

## POSITIONAL CONFLICTS AND PRO BONO PUBLICO\*

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### I. PRO BONO PUBLICO

The patron saint of lawyers acted for the public good.<sup>1</sup> St. Ives, a judge and lawyer in Brittany, practiced in the late thirteenth century.<sup>2</sup> He worked for paupers for free and merited through his lawyerly works the honor of patronage for the orphans as well.<sup>3</sup> A verse attends his honesty:

St. Ives was from Brittany

An advocate but not a thief

A thing well nigh beyond belief.<sup>4</sup>

Working for the poor and failing to take a bribe is not the part of the common lawyer; acting for the public in this selfless way is enough

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\* This Article expands upon a narrower topic addressed in an American Bankruptcy Institute Committee Newsletter. See Mark D. Yochum, *Positional Conflicts, Pro Bono Publico, and Oaths*, in OR. STATE BAR, 25TH ANNUAL NORTHWEST BANKRUPTCY INSTITUTE 1 (2012), available at [http://www.osbarcle.org/library/2012/NWB12\\_Handbook.pdf](http://www.osbarcle.org/library/2012/NWB12_Handbook.pdf). Portions of this Article that overlap or restate propositions from the American Bankruptcy Institute Committee Newsletter are reprinted and incorporated into this broader academic work with the permission of the American Bankruptcy Institute.

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<sup>1</sup> See Alice I. Youmans et al., *Questions and Answers*, 84 LAW LIBR. J. 215, 224 (1992) (discussing the public works of St. Ives, the patron saint of lawyers).

<sup>2</sup> See *id.* at 224-25 (portraying a lively précis on St. Ives’s legal career in Brittany circa 1277).

<sup>3</sup> *Id.* at 224.

<sup>4</sup> *Id.*

(with a miracle or two) to make one a saint.<sup>5</sup>

Pro bono publico (or, for short, “pro bono”) has come to mean free legal service.<sup>6</sup> Indeed, the obligation or aspiration that members of the bar perform public service is of fairly recent vintage in our 1,000-year history.<sup>7</sup> This usage has actually fully developed only in the last thirty years.<sup>8</sup> And it is only in the Ethics 2000 Commission’s interpretation of Rule 6.1 that the phrase “pro bono publico” is fully used.<sup>9</sup> The phrase pro bono publico, in part, has entered our language with a different meaning because the state had to license charitable legal practice or mandate it; the state had the authority to decide what was pro bono publico or for the public good.<sup>10</sup>

*Gideon v. Wainwright* occasioned modern discussions of oaths and pro bono public service.<sup>11</sup> *Gideon* mandated indigent representation for state systems that had no funded offices of public defenders.<sup>12</sup> Can the lawyer be forced to represent the poor? While the

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<sup>5</sup> See *id.* at 224-25 (discussing the good works, miracles, and canonization of St. Ives).

<sup>6</sup> BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “pro bono” as “[b]eing or involving uncompensated legal services performed esp. for the public good,” and defining “pro bono publico” as “[f]or the public good”); see Donald Patrick Harris, *Let’s Make Lawyers Happy: Advocating Mandatory Pro Bono*, 19 N. ILL. U. L. REV. 287, 289-90, 300 (1998-1999) (discussing pro bono representation).

<sup>7</sup> See Kim Schimenti, *Pro Choice for Lawyers in a Revised Pro Bono System*, 23 SETON HALL L. REV. 641, 672 (1993) (indicating that the discussion on pro bono legal services began in the late nineteenth century).

<sup>8</sup> See Harris, *supra* note 6, at 290-94 (outlining state bar efforts mandating pro bono legal services since 1977).

<sup>9</sup> MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt (2013), available at [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule61rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule61rem.html).

<sup>10</sup> See Schimenti, *supra* note 7, at 641-44 (discussing how many jurisdictions mandated pro bono aspirations or obligations).

<sup>11</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

<sup>12</sup> See *id.* (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to

law in this area has grown over the years, particularly as to uncompensated, state-mandated representation, the old cases focused on our oath.<sup>13</sup> Our oaths as lawyers are not uniform.<sup>14</sup> Not all of us pledged to work for the poor and to “never reject . . . the cause of the defenseless or oppressed.”<sup>15</sup> The Pennsylvania oath had no such promise; barristers in the Commonwealth are simply to avoid “lucre and malice.”<sup>16</sup>

In older times, the obligation of public service, and indeed most ethical obligations, sprang from our oaths.<sup>17</sup> The modern rationale for pro bono service is a rational one, barely moral, wherein the obligation is attendant to a profession that wishes to self-regulate.<sup>18</sup> The modern American Bar Association (“ABA”) Model Rules of Professional Conduct and Comment 6.1 do not use the word “oath” at all.<sup>19</sup> Most jurisdictions, courts, and opiners in the forests of ethics extol public service as a matter of “professional responsibility.”<sup>20</sup> All of the state bar rules of professional conduct mandate that lawyers at least aspire to do work for the public good.<sup>21</sup> However, in most cases, the factor that moves lawyers to this service is not an oath or rules, but rather, a call

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face his accusers without a lawyer to assist him.”).

<sup>13</sup> See, e.g., *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (wherein the Missouri lawyer’s oath at that time to “never reject . . . the cause of the defenseless or oppressed” bound the lawyer to public service).

<sup>14</sup> See Carol Rice Andrews, *The Lawyer’s Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 45, 49 (2009) (describing the various origins, ethical underpinnings, and level of diversity of each state bar oath).

<sup>15</sup> See *State ex rel. Wolff*, 617 S.W.2d at 65-66 (discussing public service as inherent to the legal profession).

<sup>16</sup> See 42 PA. CONST. STAT. § 2522 (2010) (“I do solemnly swear (or affirm) that I will . . . use no falsehood, nor delay the cause of any person for lucre or malice.”).

<sup>17</sup> See, e.g., *State ex rel. Wolff*, 617 S.W.2d at 67-68 (Mo. 1981) (“We expect that each member of the legal profession, as he or she has throughout history, to continue to honor the oath ‘That I will never reject, from any consideration personal to myself, the cause of the defenseless or the oppressed . . . .’”).

<sup>18</sup> Cf. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2013) (noting that pro bono service is encouraged but not required).

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> See American Bar Association, *State-By-State Pro Bono Service Rules*, [http://www.americanbar.org/groups/probono\\_public\\_service/policy/state\\_ethics\\_rules.html](http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html) (last updated Jan. 30, 2012).

from the heart.<sup>22</sup>

## II. POSITIONAL CONFLICTS AND PRO BONO PUBLICO

Lawyers are often driven to use their talents for not just gain, but good.<sup>23</sup> The lawyer may choose to seek out charity work within his practice and skill set.<sup>24</sup> However, unlike St. Ives, modern lawyers must navigate an increasingly complex set of ethical considerations and rules, and should examine how their pro bono legal services could put them at risk for positional conflicts.<sup>25</sup>

Take, for example, the Bank of Subprime attorney who, doing his pro bono, represents an indigent debtor in bankruptcy, arguing that the mortgage of a different bank is void for failure to prove execution formalities. The indigent, on the advice of his pro bono lawyer, would like to see the mortgage note. The Bank of Subprime attorney in his capacity as in-house counsel, in a different case with unrelated parties, would also argue, for the Bank of Subprime, that all the proof needed against any debtor is a referent to a database entry locked in spools held at a barely disclosed sub-basement in New Jersey.

Who better to represent the angels than the devil's lawyer? The devil's lawyer knows the field, eases the pain the system can cause, and saves us all by soothing justice.

If your conscience is pained by the tension, you may ask yourself if you need to withdraw.<sup>26</sup> What is the social-minded, yet

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<sup>22</sup> Janet Stidman Eveleth, *The Great Pro Bono Debate*, 35 MD. B.J. 46, 46 (May/June 2002).

<sup>23</sup> *Id.*

<sup>24</sup> Cf. Roy S. Ginsberg, *Pro Bono Makes Cents: The Business Case for Pro Bono*, BENCH & B. MINN., Aug. 2005, at 28 (recognizing that pro bono service allows for the ability to "either learn a new skill or sharpen an existing one").

<sup>25</sup> See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 99 (2004) ("As a system of multiparty collaborations, the shape of pro bono is influenced by actors with distinct, and sometimes conflicting, interests."); Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2288 (1999) ("Beyond the lawyer's obligations to clients, broader policy and societal issues may support the determination that a particular positional conflict is impermissible.").

<sup>26</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1), 1.7(a)(1) (2013).

ethical lawyer to do? The analysis starts with the fundamental rule of professional legal ethics—a lawyer cannot have two adverse clients.<sup>27</sup> Ethics prohibit representing clients who are in opposition.<sup>28</sup> Commerce suggests that lawyers should not represent clients who merely loathe one another.<sup>29</sup> Conflict occurs if “there is a significant risk” of material limitations on the lawyer’s effectiveness for a client.<sup>30</sup> That risk may be produced by the lawyer’s “responsibilities” to anyone else, including oneself.<sup>31</sup> The lawyer may work when he or she “reasonably believes” that competence and diligence will be unaffected.<sup>32</sup>

Some types of potential conflicts of interest can be waived by the client. The attorney must provide notice of the potential conflict, but the client has the right to consent to the lawyer’s representation regardless of the risk.<sup>33</sup> However, one conflict cannot be waived: an action for one client against another in the same case “before a tribunal.”<sup>34</sup> But traditionally one might argue legal position *X* for one client and in an unrelated action for another client, argue position not *X*.<sup>35</sup> ABA Formal Opinion 93-377 explains the situation as “[w]hen a lawyer is asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position being urged by the lawyer . . . on behalf of another client in a different and unrelated pending matter which is being litigated in the same jurisdiction . . . .”<sup>36</sup> The situation, similar to the Bank of Subprime example above, produces a tension that, with additional factual torque, might snap into a

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<sup>27</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1)-(2) (2013).

<sup>28</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1) (2013).

<sup>29</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 6 (2013); CNA PROFESSIONAL COUNSEL, CLIENT INTAKE PROCEDURES: AVOIDING PROBLEMATIC CLIENTS, 3, 5 (2013), available at [https://www.cna.com/web/wcm/connect/0a9c22cd-403d-4740-bb5a-ad9cabadbe2d/RC\\_Law\\_Bul\\_ClientIntakeProcedures\\_CNA.pdf?MOD=](https://www.cna.com/web/wcm/connect/0a9c22cd-403d-4740-bb5a-ad9cabadbe2d/RC_Law_Bul_ClientIntakeProcedures_CNA.pdf?MOD=AJPERES)

<sup>30</sup> MODEL RULES PROF’L CONDUCT R. 1.7(a)(2) (2013).

<sup>31</sup> *Id.*

<sup>32</sup> MODEL RULES PROF’L CONDUCT R. 1.7(b)(1) (2013).

<sup>33</sup> MODEL RULES PROF’L CONDUCT R. 1.7(b)(4) (2013).

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(3) (2013).

<sup>35</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 24 (2013).

<sup>36</sup> ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 93-377 (1993).

*positional conflict*.<sup>37</sup> Now recall that the conflicts of our rules can be produced by any relationship, and that all outside forces on the lawyer must be tested for material inhibitions on the lawyer's ability to do his or her duty.<sup>38</sup> Absent that caution, litigation in different jurisdictions is no conflict at all.<sup>39</sup>

Comment 24 under Rule 1.7 of the ABA Model Rules of Professional Conduct is the Ethics 2000 Commission's advance from the old comment on positional conflicts that had remained unchanged from the early eighties.<sup>40</sup> The Ethics 2000 Commission's old focus is preserved for inconsistent "legal positions" in "different tribunals" for "different clients."<sup>41</sup> Otherwise, positional conflicts are judged, under the usual array of factors as an indirect conflict for "significant risk of material limitation."<sup>42</sup> The old comment focused attention on appellate litigation and provided that "ordinarily" one may represent opposing positions in trial courts, but not "in cases pending at the same time in an appellate court."<sup>43</sup> The new comment reflects years of contemplation that even trial court representation and procedural issues may produce conflict.<sup>44</sup>

While ethical rules produce gossamer restrictions on positional conflicts, the economics of the practice of law have produced more iron

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<sup>37</sup> *See id.*

<sup>38</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013).

<sup>39</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2013).

<sup>40</sup> *Compare id.* ("Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. . . . A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case . . ."), *with* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 9 (2000) ("A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected.").

<sup>41</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2013).

<sup>42</sup> *Id.*

<sup>43</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 9 (2000); *see also* Williams v. Delaware, 805 A.2d 880, 882 (Del. 2002) (granting a defense attorney's motion to withdraw based on positional conflicts).

<sup>44</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2013).

bars.<sup>45</sup> Positional conflicts are practically unthinkable in large precincts of the practice.<sup>46</sup> One is of the plaintiff bar, the defense bar, the labor bar, the union bar, the debtor bar, and the creditor bar—cages of fluidity, to be sure, with overlap and interchange but cages nonetheless. Yet the ABA has incrementally modified the rules on conflicts to enhance the economic practice of law.<sup>47</sup> In our tale of the lawyer for both the Bank and the indigent, the lawyer has temporarily left his paying client to do what we might think of as good.<sup>48</sup> But, within the firm, for the associates of the firm, no rule supports firm-based pro bono publico service in the face of positional conflicts.<sup>49</sup>

The banker client may weigh in his heart or his pocket whether his lawyer's advocating of different legal positions, an aspect, an attitude, a worldview different than his, is to his good.<sup>50</sup> However, the banker might say no, and the lawyer would then have to choose between the paying banker client and the pro bono work.<sup>51</sup> Weil, Gotshal & Manges withdrew its pro bono representation of plaintiffs suing the gun industry, citing "positional conflicts" with its clients in the gun industry.<sup>52</sup> Unspoken (but there is no need to say), the gun makers said no.<sup>53</sup>

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<sup>45</sup> See Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STANFORD L. REV. 1395, 1409, 1416 (1998).

<sup>46</sup> See *id.* at 1415-16 (explaining how law firms now have to compete for business by agreeing not to represent the opposing side in unrelated lawsuits).

<sup>47</sup> See *supra* note 40 and accompanying text; see also Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2288 (1999).

<sup>48</sup> See *supra* bank hypo Part II.

<sup>49</sup> See Lardent, *supra* note 47, at 2289-90.

<sup>50</sup> See generally Spaulding, *supra* note 45, at 1431 (describing how some corporate clients hire lawyers that participate in a large amount of pro bono work, despite the possibility of positional conflict).

<sup>51</sup> See generally *id.* at 1416 (explaining that businesses often disapprove of their lawyers representing clients with conflicting interests).

<sup>52</sup> William Glaberson, *New York Loses Major Legal Ally in Suit Over Guns*, N.Y. TIMES, Apr. 17, 2004.

<sup>53</sup> *Cf. id.*

### III. “SCREENING” CAN BE USED TO IDENTIFY POTENTIAL POSITIONAL CONFLICTS OF INTEREST

“[O]ur historical concerns over conflicts of interest [like this] have been reduced by licit screening devices, like separation from the firm of the contact lawyer, and permitted division of labor in the practice of law.”<sup>54</sup> Screening means the “isolation of the lawyer . . . within a firm . . . [that is] reasonably adequate . . . to protect information” he ought to be protecting.<sup>55</sup>

Screening of those without the firm has been licit for years. The new secretary who worked for the firm suing your client produces the risk of conflict—the dissemination of protected information—but the employee will not taint the new firm if screened. Contractor attorneys, . . . not of the firm, are screened.<sup>56</sup>

Members of the firm may not avoid each other’s conflict.<sup>57</sup> Rule 1.10(a) provides that no one “associated in a firm” may represent a client if any of the firm is in conflict.<sup>58</sup> “The wide range of opiners felt a reluctance to regulate (in the absence of actual harm) the employment prospects of non-lawyers.”<sup>59</sup>

Inhibiting employment mobility for the non-professional (who had not taken an oath to follow these rules) smacks of some restraint of trade. Yet the full imposition of the imputation rule for the new associate had the same effect. Whether . . . to allow screening for the incoming lawyer persists as a local question, but in 2009, the ABA

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<sup>54</sup> Mark D. Yochum, *Positional Conflicts, Pro Bono Publico, and Oaths*, in OR. STATE BAR, 25TH ANNUAL NORTHWEST BANKRUPTCY INSTITUTE 1 (2012), available at [http://www.osbarcle.org/library/2012/NWB12\\_Handbook.pdf](http://www.osbarcle.org/library/2012/NWB12_Handbook.pdf).

<sup>55</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(k) (2007), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_0\\_terminology.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_0_terminology.html).

<sup>56</sup> Yochum, *supra* note 54.

<sup>57</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.10(a) (2013).

<sup>58</sup> *Id.*

<sup>59</sup> Yochum, *supra* note 54; see, e.g., STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS R. 1.10 cmt. 4, at 57 (2014).

House of Delegates finally allowed it.<sup>60</sup>

Screening as a legal cultural value is an acceptable and efficient way of doing legal business that informs the mode of modern practice.<sup>61</sup> Contractors do divided labor, and even within firms of size, “associates” work within groups organized for all of the law’s subspecialties.<sup>62</sup> Within firms, however, there is often no screening process in place to prevent positional conflict analysis for pro bono behavior.<sup>63</sup> This process could have been used to help Weil, Gotshal & Manges avoid the public embarrassment of having to withdraw from a case.<sup>64</sup>

#### IV. USING A WAIVER TO ELIMINATE POTENTIAL POSITIONAL CONFLICTS OF INTEREST

Does a potential positional conflict require withdrawal? Commentators suggest it does not; simply notify each and obtain their consent.<sup>65</sup> In 2009, while adopting the rule for screening incoming lawyers, the House of Delegates approved a recommendation by the Standing Committee on Pro Bono and Public Service, the Section of Business Law, the Bar Association of San Francisco, the Commission on Homelessness and Poverty, and the Standing Committee on Legal Aid and Indigent Defendants.<sup>66</sup> Poverty stalked the land, and debtors,

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<sup>60</sup> Yochum, *supra* note 54.

<sup>61</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.0(k), 1.10 cmt. 9 (2013).

<sup>62</sup> See, e.g., Catherine Gage O'Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 CLINICAL L. REV. 485, 494-95 (1998); Regina M. Pisa, *Not Quite Corporate: The New Law Firm Model*, CHIEF LEGAL EXECUTIVE, Spring 2003, at 60, available at [http://www.goodwinprocter.com/~media/Files/Publications/Attorney%20Articles/2003/Not\\_Quite\\_Corporate\\_The\\_New\\_Law\\_Firm\\_Model.pdf](http://www.goodwinprocter.com/~media/Files/Publications/Attorney%20Articles/2003/Not_Quite_Corporate_The_New_Law_Firm_Model.pdf).

<sup>63</sup> See Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1414 (1998).

<sup>64</sup> See generally Erin A. Cohn, *The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession*, 35 U. BAL. L. REV. 367, 373-75 (2006) (illustrating the implications of withdrawing from a case due to the lack of client screening).

<sup>65</sup> *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1789 (1999).

<sup>66</sup> Adam J. Sigman, *The Ethics Corner*, 25 JUN. PROB. & PROP. MAG. 64 (2011). See generally Mark I. Schickman, *Report to the House of Delegates: Recommendation*

“persons of limited means,” could use pro bono legal services for credit and debt-related issues.<sup>67</sup> Lawyers are willing to volunteer to help.<sup>68</sup> Some lawyers are adept at these problems because they work for a bank.<sup>69</sup> The banker’s lawyer has a risk of positional conflict acting as the pro bono legal services provider for debtors of banks.<sup>70</sup> To exercise caution in modern life is to conclude that an anticipatory waiver of the conflict is appropriate.<sup>71</sup> The conflict certainly is waivable, but the lawyer must tell both his paying client and his pro bono client of the conflict and must get waivers from each party.<sup>72</sup> The report accompanying the recommendation offers that some large banks have already waived the positional conflicts.<sup>73</sup> The recommendation simply resolves that “corporate counsel” encourage clients to waive, if they can, positional conflicts for this style of “pro bono services.”<sup>74</sup> A practical solution to an ethereal proto-conflict, a lawyer-like response, is notice and waiver, which admits no conflict known but describes the nature of the firm’s support for matters pro bono publico.<sup>75</sup>

Now the notice given in the waiver might say that a client who pays cannot object to the pro bono publico activity of the firm.<sup>76</sup> The

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102A, 2009 A.B.A. SEC. PUB. BUS. L. REP., available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fmigrated%2Fleadership%2F2009%2Fannual%2Fsummary\\_of\\_recommendations%2FOne\\_Hundred\\_Two\\_A.doc&ei=1x1EVJGdlIqzyASmtoHQA&usg=AFQjCNFO3A8y79em2-2itY7KHESK-FS16A](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fmigrated%2Fleadership%2F2009%2Fannual%2Fsummary_of_recommendations%2FOne_Hundred_Two_A.doc&ei=1x1EVJGdlIqzyASmtoHQA&usg=AFQjCNFO3A8y79em2-2itY7KHESK-FS16A).

<sup>67</sup> See Schickman, *supra* note 66, at 2.

<sup>68</sup> Thomas S. Nichols, *Profiles of Success: Donald W. Hoagland and Mary T. Hoagland*, 29 COLO. LAW. 15, Dec. 2000, at 18.

<sup>69</sup> See generally *Banking Law—Guide to Bank and Bank Regulation Law*, HG.ORG LEGAL RES., <http://www.hg.org/banking.html> (last visited Aug. 1, 2014).

<sup>70</sup> See James P. Clark, *Conflicts—“Positional” Conflicts*, in 6 BUS. & COM. LITIG. FED. CTS. § 64:29 (3d ed. 2013).

<sup>71</sup> John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 528-29 (1993).

<sup>72</sup> Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 FLA. L. REV. 383, 418-19 (1999).

<sup>73</sup> Schickman, *supra* note 66, at 5.

<sup>74</sup> *Id.* at 2.

<sup>75</sup> See *id.*

<sup>76</sup> See Richmond *supra* note 72, at 419-20.

notice is simply precautionary; there is no current positional conflict or a contested substantive legal issue in the courts of one place.<sup>77</sup> Of course, we, the collective firm, will and must warn if a real conflict of interest arises.<sup>78</sup> And we will never ever sue you, our paying client, while representing a pro bono client.<sup>79</sup>

## V. VOLUNTEERING AT A NONPROFIT LEGAL SERVICE PROGRAM TO AVOID POTENTIAL CONFLICTS OF INTEREST

The new Rule 6.5 begins to address the issue of positional conflicts in pro bono publico activity.<sup>80</sup> However, it is limited in scope.<sup>81</sup> Rule 6.5 states that

a lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client . . . is subject to Rules 1.7 and 1.9(a) [the conflict of interest rules] only if the lawyer knows that the representation of the client involves a conflict of interest.<sup>82</sup>

Furthermore, Rule 6.5 also shields the socially-minded lawyer's pro bono work from Rule 1.10, Imputation of Conflict of Interests, unless the pro bono lawyer "knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 [Conflict of Interest: Current Clients] or 1.9(a) [Duties to Former Clients] with respect to the matter."<sup>83</sup> Rule 6.5 only contemplates limited forms of representation, like one-time legal advice and consultations, but it is a step in the right direction.<sup>84</sup>

The comments explain that this rule is necessary because a

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<sup>77</sup> *Cf. id.*

<sup>78</sup> *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013).

<sup>79</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2013). A lawyer cannot represent the "assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." *Id.*

<sup>80</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 6.5 (2013).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.10, 6.5 (2013).

<sup>84</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 6.5 (2013).

lawyer in these circumstances “ordinarily is not able to check systematically for conflicts of interests.”<sup>85</sup> Without the rule, the conflict check burden would certainly stifle pro bono work.<sup>86</sup> This rule has the opposite effect.<sup>87</sup> Rule 6.5 *encourages* lawyers who want to act pro bono to do so by volunteering at a nonprofit.<sup>88</sup> It provides a mechanism (and rule) to support the lawyer’s pro bono work without him or her having to worry about potential conflicts of interest lurking in the background.<sup>89</sup>

This arrangement is beneficial to both parties.<sup>90</sup> Even though the pro bono lawyer may only provide limited or short-term services to the indigent client, the lawyer can share some of his or her expertise with the nonprofit organization’s staff.<sup>91</sup> From the lawyer’s perspective, the nonprofit organization will have taken care of the intake and initial screening of the client, getting everything ready for the pro bono volunteer to step in and lend his or her expertise to the client.<sup>92</sup> And, most important, the indigent client benefits from receiving expert legal advice.<sup>93</sup>

## VI. CONCLUSION

We wonder how often firms use notice and anticipatory waivers of positional conflicts among paying clients.<sup>94</sup> In good practice,

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<sup>85</sup> MODEL RULES OF PROF’L CONDUCT R. 6.5 cmt. 3 (2013).

<sup>86</sup> AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY 692-93 (2006).

<sup>87</sup> *See id.*

<sup>88</sup> MODEL RULES OF PROF’L CONDUCT R. 6.5 (2013).

<sup>89</sup> *See id.*

<sup>90</sup> *See infra* notes 91-93.

<sup>91</sup> *Cf.* MODEL RULES OF PROF’L CONDUCT R. 6.5 (2013).

<sup>92</sup> *Cf. id.*

<sup>93</sup> AMERICAN BAR ASSOCIATION, *supra* note 86, at 692.

<sup>94</sup> *See* Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A “Foolish Consistency”?*, 111 PENN ST. L. REV. 1, 3 (2006) (stating that “lawyers suppress most positional conflicts”); *see also* Perter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 FORDHAM L. REV. 2339, 2352 (1999) (explaining that many lawyers decline pro bono work solely because they are concerned that accepting such work would embarrass or offend their paying clients).

lawyers may use fee agreements to effect anticipatory waivers.<sup>95</sup> The specificity, however, in the pro bono publico notice must be somewhat greater and somewhat cause-particular.<sup>96</sup> Firm advertising might proudly promote the firm's charitable deeds.<sup>97</sup> But the advertising is unlikely to reveal the particular subtleties of possible positional conflicts to paying clients; absent actual competing substantive legal positions currently before the court in one jurisdiction, what the paying clients "don't know won't hurt them."<sup>98</sup> There is no conflict and no notice is required.<sup>99</sup>

One cannot fault a firm's facilitation of the pro bono publico through these waivers.<sup>100</sup> For conflicts (vague as they may be) cannot motivate as well as plain money.<sup>101</sup> If the whale client evinces a different view of what is in the public good, the firm will have to make a difficult decision.<sup>102</sup> No matter what the ethical concerns may be, good-hearted lawyers will continue to step up and provide services pro

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<sup>95</sup> See Emily Eichenhorn, *The Complete Deal—Risk Management for the Lawyer-Scrivener*, 64 OR. ST. B. BULL., Oct. 2003, at 29, 31-32 (explaining that an agreement clearly indicating "who is and is not the client can go a long way toward controlling potential professional liability losses" with anticipatory waiver). Lawyers often draft anticipatory waivers of conflict "that would allow the attorney to continue to represent one party" even once the conflict has arisen. *Id.* at 32.

<sup>96</sup> See Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1435 (2009) (explaining that lawyers typically only engage in pro bono where there is a "business reason to do so").

<sup>97</sup> See Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Firms*, 37 HOFSTRA L. REV. 699, 709 (2009) (stating that law firms proudly display the pro bono achievements "on firm websites, in firm newsletters, and in press releases").

<sup>98</sup> See Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency"?*, 111 PENN ST. L. REV. 1, 15 (2006) (explaining that the model rule did not require an attorney to disclose potential positional conflicts to paying clients).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 33 (explaining that lawyers avoid inconveniencing their paying clients by reframing the legal arguments used in pro bono representation).

<sup>101</sup> *Id.*

<sup>102</sup> *Cf. id.* at 34. "An over-emphasis on avoiding positional conflicts thus creates another incentive to behave in ways that favor powerful clients at the expense of less powerful clients." *Id.*

bono publico.<sup>103</sup> Like with any new clients, the prudent pro bono lawyer should always be aware of potential conflicts, both direct and positional, and try to resolve these issues before upsetting either party.<sup>104</sup>

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<sup>103</sup> See Judge Michael B. Hyman, *Kindness to Strangers*, CBA RECORD, Oct. 2011, at 6 (explaining that pro bono service has been in effect for as long as attorneys have argued before judges and that extending help to strangers is inherent in the work of a lawyer).

<sup>104</sup> See, e.g., Scott Krob, *A Practical Approach to Conflicts of Interest*, 26 COLO. LAW. 87, Sept. 1997, at 89-90 (providing an example for attorneys to follow in determining whether or not a potential conflict exists prior to representation).