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Conflicts, Waivers & Walls – Ethics Issues for the Real Estate Lawyer

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Conflicts, Waivers & Walls –

Ethics Issues for the Real Estate Lawyer[1]

1. General Rules: Adversity to Clients

Conflicts can arise at various times during the course of an engagement. Because of the duty of loyalty that lawyers have to their clients, the general rule is that a lawyer cannot represent a client in a matter that would result in the lawyer being adverse to another client. ABA Model Rule 1.7(a) provides as follows:

> *Rule 1.7: Conflict of Interest: Current Clients*
>
> *Client-Lawyer Relationship*
>
> *(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*
>
> *(1) the representation of one client will be directly adverse to another client; or*
>
> *(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*

Comments to the Model Rule emphasize the duty of loyalty and reinforce that conflicts arise in transactional matters as well as in litigation:

> *Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.*

ABA Model Rule 1.7 cmt. [6].

> *Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.*

ABA Model Rule 1.7 cmt. [7].

However, the Model Rules do permit a lawyer to represent a client notwithstanding a conflict if:

> *(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*
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> *(2) the representation is not prohibited by law;*
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> *(3) the representation does not involve 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; and*

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[1] John Cameron and Nancy Little would like to express special thanks to her partner, Thomas E. Spahn, a nationally-recognized author and speaker on ethics, for the background information and research source materials he provided that were invaluable in the preparation of the foregoing outline.

(4) each affected client gives informed consent, confirmed in writing.

ABA Model Rule 1.7(b).

Accordingly, in most circumstances a lawyer would likely obtain consent from the clients as contemplated by ABA Model Rule 1.7(b).

2. "Thrust Upon" Exception

The ABA Model Rules sometimes recognize an exception in certain situations where a conflict is "thrust upon" the lawyer.

> *Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. … The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn.*

ABA Model Rule 1.7 cmt. [5].

3. "Hot Potato" Rule

Under the "hot potato" rule, a lawyer cannot avoid a conflict by firing a client in order to accept representation of another client if that representation would otherwise create a conflict. The rule's name is believed to have been derived from language in Picker Int'l, Inc. v. Varian Assocs., Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), in which the court said "A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client." Although the rule is not addressed by the ABA Model Rules, the Restatement takes a position consistent with the hot potato rule:

> *If a lawyer is approached by a prospective client seeking representation in a matter adverse to an existing client, the present-client conflict may not be transformed into a former-client conflict by the lawyer's withdrawal from the representation of the existing client. A premature withdrawal violates the lawyer's obligation of loyalty to the existing client and can constitute a breach of the client-lawyer contract of employment….*

Restatement (Third) of Law Governing Lawyers § 132 cmt. c (2000).[2]

4. Identity of the Client: Partnerships and Associations

In general, a lawyer representing a partnership or an association does not automatically represent the partners or members. In 1991, the ABA issued a legal ethics opinion dealing with representation of a

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[2] See also Illustration 5 of Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iii):

> *For many years Law Firm has represented Bank in mortgage foreclosures and does so currently. Other lawyers in Law Firm have continuously represented Manufacturer as outside general counsel and do so currently. Bank and Manufacturer entered into an agreement under which Bank would loan a sum of money to Manufacturer. Lawyers from Law Firm did not represent either client in negotiating the loan agreement. A dispute arose between the parties to the agreement, and Manufacturer announced that it would file suit against Bank for breach of the loan contract. Absent client consent…, Law Firm lawyers may not represent either Bank or Manufacturer in the litigation…. Law Firm may not withdraw from representing either client in order to file or defend a suit on the loan agreement against the other…. Law Firm may, however, continue to provide legal services to both clients in matters unrelated to the litigation because as to those matters the clients' interests are not in conflict.*

partnership and its constituent partners, which stated: "There is no logical reason to distinguish partnerships from corporations or other legal entities in determining the client a lawyer represents. A partnership is, by definition, an unincorporated association…. [A] lawyer undertaking to represent a partnership with respect to a particular matter does not thereby enter into a lawyer-client relationship with each member of the partnership, so as to be barred for example,… from representing another client on a matter adverse to one of the partners but unrelated to the partnership affairs."[3]

In a legal ethics opinion, the ABA Standing Committee on Ethics and Professional Responsibility (the "Committee") analyzed the question of whether a law firm that represented a trade association could represent a client in litigation adverse to a member of the association.[4] In the Opinion, the Committee said the answer was determined largely by whether the member had "itself become a client of the firm by virtue of the firm's representation of the trade association", noting that the starting point for the analysis was "the proposition that by representing the association a lawyer does not necessarily enter into a client-lawyer relationship with each member."[5]

However, both ABA LEO 361 and 365 indicated that the conclusion as to whether the lawyer is representing partners of a partnership or the members of an association is dependent on facts and circumstances. A particularly important factor is whether the lawyer for the entity has received confidential information from the constituent member, which could create an attorney-client relationship with such constituent member and therefore would create a conflict if the lawyer wanted to accept an engagement adverse to such partner or member. The Restatement reinforces this position in the case of a trade association:

> *Lawyer represents Association, a trade association in which Corporation C is a member, in supporting legislation to protect Association's industry against foreign imports. Lawyer does not represent any individual members of Association, including Corporation C, but at the request of Association and Lawyer, Corporation C has given Lawyer confidential information about Corporation C's cost of production. Plaintiff has asked Lawyer to sue Corporation C for unfair competition based on Corporation C's alleged pricing below the cost of production. Although Corporation C is not Lawyer's client, unless both Plaintiff and Corporation C consent to the representation under the limitations and conditions provided in § 122, Lawyer may not represent Plaintiff against Corporation C in the matter because of the serious risk of material adverse use of Corporation C's confidential information against Corporation C.*

Restatement (Third) of Law Governing Lawyers § 121 cmt. d, Illus. 10 (2000).

5. Corporate Entities: Who is the Client?

ABA Model Rule 1.13(a) sets forth the general rule that the entity, not its constituent members, is the client:

> *A lawyer employed or retained by an organization represents the organization through its duly authorized constituents.*

Issues can arise if the lawyer thought he/she was only representing a committee of the company, or vice versa, and problems can ensue, for example, in determining whether communications are privileged and to whom duties are owed. As with other conflicts rules, the facts and circumstances of any given situation can be determinative, notwithstanding that the lawyer or the law firm may have had a different understanding.[6]

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[3] ABA LEO 361 (7/12/1991).
[4] ABA LEO 365 (7/6/1992)
[5] Id.
[6] See Kirschner v. K&L Gates LLP, 46 A.3d 737 (Pa. Super. Ct. 2012), allowing a trustee to pursue claims against the law firm on behalf of the company despite an engagement letter stating the law firm represented a committee and not the company.

The Restatement also recognizes the general rule but also notes that a lawyer may be found to have obligations to the constituent members of a corporation, which can be a particularly tricky situation with respect to closely held entities:

> *For purposes of identifying conflicts of interest, a lawyer's client is ordinarily the person or entity that consents to the formation of the client-lawyer relationship…. For example, when a lawyer is retained by Corporation A, Corporation A is ordinarily the lawyer's client; neither individual officers of Corporation A nor other corporations in which Corporation A has an ownership interest, that hold an ownership interest in Corporation A, or in which a major shareholder in Corporation A has an ownership interest, are thereby considered to be the lawyer's client.*
>
> *In some situations, however, the financial or personal relationship between the lawyer's client and other persons or entities might be such that the lawyer's obligations to the client will extend to those other persons or entities as well. That will be true, for example, where financial loss or benefit to the nonclient person or entity will have a direct, adverse impact on the client.*

Restatement (Third) of Law Governing Lawyers § 121 cmt. d (2000).

In a situation where the interests of the entity represented by the lawyer diverge from those of some of its constituent members, the lawyer may have a duty to make disclosure to the applicable constituent(s) (e.g., committee or officer), including the advisability of hiring separate counsel. As with other conflicts rules, a lawyer must be careful to identify the client and to engage in conduct and communications with respect to the entity and its constituents that are consistent with the lawyer's role.[7]

It should be noted that there may be circumstances under which a lawyer can represent both the both the entity and its constituents, subject to compliance with other ethics rules, including rules applicable to joint representations. See ABA Model Rule 1.13(g):

> *A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.*

6. Who is the Client: Corporate Affiliates

As noted above, under ABA Model Rule 1.13(a), the client is the organization or entity and, in general (but subject to facts and circumstances) not its constituent members. With respect to corporate affiliates, the Model Rules provide:

> *A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent*

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[7] See comments 10 and 11 to ABA Model Rule 1.13:

> *There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.*

ABA Model Rule 1.13 cmt. [10].

> *Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.*

ABA Model Rule 1.13 cmt. [11].

or subsidiary…. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

ABA Model Rule 1.7 cmt. [34].

In an ABA Ethics Opinion on the subject, the Committee concluded that representation of an affiliate depends on facts and circumstances but noted "[e]ven if the circumstances are such that client consent is not ethically required, as a matter of prudence and good practice a lawyer who contemplates undertaking a representation adverse to a corporate affiliate of a client will be well advised to discuss the matter with the client before undertaking the representation." The Opinion went on to say:

Clearly, the best solution to the problems that may arise by reason of clients' corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer's clients, or are to be so treated for conflicts purposes…. Such circumstances will frequently obtain simply because the relationship with the client is of long standing, antedating the time when letters of engagement came into common use; or because there is a change in the identity or the corporate affiliations of the client, through acquisitions, mergers and the like.

Even in circumstances where there is no established understanding about the lawyer's obligations toward affiliates of the client, considerations of client relations will ordinarily dictate the lawyer's course of action, without the occasion even arising to consider whether the Model Rules forbid the contemplated new representation. Nonetheless, there will sometimes be circumstances where the requirements of the Model Rules rather than considerations of client relations will govern: for example, where by virtue of merger or acquisition the corporate affiliation of the client changes.

It is the Committee's opinion that the Model Rules of Professional Conduct do not prohibit a lawyer from representing a party adverse to a particular corporation merely because the lawyer (or another lawyer in the same firm) represents, in an unrelated matter, another corporation that owns the potentially adverse corporation, or is owned by it, or is, together with the adverse corporation, owned by a third entity…. Nonetheless, the circumstances of a particular representation may be such that the corporate client has a reasonable expectation that the affiliates will be treated as clients, either generally or for purposes of avoidance of conflicts, and the lawyer is aware of the expectation.

ABA LEO 390 (1/25/95).

The Restatement takes a similar position, as reflected in several illustrations in the comments:

6. Lawyer represents Corporation A in local real-estate transactions. Lawyer has been asked to represent Plaintiff in a products-liability action against Corporation B claiming substantial damages. Corporation B is a wholly owned subsidiary of Corporation A; any judgment obtained against Corporation B will have a material adverse impact on the value of Corporation B's assets and on the value of the assets of Corporation A. Just as Lawyer could not file suit against Corporation A on behalf of another client, even in a matter unrelated to the subject of Lawyer's representation of Corporation A…, Lawyer may not represent Plaintiff in the suit against Corporation B without the consent of both Plaintiff and Corporation A under the limitations and conditions provided in [Restatement] § 122.

7. The same facts as in Illustration 6, except that Corporation B is not a subsidiary of Corporation A. Instead, 51 percent of the stock of Corporation A and 60 percent of the stock of Corporation B are owned by X Corporation. The remainder of the stock in both Corporation A and Corporation B is held by the public. Lawyer does not represent X Corporation. The circumstances are such that an adverse judgment against Corporation B will have no material adverse impact on the financial position of Corporation A. No conflict of interest is presented; Lawyer may represent Plaintiff in the suit against Corporation B.

Restatement (Third) of Law Governing Lawyers § 121 cmt. d, Illus. 6 and 7 (2000).

7. Who is the Client: Issues for In House Counsel

So who is the client from the standpoint of in house counsel? Model Rule 1.13(a) provides that "[a] lawyer employed … by an organization represents the organization…." Comments to Model Rule 1.0 give a bit more detail and also highlights issues for in house lawyers, such as whether they represent affiliates of their employer:

> *With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.*

ABA Model Rule 1.0 cmt. [3].

The Restatement indicates that it is a question of fact as to whether an in house representation of an entity and its affiliate(s) may create a conflict and notes that conflicts can arise even if the entities have identical ownership:

> *Whether a lawyer represents affiliated organizations as clients is a question of fact…. When a lawyer represents two or more organizations with some common ownership or membership, whether a conflict exists is determined primarily on the basis of formal organizational distinctions. If a single business corporation has established two divisions within the corporate structure, for example, conflicting interests or objectives of those divisions do not create a conflict of interest for a lawyer representing the corporation. Differences within the organization are to be resolved through the organization's decisionmaking procedures.*
>
> *If an enterprise consists of two or more organizations and ownership of the organizations is identical, the lawyer's obligation is ordinarily to respond according to the decisionmaking procedures of the enterprise, subject to any special limitations that might be validly imposed by regulatory regimes such as those governing financial institutions and insurance companies.*
>
> *On the other hand, when ownership or membership of two or more organizations is not identical, the lawyer must respect the organizational boundaries of each and analyze possible conflicts of interest on the basis that the organizations are separate entities. That is true even when a single individual or organization has sufficient ownership or influence to exercise working control of the organizations….*

Restatement (Third) of Law Governing Lawyers § 131 cmt. d (2000).

The Restatement also provides an illustration of when the interests of related entities can diverge, triggering the requirement for consent, where an entity asks its lawyer to handle the sale of real estate for its subsidiary in a case in which the affiliate is not wholly owned so that the ownership of both entities is not identical as contemplated by the last paragraph of comment d of Restatement § 131.[8] Accordingly, care must be taken by in house counsel as well as outside lawyers to understand and respect entity structure and to recognize and address potential conflicts.

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[8] Illustration 2 of Restatement (Third) of Law Governing Lawyers § 131 cmt. d (2000) provides: A Corporation owns 60 percent of the stock of B Corporation. All of the stock of A Corporation is publicly owned, as is the remainder of the stock in B Corporation. Lawyer has been asked by the President of A Corporation to act as attorney for B in causing B to make a proposed transfer of certain real property to A at a price whose fairness cannot readily be determined by reference to the general real-estate market. Lawyer may do so only with effective informed consent of the management of B (as well as that of A). The ownership of A and B is not identical and their interests materially differ in the proposed transaction.

8. Business Adversity

Economic or business adversity does not necessarily preclude a lawyer from representing two or more separate clients. The Model Rules address this situation in ABA Model Rule 1.7 cmt. [6]:

> *[s]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.*

However, there may be situations, such as two companies competing for a limited number of permits, where the lawyer's ability to provide effective representation to both clients could be affected in contravention of applicable provisions of Model Rule 1.7, which allows simultaneous representation of two clients if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client".[9]

The Restatement deals with this situation in an illustration:

> *Lawyer has been retained by A and B, each a competitor for a single broadcast license, to assist each of them in obtaining the license from Agency. Such work often requires advocacy by the lawyer for an applicant before Agency. Lawyer's representation will have an adverse effect on both A and B as that term is used in this Section. Even though either A or B might obtain the license and thus arguably not have been adversely affected by the joint representation, Lawyer will have duties to A that restrict Lawyer's ability to urge B's application and vice versa. In most instances, informed consent of both A and B would not suffice to allow the dual representation….*

Restatement (Third) of Law Governing Lawyers § 121 cmt. c(i), Illus. 1 (2000).

Lawyers need to be careful to consider if a "business conflict" can become a legal conflict, as well whether such conflict can be addressed by consent of the affected clients. Obviously, it goes without saying that relationship issues can also arise in the representation of business competitors.

9. Representing Clients on Opposite Sides of the Same Transaction

Representing one client opposite another on the same transaction can be a proverbial can of worms in many respects. With respect to the conflicts rules, surely the lawyer would need consent in such a situation. A comment to the Model Rules provides:

> *Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, 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, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.*

ABA Model Rule 1.7 cmt. [28].

Although it is possible that such representation may be permitted depending upon the circumstances and the lawyer's ability to comply with other conflicts rules relating to the lawyer's ability to provide effective

[9] ABA Model Rule 1.7(b)(1).

representation and the lawyer's duties with respect to confidential information[10], the Restatement § 122, comment g discusses "nonconsentable" conflicts and situations that render the lawyer incapable of adequately representing a client.[11] It also includes examples where representation of clients on opposite sides of a matter would be problematic:

> *10. Lawyer has been asked by Buyer and Seller to represent both of them in negotiating and documenting a complex real-estate transaction. The parties are in sharp disagreement on several important terms of the transaction. Given such differences, Lawyer would be unable to provide adequate representation to both clients.*
>
> *11. The facts being otherwise as stated in Illustration 10, the parties are both in agreement on terms and possess comparable knowledge and experience in such transactions, but, viewed objectively, the transaction is such that both parties should receive extensive counseling concerning their rights in the transaction and possible optional arrangements, including security interests, guarantees, and other rights against each other and in resisting the claims of the other party for such rights. Given the scope of legal representation that each prospective client should receive, Lawyer would be unable to provide adequate representation to both clients.*

Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iv), Illus. 10 and 11 (2000).

Accordingly, it may be possible for a lawyer to act for both clients on opposite sides of a matter, but as in many other conflicts situations, that will depend on facts and circumstances. In addition, the Restatement discourages a lawyer from acting as a "scrivener".[12]

10. Conflicts with "Former" Clients

At some point, the case or matter that a lawyer is working on comes to an end, and the lawyer may have an expectation that he/she can accept representations adverse to the former client.

ABA Model Rule 1.9 gives some guidance on dealing with conflicts with respect to representations that are adverse to former clients:

> *(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.*
>
> *(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client*
>
> *(1) whose interests are materially adverse to that person; and*

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[10] See Restatement (Third) of Law Governing Lawyers § 122 cmt. c(i), Illus. 1 (2000): "*Client A and Client B give informed consent to a joint representation by Lawyer to prepare a commercial contract. Lawyer's bill for legal services is paid by both clients and the matter is terminated. Client B then retains Lawyer to file a lawsuit against former Client A on the asserted ground that A breached the contract. Lawyer may not represent Client B against Client A in the lawsuit without A's informed consent…. Client A's earlier consent to Lawyer's joint representation to draft the contract does not itself permit Lawyer's later adversarial representation.*"

[11] See Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iv) (2000).

[12] Restatement (Third) of Law Governing Lawyers § 130 cmt. b (2000) provides: *Whether a lawyer can function in a situation of conflict… depends on whether the conflict is consentable…, which in turn depends on whether it is "reasonably likely that the lawyer will be able to provide adequate representation" to all affected clients…. Conflicted but unconsented representation of multiple clients, for example of the buyer and seller of property, is sometimes defended with the argument that the lawyer was performing the role of mere "scrivener" or a similarly mechanical role. The characterization is usually inappropriate. A lawyer must accept responsibility to give customary advice and customary range of legal services, unless the clients have given their informed consent to a narrower range of the lawyer's responsibilities.*

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ABA Model Rule 1.9.

These Model Rules have a strong focus on protecting confidential information. The comments to Model Rule 1.9 also support to this notion:

> *After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.*

ABA Model Rule 1.9 cmt. [1].

In analyzing a potential conflict with a former client, a lawyer will need to analyze whether the potential representation is "substantially related" to a matter the lawyer handled for the former client:

> *Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, … a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.*

ABA Model Rule 1.9 cmt. [3].

As noted above, commentary on "substantially related" matters takes into account the information learned by the lawyer in the prior representation is relevant to the potential representation (i.e., the engagement that the lawyer proposes to take adverse to his/her former client):

> *Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.*

ABA Model Rule 1.9 cmt. [3].

In addition, the Restatement contemplates that a lawyer may limit the scope of his or her representation of a client to try to avoid (or limit) situations where a subsequent engagement would be substantially related to prior representation for a former client and result in a conflict:

> *The lawyer may limit the scope of representation specifically for the purpose of avoiding a future conflict…. Similarly, the lawyer may limit the scope of representation of a later client so as to avoid representation substantially related to that undertaken for a previous client.*

Restatement (Third) of Law Governing Lawyers § 132 cmt. e (2000).

But when does the attorney-client relationship end? There is not a definitive Model Rule nor a clear-cut Restatement answer to that question. The answer may not depend on how long or how short a period of time the lawyer represented client. Facts and circumstances will be relevant, and it is best for a lawyer to confirm the end of the representation in writing with the client to assist the lawyer in analyzing future conflicts.

11. Adversity to a Former Client: "Playbook" Information

Substantive legal knowledge learned while representing one client may not disqualify a lawyer from subsequently being adverse to that client. However, information obtained by a lawyer in the course of representing a former client may prevent the lawyer from accepting a matter adverse to that client if the information learned is relevant to the subsequent engagement. In that case, the two matters may be considered "substantially related" for the purposes of ABA Model Rule 1.9(b).

ABA Model Rule 1.9 cmt [3] provides:

> *In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.*

The Restatement similarly takes into account whether the relevance and value of the information:

> *[A] lawyer may master a particular substantive area of the law while representing a client, but that does not preclude the lawyer from later representing another client adversely to the first in a matter involving the same legal issues, if the matters factually are not substantially related. A lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.*

Restatement (Third) of Law Governing Lawyers § 132 cmt. d(iii) (2000).

The disqualifying information sometimes is referred to as "playbook information". Any lawyer approached for an engagement against a former client will need to assess whether information he or she learned in the prior matter would cause the engagement to be "substantially related" under the applicable rules.

12. Consents: Revocability

Under the Model Rules:

> *(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:*
>
> *(1) withdrawal can be accomplished without material adverse effect on the interests of the client;*

ABA Model Rule 1.16(b)(1).[13]

However, the Model Rules do take into account the impact the revocation may have on the other client the lawyer is representing in reliance on the consent:

> *A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.*

ABA Model Rule 1.7 cmt. [21].

The Restatement provides similar guidance:

> *f. Revocation of consent through client action or a material change of circumstances. A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent…. Revoking consent to the client's own representation, however, does not necessarily prevent the lawyer from continuing to represent other clients who had been jointly represented along with the revoking client. Whether the lawyer may continue the other representation depends on whether the client was justified in revoking the consent (such as because of a material change in the factual basis on which the client originally gave informed consent) and whether material detriment to the other client or lawyer would result. In addition, if the client had reserved the prerogative of revoking consent, that agreement controls the lawyer's subsequent ability to continue representation of other clients.*
>
> *A material change in the factual basis on which the client originally gave informed consent can justify a client in withdrawing consent. For example, in the absence of an agreement to the contrary, the consent of a client to be represented concurrently with another … normally presupposes that the co-clients will not develop seriously antagonistic positions. If such antagonism develops, it might warrant revoking consent. If the conflict is subject to informed consent …, the lawyer must thereupon obtain renewed informed consent of the clients, now adequately informed of the change of circumstances. If the conflict is not consentable, or the lawyer cannot obtain informed consent from the other client or decides not to proceed with the representation, the lawyer must withdraw from representing all affected clients adverse to any former client in the matter….*
>
> ….
>
> *In the absence of valid reasons for a client's revocation of consent, the ability of the lawyer to continue representing other clients depends on whether material detriment to the other client or lawyer would result and, accordingly, whether the reasonable expectations of those persons would be defeated. Once the client or former client has given informed consent to a lawyer's representing another client, that other client as well as the lawyer might have acted in reliance on the consent. For example, the other client and the lawyer might already have invested time, money, and effort in the representation. The other client might already have disclosed confidential information and developed a relationship of trust and confidence with the lawyer. Or, a client relying on the consent might reasonably have elected to forgo opportunities to take other action.*

Restatement (Third) of Law Governing Lawyers § 122 cmt. f (2000).

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[13] ABA Model Rule 1.16(c) states: "*A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation*."

13. Prospective Consents[14]

No ethics rule automatically prohibits a client from granting a prospective consent. However, lawyers arranging or (especially) relying on such prospective consents must be very wary.

A comment to ABA Model Rule 1.7 explains that

> *[t]he effectiveness of such [prospective] waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).*

ABA Model Rule 1.7 cmt. [22].

The Restatement takes the same basic approach. Restatement (Third) of Law Governing Lawyers, § 122 cmt. d (2000) warns that prospective consents are "subject to special scrutiny," but acknowledges that they are often appropriate.

> *A client's open ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. . . . On the other hand, particularly in a continuing client lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.*

Restatement (Third) of Law Governing Lawyers, § 122 cmt. d (2000). A later comment implicitly deals with prospective consents in a discussion of the client's ability to revoke a consent.

> *The issue of withdrawal of consent typically arises when consent was given in general terms or long in advance, and a direct conflict thereafter arises between the parties. Courts generally hold that such changed circumstances permit the objecting client to withdraw consent.*

Restatement (Third) of Law Governing Lawyers § 122 reporter's note cmt. f.

Every bar that has addressed the issue of prospective consents has refused to adopt a per se prohibition of such consents.[15]

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[14] The following material in this paragraph 13 is reproduced from "Basic Conflicts of Interest Rules: Key Issues" (2018), by Thomas E. Spahn, Partner, McGuireWoods LLP, as edited by John G. Cameron, Jr.

[15] New York City LEO 2008-2 (9/2008); Pennsylvania LEO 2006-200 (7/26/06); Oregon LEO 2005 122 (8/2005); District of Columbia LEO 309 (9/20/01) ("Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct. Such waivers, however, must comply with the overarching requirement of informed

Not surprisingly, courts uphold the effectiveness of prospective consents that meet the generally-accepted standard—providing some specific description of the type of adversity that might develop.

See, for example, Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003) (upholding the following prospective consent in a retainer letter between the Heller Ehrman Law Firm and First Data:

> *Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in "transactions," including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you.*

and General Cigar Holdings, Inc. v. Altadis, *S.A.,* 144 F. Supp. 2d 1334, 1336, 1339 (S.D. Fla. 2001) (enforcing a prospective consent obtained by Latham & Watkins; explaining that the client signed an engagement letter with the following provision:

> *Our firm has in the past and will continue to represent clients listed on the attached Exhibit A (each an "Exhibit A Client") in matters not substantially related to this engagement. Accordingly, each Client agrees to waive any objection, based upon this engagement, to any current or future representation by the firm of any of the Exhibit A Clients, its respective parent, subsidiaries and affiliates in any matter not substantially related to this representation. Of course, we will not accept any representation that is adverse to you in this matter.*

In finding the prospective consent enforceable, the court noted "[t]he engagement letter in the instant case was reviewed by outside counsel and the respective representatives of the corporations."

In contrast, some courts reject the effectiveness of prospective consents that tend to be too broad.

One example may be found in Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 801-02, 820, 821 (N.D. Cal. 2004) (disqualifying Morgan Lewis & Bockius from representing a client adverse to another client who had signed a retainer letter containing the following prospective consent:

> *Morgan, Lewis & Bockius is a large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you. Further, you agree in light of its general consent to such unrelated conflicting representations, Morgan, Lewis & Bockius will not be required to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations contained in the preceding sentence shall not apply in any instance where, as the result of our representation of you, we have obtained confidential information of a non-public nature that, if known to another client of ours, could be used to your material disadvantage in a matter in which we represent, or in the future are asked to undertake representation of, that client.*

In finding the prospective consent ineffective, the court said:

> *Applying these factors to the waiver executed by Dr. Winchell at Thomas' request, Winchell Decl., Ex. 1, the Court finds as follows: (1) the terms of the waiver are extremely broad and were evidently intended to cover almost any eventuality; (2) its temporal scope is likewise unlimited; (3) the record contains no evidence of any*

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consent. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid.); California LEO 1989 115 (1989).

discussion of the waiver; (4) the waiver lacks specificity as to the conflicts that it covers and effectively awards Morgan, Lewis an almost blank check; (5) however, Morgan Lewis explicitly stated that it would not seek to represent Dr. Winchell and an adverse client in a 'substantially related' matter; and (6) Dr. Winchell's education and business experience are strongly indicative of a high degree of sophistication. Thus, the fifth and sixth factors tend to support a finding of informed consent, but the first four weigh in the opposite direction. The interests of justice (factor (7) remain to be determined." (footnote omitted); also explaining that "[u]nder the law of this jurisdiction, even if a prospective waiver of conflict has been obtained, the attorney must request a second, more specific waiver, 'if the [prospective] waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between the parties.' . . . This Morgan, Lewis did not do.)"

Another can be found in Goss Graphics Sys., Inc. v. MAN Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 MJM, 2000 U.S. Dist. LEXIS 18100, at *7 (N.D. Iowa May 25, 2000) (disqualifying Kirkland & Ellis from representing a client adverse to another firm client who had signed a retainer letter with the following prospective consent:

In the event a present conflict of interest exists between [Goss] and [Kirkland's] other clients or in the event one arises in the future, [Goss] agrees to waive any such conflict of interest or other objection that would preclude [Kirkland's] representation of another client in other current or future matters. Accordingly, our representation of [Goss] in connection with the [Bankruptcy Proceedings] and in connection with any future matter will be with the understanding that such representation will not preclude [Kirkland] from continuing any present representation or assuming future representation in other matters that another client may request (other than a matter where [Goss] and another [Kirkland] client are on opposing sides of litigation).

The Washington, D.C., Bar suggested the following prospective consent language (although warning that the language was not "authoritative or exclusive").

As we have discussed, the firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on _____, we have or may have clients whom we represent in connection with _____.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you.

District of Columbia LEO 309 (9/20/01).

Courts have rejected the effectiveness of the following prospective consent provisions.

While the precise nature of each possible conflict that may arise in the future [in connection with a common interest agreement among several separately represented companies] cannot be identified at the present time, each client member after being informed of the general nature of the conflicts that may arise, knowingly, and intelligently waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own attorney, cross-examining him, her or it at trial in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information.

All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., Nos. C 07-1200, -1207, -1212 & No. 06-2915, 2008 U.S. Dist. LEXIS 106619, at *7-8, *32-34 (N.D. Cal. Dec. 18, 2008).

In contrast, a court upheld the effectiveness of the following prospective consent.

Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in 'transactions,' including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed [Heller's] past and on-going representation of Visa U.S.A. and Visa International (the later mainly with respect to trademarks) (collectively, 'Visa') in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from [sic] each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances.

Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003).

14. Lawyers from Temp Agencies/Staffing Firms

Temporary lawyers are often used to staff client matters. How can the use of these lawyers create conflicts issues, and how do the rules apply?

It is unclear how the Model Rules apply. ABA Model Rule 1.10(a) states: "*[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9….*"[16] However, "associated is not defined, and it is also unclear whether "firm" is intended to include temporary lawyers.

ABA Legal Ethics Opinion 356 analyzed issues presented by the use of lawyers from lawyer placement agencies:

Ultimately, whether a temporary lawyer is treated as being "associated with a firm" while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm. For example, a temporary lawyer who works for a firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients, may well be deemed to be "associated with" the firm generally under Rule 1.10 as to all other clients of the firm, unless the firm, through accurate records or otherwise, can demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access can be demonstrated, then the temporary lawyer should not be deemed to be "associated with" the firm under Rule 1.10. Also, if a temporary lawyer works with a firm only on a single matter under circumstances like the collaboration of two independent firms on a single case, where the temporary lawyer has no access to information relating to the representation of other firm clients, the temporary lawyer should not be deemed "associated with" the firm generally for purposes of application of Rule 1.10. This is particularly true where the temporary lawyer has no ongoing relationship with the firm and does not regularly work in the firm's office under circumstances likely to result in disclosure of information relating to the representation of other firm clients.

ABA LEO 356 (12/16/88).

[16] ABA Model Rule 1.10(a) goes on to state certain exceptions to the rule that are not included in the quoted text.

The Opinion went on to suggest the use of a screen to try to avoid imputation issues and potential disqualification:

> *For the reasons discussed above, in order to minimize the risk of disqualification, firms should, to the extent practicable, screen each temporary lawyer from all information relating to clients for which the temporary lawyer does no work. All law firms employing temporary lawyers also should maintain a complete and accurate record of all matters on which each temporary lawyer works. A temporary lawyer working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the temporary lawyer is not working. Since a temporary lawyer has a coequal interest in avoiding future imputed disqualification, the temporary lawyer should also maintain a record of clients and matters worked on.*

Id.

The Restatement provides a little guidance:

> *c(i). Law-firm members and employees. The rule of imputation applies to both owner-employer and associate-employees of a sole-proprietorship law practice, to partners and associates in a partnership for the practice of law, and to shareholder-principals and nonequity lawyer employees of a professional corporation or similar organization conducting a law practice. The lawyers in all such organizations typically have similar access to confidential client information. Owners, partners, and shareholder-principals have a shared economic interest. Associates and nonequity lawyer employees have both a stake in the continued viability of their employer and an incentive to keep the employer's good will.*
>
> ….
>
> *A form of lawyer-employee is the lawyer temporary-a lawyer who temporarily works for a firm needing extra professional help. The rules barring representation adverse to a former client … and imputing conflicts to all lawyers associated in a firm generally apply to such lawyer temporaries.*

Restatement (Third) of Law Governing Lawyers § 123 cmt c(i) (2000).

15. Doing Business with Clients

Under the Model Rules, certain conditions apply for lawyers to do business with their clients:

> *(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*
>
> *(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*
>
> *(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*
>
> *(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

ABA Model Rule 1.8(a).

However, there are certain exceptions:

> *[T]he Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or*

brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

ABA Model Rule 1.8 cmt [1].

The Restatement provides similar guidance:

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

(1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;

(2) the terms and circumstances of the transaction are fair and reasonable to the client; and

(3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

Restatement (Third) of Law Governing Lawyers § 126 (2000).

Lawyers doing business with their clients are advised to take care in doing so. In addition, they will want to check any applicable state rules that may be applicable.