States v. Dolan*, 570 F.2d 1177, 1184 (1978)).

206. *See supra* Part II. A-B.

207. *See Wheat*, 486 U.S. at 164 (creating a rebuttable presumption in favor of client's choice of counsel); *see also* *United States v. Curcio*, 680 F.2d 881, 888 (2d Cir. 1982) (upholding defendant's informed conflict waiver, citing Sixth Amendment right to counsel of one's choosing).

208. *See supra* note 195 and accompanying text.

209. *See supra* Part II.C.3.

210. *See* *U.S. v. Massimino*, 832 F. Supp. 2d 510, 514-15 (E.D. Pa. 2011) (applying *Wheat* standard to determine whether court can reject criminal defendant's conflict waiver despite Sixth Amendment right to counsel of one's choice, and noting that the Pennsylvania Rules of Professional Conduct "provide a useful template against which to measure the conduct of lawyers subject to a disqualification motion").

211. When joint representation is proposed in federal criminal matters, the court must conduct a hearing to assess whether joint representation is appropriate. FED. R. CRIM. P. 44(c)(2) ("Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures [to protect each defendant's right to counsel.]).

212. Although acquittal (or a favorable plea bargain grounded on the prospect of

was subject to two limitations in representing Wheat as a result of the conflict of interest. If the trial court rejected Gomez-Barajas's tax plea, and if the government called Wheat to testify, then Iredale would not be able to cross-examine Wheat in his defense of Gomez-Barajas.²¹³ Moreover, if the government called Bravo as a witness in Wheat's case, then Iredale would not be able to cross-examine Bravo in his defense of Wheat.²¹⁴

The third element of the test asks whether the limitations we have identified are likely to defeat either Gomez-Barajas' or Wheat's goal of acquittal. We might first ask what the likelihood is that the trial court in the Gomez-Barajas trial would reject the plea agreement struck by the parties.²¹⁵ As a statistical matter, it is beyond contention that trial courts accept the overwhelming majority of plea agreements in criminal matters.²¹⁶ Moreover, nothing in the *Wheat* opinion suggests that the plea agreement in the *Gomez-Barajas* case was unusual and therefore likely to be treated differently than the typical plea agreement presented to the trial court. In addition, even if the *Gomez-Barajas* case went to trial, the likelihood appears quite low that Wheat would have been called as a witness given that he was not involved in the crimes alleged.²¹⁷ With a less than 5% chance the trial would take place, multiplied by the modest prospect that Wheat would offer testimony of probative value, it seems fair to conclude that the waiver was not likely to defeat Gomez-Barajas's objectives of acquittal.

Turning to Wheat's case, Bravo appears not to have been privy to much that could incriminate Wheat. Bravo did not know of the existence of Wheat and had no dealings with him.²¹⁸ The value of Bravo's testimony to the government thus appears tenuous at best,

acquittal) is the goal of nearly every criminal defendant at trial, one exception might be the defendant who believes that conviction is inevitable and who seeks only a "show trial" or a platform to proclaim his views. This limited goal presumably would expand the types of conflict limitations that we would allow under the proposed test. As we shall see in our discussion of the civil-practice setting, however, client objectives can vary considerably in other practice settings, and thus the first element of the test will require careful inquiry. See *infra* Parts IV.C, IV.D.

213. See *Wheat*, 486 U.S. at 164.

214. See *id.* at 155-56.

215. We will assume here, *arguendo*, that protection of Gomez-Barajas in a separate matter is reason to deny Wheat counsel of choice in his own matter.

216. Over 95% of criminal cases in the federal system are resolved by plea agreement. Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006). It seems a safe bet, moreover, that a considerable portion of the 5% of cases remaining go to trial because the parties cannot agree on a plea rather than because the judge rejected a proffered settlement.

217. Wheat's lack of involvement is noted by Justice Marshall in his dissent. *Wheat*, 486 U.S. at 169-70 (Marshall, J., dissenting).

218. *Id.* at 156.

and counsel's inability to cross-examine Bravo would not be likely to defeat Wheat's goal of acquittal. Thus, under the proposed test, we would not reject Wheat's voluntary and knowing decision to retain Iredale as his attorney.

The proposed test provides a means by which to determine when a conflict of interest can be waived in the criminal defense setting, a critical question on which the *Wheat* holding provides little or no guidance to practitioners or courts. *Wheat's* holding that an "actual . . . [or] potential" conflict is sufficient grounds to reject an informed waiver²¹⁹ does not tell us *which* conflict waivers should be rejected since a conflict waiver *presupposes* such a conflict of interest. The *Wheat* approach would either invalidate every waiver or leave the trial court to decide which waivers to invalidate by caprice rather than principle—a curious laxity given the interests at stake for the criminal defendant and the attorney-ethics system. The client-objectives test, by contrast, allows trial courts to identify not only the concerns posed by the conflict, but to determine *when* those concerns rise to a level that warrants rejection of the client's informed waiver under an analytical standard that allows for genuine appellate review rather than deference.

Notice what the proposed test does *not* do: it does not substitute the trial court's judgment for that of the defendant on the question of what is best for the defendant. The fact that the client could, in the court's eyes, fare better with different, conflict-free counsel is insufficient to strike down a waiver. Unless and until the client's decision about limitations is likely to defeat his own objective, the proposed test allows the defendant to engage in his own weighing of the benefits of retaining his choice of counsel against the costs of proceeding with such counsel despite material limitations. This latitude is what honors the client's autonomy and control over the representation under Model Rule 1.2(a) as well as the client's right to counsel of his choice under the Sixth Amendment. The *Wheat* Court has deprived the defendant of his chosen attorney without an adequate theory of why or when waivers should be invalidated. Wheat's chosen attorney had already demonstrated his prowess in gaining the acquittal of another defendant in the alleged scheme.²²⁰ Given the stakes for criminal defendants, we must insist on a clear, reasoned justification for refusal to honor a client's choice of counsel.

In summary, a material limitation on the representation caused by a conflict of interest is not enough to invalidate a waiver. A client

219. *See id.* at 163. In Marshall's dissent, he noted: "When a defendant's selection of counsel, under the particular facts and circumstances of a case, gravely imperils the prospect of a fair trial, a trial court may justifiably refuse to accede to the choice." *Id.* at 166 (Marshall, J., dissenting).

220. *See id.* at 170 n.3 (Marshall, J., dissenting).

may rightly determine that the advantage of proceeding jointly or with a particular attorney outweighs the loss from a material limitation caused by an attorney's conflict of interest. This is the range of freedom required to ensure that the competency requirement does not swallow up the client's right to enter into an informed conflict waiver in the first place. It is only when the client has accepted a waiver that is likely to undermine his own goal that courts can overturn the consent on competency grounds without undermining the client's autonomy.

C. Civil Litigation

In the civil litigation setting, we are confronted with many of the same types of competency concerns as in the criminal setting, albeit without the right-to-counsel concerns posed by the latter. Civil litigants may, however, have more varied objectives than criminal defendants. By examining some fact patterns from the civil litigation setting, we can explore how variations regarding objectives can affect the enforceability of a conflict waiver.²²¹

Suppose A is a passenger in a car driven by B. A is injured when the car collides with a car driven by C. An attorney obtains consent to represent both A and B in a claim against C, disclosing to A—among other things—that he cannot bring a claim against B.²²² Assuming that the consent is fully informed,²²³ the question is whether A's waiver should be upheld under what we have termed the competency element of Model Rule 1.7(b).²²⁴ In looking at these facts, it is difficult without a clear, principled standard to know how to order and prioritize our various concerns about the representation: client autonomy, client protection, the significance of the limitations posed by the conflict, and so on.

The proposed test directs us first to client objectives. Let us

221. We will explore the driver-passenger setting because it will allow us to consider a range of variations without extended factual accounts. The proposed test would apply to joint representations in civil litigation generally regardless of the nature of the underlying claims, such as the representation of the company and an executive in defense of a wrongful-termination claim, co-plaintiffs in commercial litigation, joint claimants under a will, and so on.

222. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2012) categorically prohibits representation of adverse parties in the same litigation matter. *See, e.g.*, *Walden v. Hoke*, 429 S.E.2d 504, 509 (W. Va. 1993) (prohibiting dual representation of husband and wife in divorce proceeding even with informed consent).

223. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4), 1.0(e) (2012). For examples of limitations that an attorney may need to disclose to gain informed consent, see *supra* note 4 and accompanying text. *See also supra* notes 130-35 and accompanying text.

224. We will limit our analysis here to whether A's waiver is valid. In practice, counsel would need to undertake a separate analysis under the proposed test to determine whether B's consent is valid. *See supra* note 168 and accompanying text.

assume that, after a discussion with A, it is clear that A wants what is hardly surprising—full and fair compensation for his injuries. Our next question is whether the limitation on means resulting from the conflict is likely to defeat A's goal. That question, in turn, directs us to an assessment of whether B had any fault in the accident.²²⁵ If it is clear that the fault lies solely with C—if, for example, C were drunk and veered into B's lane—then A's recovery will likely not be diminished by the failure to bring a claim against B, and thus the consent should be upheld.

Suppose, however, that B's tires were tread worn, extending the distance required to slow or stop his vehicle on the wet road.²²⁶ In adducing A's consent to the conflict, we will assume that the lawyer has adequately explained that B may have liability to A, that A will not be able to sue B because of the attorney's conflict, and that failure to sue A may reduce B's recovery. Under the proposed test, the fact that there is a material and even substantial—for example, a one-in-three—prospect that B will be found negligent is insufficient reason to overturn the waiver. This is the “decision space” that belongs to the client. Within this range, A should decide whether the risk that his recovery will be reduced by not suing B is outweighed by the benefit of proceeding with counsel of choice. If, however, it is more likely than not that B will be found negligent and therefore that A's recovery will be reduced, then we must reject A's waiver as self-defeating, i.e., likely to undermine his own professed goal.²²⁷

Notice that we do not characterize A's goal in terms of the probability of achieving a certain outcome. For example, we would *not* describe A's goal as “maximizing his prospects of achieving a full and fair recovery.” We focus instead on what the client wants to achieve (a full and fair recovery), and bring probability to bear in

225. We will assume that the inability to bring a claim against co-client B is the only material limitation arising in our example, which may or may not be the case in practice. For example, C may have insurance coverage and assets insufficient to cover the entirety of A and B's claims, in which case the lawyer may face a new limitation on means, namely the inability to maximize A's recovery given his competing obligation to B. See *Straubinger v. Schmitt*, 792 A.2d 481, 487 (N.J. Super. Ct. App. Div. 2002) (finding a conflict of interest). Under the proposed test, a court could hold that a consent to this limitation, no matter how well informed, is invalid because it is likely to undermine A's objective of a full and fair recovery.

226. For an early case examining the liability of a driver for tread-worn tires, see *DeLair v. McAdoo*, 188 A. 181 (Pa. 1936). For background on how insufficient tire tread can extend stopping distance, see *How Safe Are Worn Tires?*, CONSUMERREPORTS.ORG, <http://www.consumerreports.org/cro/2012/12/how-safe-are-worn-tires/index.htm> (last updated Feb. 2013).

227. Under apportionment rules, A's recovery would be allocated between B and C by degree of fault. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 (2000); see also WIS. STAT. § 895.045 (2011) (providing for allocation based on fault except that defendant shall be jointly and severally liable for the damages if his fault is 51% or more).

determining when the limitations resulting from the conflict are “likely” to undermine the client’s goal.

The proposed test also shapes our analysis of client objectives.²²⁸ Suppose that A states that he does not wish to sue B because B is a friend. It is tempting to assume that this renders the waiver valid. A’s goal might be understood as a full and fair recovery reduced by the amount he would have recovered if he had sued B. Thus, the fact that A cannot sue B due to his attorney’s conflict will not undermine A’s goal. The reasoning is correct provided that we can be confident that this is in fact A’s goal.²²⁹ There are reasons for concern, however. First, any waiver can be rendered valid if we simply recharacterize the troublesome procedural limitation (the attorney cannot sue B) into a new goal (the client only wants recovery minus proceeds he would received from B). If we treat means limitations as objectives when they are not, we allow clients to accept procedures that are likely to undermine their *genuine* objectives, eliminating the competency constraint on waivers imposed by Model Rule 1.7(b) and the proposed test. Second, there is cause for suspicion when client objectives mirror the limitations caused by a conflict of interest: is this a happy coincidence or a contrivance to insulate the waiver from competency review?

Thus, when we are confronted by a client goal that incorporates a procedural limitation, we need to confirm that it is in fact the client’s goal. The question is whether the client would have wanted this limited goal even if he had independent counsel, i.e., counsel who was not subject to the conflict. This might be confirmed by client statements to this effect coupled with the identification of special client circumstances that explain why the client would want this limited goal.²³⁰ Thus, if A and B were mere acquaintances, we would be reluctant to accept at face value A’s supposed desire to recover less than a full amount. The close friendship of A and B may, however, be sufficient to conclude that A’s goal is not a contrivance. And if A and B were married, we would accept the limited goal without question.

The client-objectives test also allows us to identify after-arising

228. See *supra* Part III.B.

229. This example also highlights the importance of counsel providing sufficient explanation to the client to enable the latter to make an informed decision about her objectives for the representation. See *supra* note 126 and accompanying text. The client may not know, to cite one possibility, that the friend’s insurer would be responsible for payment of any judgment against the friend within the policy limits. This information may well affect the client’s decision about whether to institute suit against the friend.

230. If there is conflicting testimony or other factual barriers to a clear account of the client’s objectives, a court may be required to reconstruct or infer the client’s objectives from the circumstances. See *infra* Part IV.E., for a discussion of the procedures for determining and documenting client objectives to reduce ambiguity on this critical question.

conflicts, i.e., information learned after the representation is underway that warrants revisiting the original conflict-waiver decision.²³¹ Suppose that, in the original example, the parties first learn of the tread wear during discovery. At that time, the lawyer and his clients will need to revisit the waiver question. Limiting our analysis to A, the question, once again, is whether A's objectives are likely to be undermined by the decision not to sue B. If so, we will not allow A to consent to the continued dual representation, and the lawyer will be required to withdraw from the representation of A. Whether the lawyer should continue to represent B turns on factors outside the scope of our inquiry.²³²

D. The Transaction Setting

Suppose that an attorney obtains consent to represent Mary and Dave, who are shareholders in a closely held corporation, in connection with an agreement to set forth their rights and obligations by and between themselves and the corporation ("shareholder agreement"). Attorneys are often asked to serve multiple shareholders in drafting agreements of this kind,²³³ in part because of a perception that the shareholders are generally aligned regarding the issues at stake and that separate attorneys will slow the deal and add to its expense.²³⁴ Assuming that the attorney has gained informed consent to the transaction, the question is whether the conflict is waivable under Model Rule 1.7(b). We will focus solely on Mary's waiver, although the lawyer would have to analyze the

231. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000) ("If a material change occurs in the reasonable expectations that formed the basis of a client's informed consent, the new conditions must be brought to the attention of the client and new informed consent obtained . . .").

232. See § 121 & cmt. d.

233. We will assume that the attorney proposes to represent the shareholders rather than the corporation in this example. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 28 (2012) ("[A] lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs . . ."). See generally Ze'ev Eiger & Brandy Rutan, *Conflicts of Interest: Attorneys Representing Parties with Adverse Interests in the Same Commercial Transaction*, 14 GEO. J. LEGAL ETHICS 945 (2001) (discussing adverse representation in commercial transaction setting).

234. See *id.* at 949 n.25 (noting that separate counsel in transaction setting may result in additional costs); Zacharias, *supra* note 23, at 414-15 ("Even when clients are antagonists, the potential benefits that an aggressive, unconflicted lawyer might achieve on behalf of a client may be less than the expense of the additional representation."); Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 592 (1992) (discussing possible savings from multiple representation); Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 822-33 (1976) (noting cost savings and conflicts of interest arising from multiple representation in a variety of settings, including transactions).

situation from Dave's perspective as well before entering into the joint representation.²³⁵

Attorneys typically begin by identifying the limitations on the representation resulting from the dual representation.²³⁶ The attorney might, for example, warn Mary that the attorney cannot: keep her confidences from Dave; provide individual counsel to Mary; negotiate on behalf of Mary against Dave; or assist Mary in advancing terms that may disadvantage Dave.²³⁷ The attorney might next ask Mary whether she understands these limitations and wishes to go forward despite them, and if so, document Mary's informed consent.²³⁸ The problem with this approach, as the proposed test makes clear, is that neither the attorney nor ultimately the court can evaluate the competency of a representation by considering only the limitations arising from the conflict.

The proposed test asks us first to consider the client's objectives or desired outcomes from the representation.²³⁹ After discussion, the attorney may conclude that Mary seeks an agreement that reasonably protects her with respect to the central concerns relating to the business. The attorney's inquiry should run deeper, however. He could explore with Mary her various objectives for the agreement, listening intently for any goal that would require services that the attorney cannot provide because of the conflict. Suppose Mary and Dave will own equal interests and Mary harbors no objective that will place a premium on private counseling, confidentiality, or negotiation of terms with Dave. In these circumstances, we have not identified any client goal that, as a result of the limitations arising from the dual representation, is likely to prevent the attorney from developing an agreement that provides Mary with the reasonable protections she seeks. Thus, under the proposed test, Mary's informed conflict waiver would be valid.

Here, the proposed test sharpens and focuses the intuition that guides the *Model Rule* comments, which note that consent can cure a conflict in the transaction setting if "clients are generally aligned in interest even though there is some difference in interest among them."²⁴⁰ The drafters' comments should not be read to imply that a waiver is acceptable if the issues on which the parties align preponderate over those on which they disagree—a calculation that ignores the nature and magnitude of the issues on which the parties'

235. See *supra* note 168 and accompanying text.

236. See *supra* notes 133-37 and accompanying text.

237. See *supra* notes 136-38 and accompanying text.

238. See MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2012) (defining informed consent); *id.* R. 1.7(b)(4) (requiring that informed consent be confirmed in writing).

239. In Part IV.E, we will discuss both the importance and means of documenting the client's desired outcomes as part of any conflict waiver.

240. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 28 (2012).

interests diverge. As we shall see next, disagreement on *one* issue can—in certain circumstances—be sufficient to render a dual representation incompetent. By insisting that we determine each client’s objectives, and then asking how the limits resulting from the conflict affect those objectives, the proposed test shows us how to identify client-specific concerns—regardless of quantity—that bear on the validity of a consent, moving us from intuition to a viable standard for measuring competence.

Suppose, to vary our hypothetical, that Mary plans to work for the company for two years and then move to another state with her fiancé. A critical concern is whether she will be allowed to continue as a shareholder if her employment ceases. Mary is unsure whether to tell Dave about her plans, and she hopes to forge an agreement that will allow her to continue to own her stock in the company regardless of whether she continues in the company’s employ.²⁴¹ It is difficult to know how an attorney could address Mary’s concern without conferring with her confidentially regarding this issue, exploring the question of whether to disclose Mary’s planned move to Dave, and considering whether Mary has sufficient leverage to negotiate an agreement with Dave allowing Mary to continue as a shareholder after the move. Moreover, given Mary’s lack of legal knowledge and understandable discomfort discussing the issues with Dave, there is no alternative path by which these terms could be reasonably addressed—for example, by direct discussion between Mary and Dave. Because the limitations on the representation are likely to defeat Mary’s goal, a court could hold under the proposed test that Mary’s consent to the dual representation—no matter how well informed—renders the waiver unenforceable.²⁴²

Consider still another factual variation. Suppose that Mary states that she has contributed more to the company through her services and is deserving of a greater stock percentage and salary. Mary explains to the attorney, however, that she has already discussed these issues with Dave and she plans to negotiate her ownership percentage on her own behalf. If Mary can reasonably advance her own interests on this issue, then there is no reason to invalidate the representation on competency grounds with respect to this client objective. Questions of ownership percentage and salary are terms that can be negotiated by business persons, and while individual counseling on these issues would be preferable, it does not appear that Mary’s objectives are likely to be defeated by the limitations stemming from the dual representation. Thus, the

241. See *infra* Part IV.E for a discussion of how counsel might conduct an inquiry into the circumstances that inform the client’s objectives.

242. The same reasoning should prompt counsel not to seek a waiver in the first place, eliminating the prospect of later court review under the competency standard. See *infra* Part IV.E.

proposed test explains the significance of the client's decision to undertake certain aspects of the representation on her own.²⁴³ The test does not dismiss this desire as irrelevant in evaluating the competency of the joint representation. Nor does the test presume that the client's desire to handle certain aspects of the representation automatically validates the arrangement as competent. Instead, the test treats the client's desire to handle a portion of the matter as a decision about means, and asks whether that approach is likely to undermine the client's goal.

Thus, if the issues on which Mary had special concerns were suffused with legal aspects, we would be less willing to defer to a limitation based on Mary's assertion that she will handle such matters on her own. Suppose, for example, that in a separate transaction Dave proposed to sell commercial real estate to Mary, and in a conflict waiver precedent to representing both Mary and Dave, the attorney once again discloses all, explaining for example that he cannot individually counsel or negotiate for either party. Suppose, as is often the case, that the commercial real estate transaction contains an array of conditions, contingencies, title clearance, and other concerns that require legal analysis and counseling. Absent legal training or some other reason to believe that Mary can competently protect herself on these issues, we should be unwilling to accept a waiver that precludes counsel from performing these services, which are essential to Mary's presumptive goal of consummating the transaction with reasonable protections.²⁴⁴ If the client wishes to proceed on her own, she certainly may, even incompetently. But under the proposed test, counsel cannot preside over a transaction that will fundamentally disserve the client's objectives—even with the client's informed consent.

E. The Law Office

The proposed test would not only fundamentally alter the method by which courts analyze the enforceability of conflict waivers, it would augur a sea change in the way that practitioners approach conflict-waiver problems. In many ways, the current approach of practitioners reflects the lack of clarity or coherence in the law governing whether consent can cure a concurrent conflict of interest.²⁴⁵ Although attorneys understand that they must explain to

243. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 32 (2012) (noting in concurrent representation "the clients may be required to assume greater responsibility for decisions than when each client is separately represented").

244. See *Baldasarre v. Butler*, 625 A.2d 458, 467 (N.J. 1993) (holding that the buyer and seller in a complex commercial real estate transaction cannot consent to dual representation by an attorney).

245. See *id.* at 459-61 (attorney procured consent of buyer and seller, then attempted to execute transaction).

clients the risks and limitations posed by the conflict, they have no standard by which to determine whether consent should be sought in the first place.²⁴⁶ As a result, client rights and interests are compromised: attorneys obtain waivers when they should not,²⁴⁷ and, conversely, they may refuse to obtain a waiver when the clients strongly prefer to proceed jointly and there is no reason not to accommodate them.²⁴⁸

Counsel must begin with an inquiry into the prospective client's objectives for the representation.²⁴⁹ In some instances, the prospective client's objectives will often be obvious: in the criminal setting, she seeks an acquittal or the most favorable plea agreement;²⁵⁰ in the civil litigation context, the plaintiff typically wants a full and fair recovery, and the defendant hopes to minimize the plaintiff's recovery.²⁵¹ In some situations, however, the prospective client may have special circumstances that counsel must descry in order to have a full understanding of the client's goal.²⁵² For example, in the litigation setting, the prospective client may be unwilling to pursue a claim or sue a potentially responsible party.²⁵³ In the transaction setting, the prospective client may have a particular protection in mind that flows from her unique circumstances.²⁵⁴ The attorney need not be passive in seeking to uncover the client's objectives: she may need to counsel the client on the implications of various objectives that the client is considering. While the attorney may provide valuable advice on client objectives,

246. See *supra* notes 129-30 and accompanying text.

247. See, e.g., *Baldassarre*, 625 A.2d at 467 (representing buyer and seller of commercial real estate); *In re Jans*, 666 P.2d 830, 833 (Or. 1983) (representing employer and employee regarding employment agreement); *Rice v. Baron*, 456 F. Supp. 1361, 1374 (S.D.N.Y. 1978) (representing clients with cross claims against each other).

248. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 cmt. (b) (2012) ("A lawyer might be unwilling to accept the risk that a consenting client will later become disappointed with the representation and contend that the consent was defective . . .").

249. The term "prospective client" is used here because the attorney should inquire into objectives (and analyze whether the conflict is consentable under the proposed test) before eliciting consent to the conflict or entering into the representation.

250. See *supra* note 212 and accompanying text.

251. See *infra* Part IV.C, for a discussion of varied client objectives in the civil litigation setting. Of course, a client may have values that lead to objectives other than maximizing her legal interests. See *Kruse*, *supra* note 126, at 133-34 (suggesting that attorney "actively" listen and probe "beneath the client's expressed desires" to help the client clarify her values.).

252. For additional discussion of special circumstances, see *supra* notes 141-41, 228-30 and accompanying text.

253. See *supra* notes 228-30 and accompanying text.

254. See *supra* note 241 and accompanying text.

the decision belongs to the client.²⁵⁵

In a joint representation, the attorney's inquiry into a client's objectives must be conducted outside the presence of the other prospective client. A prospective client may be unwilling to disclose his special circumstance in the presence of the other client. Moreover, such disclosure may compromise prospective client interests that would have been protected in a confidential communication with separate counsel.²⁵⁶ The lawyer cannot evaluate whether a matter is a good candidate for a client waiver without an uninhibited and confidential discussion with the prospective client about her objectives for the representation.

If, after the private discussion with the prospective clients,²⁵⁷ the attorney concludes that a waiver is appropriate, then the attorney can establish with each client the treatment of confidential information under the dual representation.²⁵⁸ If the conflict cannot be waived under the proposed test, however, and if the information learned in the private consultation could adversely harm a prospective client if withheld or disclosed from the other client, then the lawyer should not represent *either* prospective client in the same or related matter.²⁵⁹

Once the attorney has thoroughly considered the client's objectives, she must next identify the limitations on the representation resulting from the conflict of interest. The attorney must then determine whether the limitations on means resulting from the conflict of interest are likely to defeat those objectives. The examples of the proposed test in application provided earlier²⁶⁰ should provide guidance for counsel in conducting this analysis even though the factual particulars will no doubt differ.

255. See *supra* notes 126-27 and accompanying text.

256. See MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2012) ("Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation . . .").

257. The attorney should not disclose the contents of the objectives discussion with either prospective client to the other without consent. *Id.* R. 1.18(b).

258. Almost invariably, the correct practice is for counsel to condition the joint representation on a sharing of all information relating to the representation by and between the co-clients. This will avoid the danger that one client will provide information to counsel that the other client will deem material, and the attorney will be left with the unenviable choice of breaching his duty of confidentiality to one client under Model Rule 1.6(a) or breaching his duty of communication to the other client under Model Rule 1.4. See *id.* R. 1.7 cmt. 31.

259. See *id.* R. 1.18(b) (2012). See *infra* note 258 for an analysis of why the competing obligations of confidentiality and disclosure cannot be satisfied between co-clients. These concerns apply with equal force to a representation of one client who will benefit from disclosure of confidential information gained from a prospective but-not-retained co-client.

260. See *supra* Part IV.

If the attorney concludes that the circumstances allow for a conflict waiver under the proposed test, the attorney is well advised to document the facts and analysis upon which that finding is based. First, the client's objectives are best memorialized in writing.²⁶¹ Second, if the goal differs from the typical outcome that a client would want from a representation of this kind, then the attorney should also document the special client circumstances that warrant the unusual goal.²⁶² Third, the attorney should identify the limitations on the representation posed by the conflict, and explain why those limitations—even if material—are not likely to defeat the client's objectives. Finally, if alternate means will be used to further the client's objectives,²⁶³ counsel should identify these alternate means and explain why this approach, even if less than optimal, is not likely to defeat the client's objectives.

By providing a written analysis of the facts and analysis mandated by the proposed test, the attorney can reduce the risk of a later challenge by a client who contends that he should never have been allowed to waive the conflict in the first place. While a court need not defer to the attorney's analysis of whether the limits on the representation are likely to defeat the client's objectives, the documentation—if countersigned by the client—will establish the lawyer's and client's understanding regarding the client's objectives, any special circumstances that informed them and any alternate means. This writing should create a strong (although defeasible) presumption that the factual elements that supported the attorney's decision to proceed with a waiver are correct.

V. CONCLUSION

The world would be simpler if lawyers were never asked to represent two or more clients in the same or related matters. In

261. The *Model Rules* apparently require only that the fact of the informed consent but not the underlying disclosures be confirmed in writing. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (requiring that the informed consent of each client be "confirmed in writing."); see *id.* R. 1.0(b) (defining "confirmed in writing" as "informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent"). Nonetheless, the detailed writing recommended herein will provide a measure of protection for counsel against a later client challenge of the waiver. See *supra* note 258 and accompanying text.

262. See *supra* note 225. By documenting why the client does not wish counsel to pursue a particular goal or objective, counsel can reduce the risk of a later claim that that failure to pursue this goal was the result of a conflict of interest that rendered the representation incompetent. Moreover, the understanding should qualify as a competent, enforceable limitation on the scope of the representation under Model Rule 1.2(c), protecting the attorney against a malpractice claim for not pursuing such goal. See, e.g., *Fitzgerald v. Linnus*, 765 A.2d 251, 259 (N.J. Super. Ct. App. Div. 2001).

263. For a discussion of alternate means, see *supra* text accompanying notes 241-42.

practice, however, the request is surprisingly common, and it can place counsel in a difficult position. Clients may have good reasons for wanting to proceed with a joint representation, and—after explanation by counsel—they may fully understand the risks and disadvantages of doing so. As the *Model Rules* make clear, however, the informed consent of the clients is not enough to waive the conflict of interest posed by a joint representation. Informed conflict waivers are valid only if the representation of each client will nonetheless be competent. Thus, the attorney is left with the challenge of determining whether to accede to the client's request, knowing that proceeding jointly could lead to disciplinary and malpractice consequences if a tribunal later disagrees with her competence analysis. The need for a principled standard to guide lawyers and courts in determining when and whether a joint representation is competent could hardly be greater.

And yet we have anything but clarity. Courts have not found a way to integrate the twin elements of competence and consent, and—as a result—they have not developed a viable test by which to determine when a concurrent conflict can be waived under Model Rule 1.7(b). Our traditional understanding of competence asks what a reasonable lawyer would do for the client in the representation. Reasonable lawyers, one presumes, undertake material actions for the client during the course of a representation. When clients grant their informed consent to a joint representation, however, they understand that counsel *cannot* undertake certain material actions on their behalf as a result of the conflict of interest. These are the disadvantages of joint representation—the disadvantages the client accepts by waiving the conflict. Thus, if we measure competence without understanding its relation to client consent, nearly every informed conflict waiver presents a risk of invalidation due to the material limitations on counsel's role resulting from the conflict of interest.

Without a unified understanding of competence and consent, courts have been remitted to largely intuitive accounts of whether informed consents should be disregarded under the competence standard. In *Wheat*, the Supreme Court's five-four split was grounded in fundamental disagreement over whether to uphold the defendant's conflict waiver, but neither the majority nor minority opinions articulate the basis for the differing standards they applied in evaluating the competence of the representation. The confusion extends to other major practice areas, since lawyers regularly receive requests for joint representation in civil litigation and transaction settings and courts have likewise offered no principled basis by which to analyze competence in these matters. We need to find a way to honor client consent and competence without allowing either element to overtake the other.

The search for a principle that can unify these two seemingly disparate elements begins with an understanding of the interests served by each. We allow clients to consent to a conflict to preserve their autonomy or control over the representation. Although a variety of rationales have been proffered for our commitment to competence, the best account understands competence as a safeguard to protect clients from their own faulty decision making—a form of paternalism. Paternalism takes a variety of forms, however, and most forms of paternalistic intervention are simply incompatible with client autonomy. If we strike down consents because the client has not acted in her “best interest,” we supplant the client’s assessment of the joint representation with our own, undermining the commitment to client autonomy that grounds the client’s right of consent in the first place.

However, one type of paternalism *is* consonant with client autonomy—that which we have termed “means” paternalism. Under this approach, we defer to the client’s *objectives*, long understood as the sole province of the client; we intervene when the client makes decisions about *means* that are likely to undermine those objectives, and thereby defeat her own, more fundamental commitment. In an important sense, therefore, intervention to protect the client from undermining *her own objectives* enhances rather than restricts client autonomy. Thus understood, competence and consent are animated by the same deeper goal—client autonomy. This insight allows us to fashion a standard by which to determine when concurrent clients can waive a conflict of interest under Model Rule 1.7(b). *An informed conflict waiver must be rejected as incompetent if limitations on the means or procedures by which the attorney pursues the matter caused by the conflict of interest are likely to defeat the client’s objectives for the representation (the “client-objectives” or “proposed” test).*

The proposed test solves the paradox of competency and consent posed by Model Rule 1.7(b). If the purpose of a conflict waiver is the client’s acceptance of material limitations on the representation resulting from the conflict, and if representations with material deficiencies are incompetent, how could *any* waiver withstand scrutiny under the competence standard? In a standard representation, where there is no conflict of interest and the client has not accepted any limitations on the lawyer’s performance, *any* material deficiency in the representation can render it incompetent under Model Rule 1.1. When the client accepts limitations on the lawyer’s performance as a result of a conflict, however, those accepted deficiencies cannot render the representation incompetent simply because they are material, otherwise the client’s consent will be given no force or effect. Under the proposed test, a limitation resulting from a conflict could prevent the attorney from taking certain, material steps to achieve the client’s goal without being

likely to defeat the client's goal. The question is not whether the limitations are material. We presume as much: if the limitations were not material, they would not have been the subject of disclosure and consent under Model Rule 1.7(b) in the first place. The question instead is whether the limitations are likely to be goal defeating. In evaluating competency, the proposed test acknowledges that the client has *accepted* the limitations in question.

The proposed test integrates Model Rule 1.7(b) with the remainder of the *Model Rules* and the deeper commitments of the legal profession that ground the *Rules*. The *Model Rules* treat objectives and means as distinct elements of the representation, and provide that objectives are, within ethical limits, uniquely the client's to shape. Moreover, the "agency" or "client autonomy" vision of lawyering remains a core commitment of the legal profession. It is the *client's* case or transaction, after all, and the client—as principal—ought to retain control (within ethical limits) over what is pursued on her behalf. When courts reject waivers on competency grounds under the proposed test, they do not superimpose their objectives for the representation on the client. When the client accepts means limitations that are *inconsistent* with the client's objective, however, we have strong reason to believe that the objective and not the means represents the true and deepest commitment of the client. Incompetence, understood through this lens, is a failure of means—limitations that are likely to prevent the attorney from undertaking the steps necessary to fulfill the client's goal. Thus, in an important sense, we *preserve* client autonomy by refusing to accept client-approved lawyering means that undermine client objectives.

By integrating competency and consent into the test of conflict waivers, the client-objectives test restores both elements to their proper role in conflict-waiver analysis under Model Rule 1.7(b). We need no longer oscillate between the poles of (i) deference to informed consent—assuming that every informed decision of the client to waive a conflict is valid regardless of its effect on the representation, and (ii) an assessment of competency uninformed by consent—rejecting client waivers that do not comport with our view of the client's best interests without acknowledging that the client has accepted at least certain, material deficiencies in the representation through her informed consent.

By identifying what the client hopes to accomplish with the representation, the proposed test provides a baseline against which to measure the significance of the limitations caused by the joint representation. Not just any limits on means—even material ones—will invalidate a client's consent. When a client consents to limitations that are likely to undermine her own objectives for the representation, the representation is incompetent—by dint of the

client's own more fundamental commitment. The proposed test accommodates both elements of Model Rule 1.7(b): competency and consent in tandem determine when and whether a client's consent to a joint representation should be upheld or disregarded.

By way of summary of Parts III and IV, we can offer something of a decision guide for practitioners and courts in applying the proposed test to determine when clients can waive a concurrent conflict of interest.²⁶⁴

I. Objectives

A. The attorney should engage in a confidential discussion with each proposed client (henceforth "client") to identify the objectives of each for the representation.²⁶⁵

B. While the type of representation will often provide strong presumptions about a client's objectives, an inquiry into the client's "special circumstances" may reveal a different or more particularized client objective. While lawyers can offer valuable input on what the client might hope to achieve from the representation, decisions about what to accomplish in the representation lie ultimately with the client.

C. Practitioners and courts should be solicitous of any client objective that incorporates a procedural limitation, e.g., "the client wishes to maximize her recovery in the civil litigation without suing B." Absent careful inquiry, waivers can incorrectly be rendered valid by characterizing the troublesome procedural limitation (the attorney cannot sue B) as a new objective (the client seeks only the recovery she would obtain without suing B).

1. When client objectives reflect the same limitations caused by a conflict of interest, courts must determine whether: (a) the client genuinely desires only the limited objective, thereby satisfying the competency concern; or (b) the limited objective is a contrivance to insulate the waiver from competency review.

2. The question is whether the client would have sought this limited objective if she had pursued the representation with independent counsel.

3. The attorney should document the special circumstances

264. The following assumes that the lawyer has or plans to disclose sufficient information to gain the informed consent of the client. Our question here, as in this Article generally, is whether this consent should be honored under the competence and diligence demands of Model Rule 1.7(b)(1) and not what must be disclosed in order to obtain informed consent to the conflict Model Rule 1.7(b)(4). Nonetheless, the proposed test also implies much about the latter question: in eliciting informed consent, the attorney must identify the limitations on means caused by the conflict and explain their implications, which are the effect of the limitations on the attorney's pursuit of the client's objectives.

265. The representation of *each* client that proposes to enter into the concurrent representation must satisfy the proposed test.

that explain why the client desired a limited objective. For example, the client and B may be close personal friends and the client may not wish to sue B; or a corporation may not wish to litigate a matter to avoid negative publicity.

D. The client's objective should not be characterized in terms of the probability of achieving a certain outcome. For example, we would *not* describe A's objective as "maximizing her prospects of achieving a full and fair recovery." We focus instead on what the client wants to achieve (e.g., a full and fair recovery), and bring probability to bear in determining whether the limitations resulting from the conflict are "likely" to undermine the client's objective.

II. *Limitations.*

A. The attorney or court must next identify the material limitations on the actions the lawyer can take as a result of the conflict of interest. For example:

1. In the litigation setting, the dual representation may preclude a lawyer from raising or counseling the clients about certain claims or defenses that affect the other client, one client's testimony may adversely affect the other, or the attorney may not be able to cross-examine a co-client who provides adverse testimony.

2. In the transaction setting, the conflict may preclude a lawyer from negotiating on behalf of one client against the other, or from suggesting alternatives to one client that could disadvantage another.

3. In concurrent representations, an overriding limitation is the lawyer's inability to preserve client confidences from the co-client.

B. To identify limitations that may affect the representation, the lawyer should ask herself what services will be necessary for the client over the predicted course of the representation, and which of these services cannot be undertaken because of the conflict of interest.

III. *Likely to Defeat the Client's Objectives*

A. A material limitation on the representation caused by a conflict of interest is not enough to invalidate an informed conflict waiver. The client may determine that the advantages of proceeding jointly or with a particular attorney outweigh the loss from a material limitation. This is client's "decision space," which keeps the competence requirement from overtaking the client's right to enter into an informed conflict waiver. When it is more likely than not that the limitations resulting from the conflict will defeat the client's goal, then the waiver should not be honored. For example:

1. In *Wheat*, the attorney's inability to cross-examine a witness whose testimony is not central to the case, although a disadvantage, should not defeat the client's informed waiver.

2. If there were, say, a one-in-three chance that the failure to

name a defendant as a result of a conflict will reduce the client's objective of a full recovery in a civil litigation (assuming that the client has no special circumstances that warrant a limited goal as described above), then the client's informed decision to take on that risk warrants deference. When the risk exceeds 50%, however, the conflict has rendered the representation incompetent and must not be honored.

3. In the transaction setting, when a client will require the attorney's confidential counseling and negotiation efforts to achieve the client's objectives, a dual representation that prevents the attorney from providing these services renders the waiver unenforceable.

B. If a client proposes to undertake certain aspects of the matter on her own (e.g., a sophisticated businessperson who wishes to negotiate certain terms with the co-client without assistance from counsel), the proposed test asks whether that approach is likely to undermine the client's objective. The test does not dismiss the client's desire as irrelevant in evaluating the competence of the representation. Nor does the test presume that the client's desire to handle certain aspects of the representation automatically validates the arrangement as competent.

C. If circumstances change materially during the course of the representation, the proposed test should be reapplied to determine whether the consent remains valid on competency grounds.

D. If the attorney concludes that the circumstances allow for a conflict waiver under the proposed test, she should document the facts and analysis upon which that finding is based. The attorney should document: the client's objectives and, if the objectives differ from those for a typical representation of this kind, the special client circumstances that warrant the limited objectives; the material limitations on the representation posed by the conflict; and why those limitations are not likely to defeat the client's objective.

E. Counsel should understand the risk posed by engaging in the preliminary inquiry to determine whether a concurrent representation waiver is appropriate. If the conflict cannot be waived under the proposed test, *and* if the information learned in the private consultation with each prospective client could adversely affect either client if disclosed or withheld from the other, then the lawyer should not thereafter represent *either* prospective client in the same or related matter.

Model Rule 1.7(b) offers a challenge and an opportunity in conditioning a valid conflict waiver on both competency and consent. The challenge is to avoid allowing either element to serve as the sole measure of whether a conflict waiver is valid. The opportunity lies in forging a deeper understanding that enables us to honor *both* elements. The client-objectives test proposed in this Article reconciles

the dual demands of competency and consent, and offers a principled standard by which to determine when conflict consents should be upheld or struck down by courts on competence grounds. Given the stakes for clients and attorneys, it is time we understood why and when a conflict can be waived.