DRAFTING ADVANCE WAIVERS OF CONFLICTS OF INTEREST

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DRAFTING ADVANCE WAIVERS OF CONFLICTS OF INTEREST

I. INTRODUCTION

Some of the most difficult ethical dilemmas faced by lawyers and law firms involve identifying and addressing actual and potential conflicts of interest among clients. A conflict of interest arises where “there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.” (The Restatement (Third) of the Law Governing Lawyers (hereafter, the “Restatement”), §121). Each client is entitled to the undivided loyalty of his lawyer and, by application of imputation rules, affiliated lawyers in that lawyer’s firm. Balanced against this expectation is the client’s fundamental right to select counsel of his choice. When a lawyer has a conflict of interest these two principles come into opposition. The mechanism for resolving the tension between these principles is for the client to consent to or waive the conflict.

Two trends over the past several decades, together with the imputation rules, make dealing with conflicts more difficult for both law firms and clients. Law firms have undergone a process of consolidation and growth, adding lawyers and practice areas and expanding in geographic scope. At the same time clients, particularly larger corporate clients, have for the most part abandoned the traditional model whereby a client directed the bulk of its work to a single firm. Instead, they are utilizing the services of multiple law firms. As noted in the Bar of the City of New York, Committee on Professional and Judicial Ethics Formal Opinion 2006-1, dated February 17, 2006 (hereafter, the “2006 NY Bar Opinion”), “the paradigm of a lawyer serving all the legal needs of the client and being a friend ‘for all purposes’ no longer applies to the relationships between many lawyers and clients.”

Given these developments, both clients and law firms face an increasingly constricted market for legal services. Unless waived by the client, such a conflict of interest would preclude the lawyer and the lawyer’s firm from representing the client. For example, a real estate lawyer in the Dallas office of a law firm may be reluctant to take on a new client, especially for a one-off deal, out of a concern that another lawyer in the firm in a different practice area in the New York office may be conflicted out of existing and future representations. As a result, the real estate lawyer loses a potential client and the client may be deprived of his first choice for counsel.

The most efficient solution for this problem is the advance waiver of conflict, whereby a potential client consents to possible future conflicts at the outset of representation. An advance waiver is preferable to a waiver obtained at the time the conflict arises because the advance waiver introduces certainty into the relationship and reduces the opportunity for a client to engage in gamesmanship. However, to be an effective tool advance waivers must be enforceable.

This paper will address the effectiveness of advance waivers generally and will include a brief history of the advance waiver. It will also examine the principal sources of law for advance waivers, discuss when withdrawal may be necessary in spite of an advance waiver, and provide sample advance waiver language.

II. WHAT IS AN ADVANCE WAIVER?

In general, a client’s waiver of a conflict of interest is a contractual agreement between a lawyer and a client whereby the client consents to representation in spite of a known concurrent conflict. For the waiver to be effective, the consent must be “informed” and must be confirmed “in writing” (Model Rules of Professional Conduct (hereafter, the “Model Rules”), R. 1.7.). The Texas Disciplinary Rules of Professional Conduct (hereafter, the “TDRPC”) require “full disclosure of the existence, nature, implications and possible adverse consequences...”, but do not specifically require a written confirmation (TDRPC, R.1.06). When a client waives a concurrent conflict, the scope of the conflict is generally clear, both as to the subject matter of the conflict and the identity of the adverse parties.

In an advance waiver situation, the client is not consenting to a known conflict, but rather to potential future conflicts. In D.C. Bar Legal Ethics Committee Opinion 309, dated September 20, 2001 (hereafter, “Opinion 309”), the committee defined an “advance waiver” as a waiver “granted before the conflict arises and generally before its precise parameters (e.g., specific adverse client, specific matter) are known.” By its nature an advance waiver involves conflicts the details of which are unknown to either lawyer or client. Reconciling this uncertainty with the requirement that any waiver be “informed” is at the heart of any analysis of the effectiveness of an advance waiver.

Whether an advanced waiver will be found effective depends in large part on the degree of specificity of the waiver. Advance waivers can be divided into four basic types: (i) a general waiver which does not identify either the subject matter of waived conflicts or the potential adverse parties; (ii) a matter specific waiver that identifies the subject matter, but not adverse parties; (iii) an adverse party specific waiver that identifies adverse parties (either specifically or as a class), but not the subject matter; and (iv) a specific waiver that identifies both subject matter and adverse parties. As a general rule, the more
sophisticated the client, the less specificity as to both adverse party and type of matter covered by the waiver is required.

III. A LITTLE HISTORY

A. Attitude Prior to Revision of Restatement § 122 and Model Rule 1.7

Prior to the revision of Restatement § 122 in 2000 and Model Rule 1.7 in 2002, neither the Model Rules nor the Restatement specifically addressed advance waivers. The earliest formal treatment of advance waivers under the Model Rules was contained in the American Bar Association Committee on Professional Ethics Formal Opinion 93-372, dated April 16, 1993 (hereafter, the “1993 Opinion”). The 1993 Opinion recognized a growing need for advance waivers based on the changing nature of the legal profession and allowed that “it is not ordinarily impermissible to seek such prospective waivers.” However, what the 1993 Opinion gave with one hand, it took away with the other. It held that “such a waiver must meet all the requirements of a waiver of a contemporaneous conflict of interest.” That is, an advance waiver would need to identify both the “particular conflict” and the “potential party or class of parties that may be represented in the future matter”. Even then, “the mere existence of a prospective waiver will not necessarily be dispositive of the question whether the waiver is effective.” With these caveats, the advance waivers authorized under the 1993 Opinion provided limited protection to lawyers and thus did little to address concerns with the constriction of the market for legal services.

B. Current Attitude

The 1993 Opinion was not the final word on advance waivers. It was followed by major opinions from New York and the District of Columbia (see Opinion 309 and N.Y.C.L.A. Committee on Professional Ethics Formal Opinion 724, dated January 28, 1998 (“Opinion 724”)), both of which authorized the use of advance waivers and, in certain circumstances, general advance waivers. Presaging the analysis ultimately outlined in the Restatement and the Model Rules, Opinion 724 held that a “‘blanket’ waiver of future conflicts involving adverse parties may be informed and enforceable depending on the client’s sophistication, its familiarity with the law firm’s practice, and the reasonable expectations of the parties at the time consent is obtained.” Both the 2000 version of § 122 of the Restatement and the 2002 revision of Model Rule 1.7, reflected the trend towards greater acceptance of advance waivers.

IV. SOURCES OF LAW

Every state has its own ethics rules governing waivers of conflicts of interest. In addition, the Model Rules and the Restatement provide a general analytical backdrop for evaluating the efficacy of waivers. This section will examine the treatment of waivers of conflicts of interest under the Model Rules, the Restatement, and the TDRPC.

A. ABA Model Rule 1.7 and Comment 22

Model Rule 1.7 provides the framework under the Model Rules for evaluating whether a concurrent conflict of interest exists, and if so, whether that conflict may be waived. A concurrent conflict of interest exists where either, (i) the representation of one client will be directly adverse to another client or (ii) there is a significant risk that representation of a client will be materially limited by responsibilities to another client, a former client, a third person or the lawyer’s personal interests. A concurrent conflict of interest may be waived by the client if the following four elements found in paragraph (b) of Model Rule 1.7 are satisfied:

1. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. The representation is not prohibited by law;
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
4. Each affected client gives informed consent, confirmed in writing.

Comment 22 to Model Rule 1.7 provides guidelines for evaluating advanced waivers under the Model Rules:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such 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).

As with a waiver of a concurrent conflict, the effectiveness of an advance waiver hinges on the degree to which the client’s consent to the conflict is deemed to be informed (i.e., “the extent to which the client reasonably understands the material risks that the waiver entails”). An advance waiver must meet all of the requirements of paragraph (b) to Model Rule 1.7 as set forth above and must additionally satisfy the requirements of Comment 22. Rather than adopting a bright-line test to determine whether an advance waiver is enforceable, Comment 22 provides a series of factors that must be weighed in a balancing test.

Comment 22 distinguishes between “general” and “matter specific” advance waivers and between sophisticated and unsophisticated clients. A “matter-specific” advance waiver will typically be effective, while a “general” advance waiver will not. However, even a “general” advance waiver may be enforceable against “an experienced user of the legal services involved” particularly if “the client is independently represented by other counsel” and “the consent is limited to future conflicts unrelated to the subject of the representation.”

The American Bar Association Committee on Professional Ethics Formal Opinion 05-436, dated May 11, 2005 (hereafter, the “2005 Opinion”) provides further guidance for evaluating the effectiveness of an advance waiver. In determining whether a client has the requisite understanding to render an advance waiver effective, the 2005 Opinion notes several factors to be considered. These include (i) the comprehensiveness of the lawyer’s description of potential conflicts and adverse consequences, (ii) the sophistication of the client with respect to the legal services involved, (iii) the generality of the waiver as to both type of conflict and identity of potentially adverse parties, and (iv) whether the client is independently represented by other counsel in giving consent.

It is unclear from Comment 22 whether a general advance waiver for a substantially related matter can ever be effective under the Model Rules. The 2005 Opinion states that “unrelated to the subject of the representation”, as used in Comment 22, means that the future matters “do not involve the same transaction or legal dispute” and would not involve the disclosure of information relating to the current representation that would materially advance the position of future clients of the lawyer. The formulation in Comment 22 does not appear to foreclose general advance waivers of conflicts arising out of substantially related matters, but neither does it clearly uphold them. Further, if the matters are so substantially related that the lawyer’s duties as to confidentiality are called into question, then a general advance waiver will not be effective. Model Rule 1.6.

B. Restatement § 122 and Comment d.

Restatement § 122 provides the framework for analyzing a waiver of a conflict of interest under the Restatement:

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer’s representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.

(2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

(a) the representation is prohibited by law;
(b) one client will assert a claim against the other in the same litigation; or
(c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

As with Model Rule 1.7, “informed consent” is the principal test for evaluating the effectiveness of a client’s waiver. However, while the Model Rules establish a balancing test of many factors for determining whether different types of advance waivers may be effective, Comment (d) to Restatement § 122 provides a simpler two-part test for determining whether a “general” advance waiver is effective.

A general advance waiver under Comment (d) is not enforceable unless the client (i) “possesses sophistication in the matter in question” and (ii) “has had the opportunity to receive independent legal advice about the consent.” While the Restatement
formulation is simpler than the multi-factor test of the Model Rules, there is still a great deal of ambiguity. The Restatement does not provide any guidance as to what constitutes “sophistication in the matter in question.” It is also unclear whether Comment (d) requires the client to have actually received independent legal advice about the consent or merely to have had the opportunity to obtain such advice. Finally, like the Model Rules, the Restatement is silent as to whether a general advance waiver for a substantially related matter can ever be effective, and again the lawyer's duty as to confidentiality must be considered. Restatement, § 60.

C. Texas Disciplinary Rules of Professional Conduct, Rule 1.06.

TDRPC, Rule 1.06 provides the framework for analyzing a waiver of a conflict of interest under Texas law:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in paragraph (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

While the TDRPC do not directly address the effectiveness of advance waivers, a unique feature of the Texas conflict rules may obviate the need for advance waivers, at least in instances where the matters at issue are not substantially related. Texas conflict rules are unique in that direct adversity to a current client is not necessarily considered a conflict of interest so long as the matter at issue is not substantially related to the representation.

Much like Model Rule 1.7 and Restatement § 122, Rule 1.06 generally provides that a lawyer may not represent conflicting interests without informed consent from each affected client. However, Rule 1.06 diverges significantly from the Model Rules and the Restatement by incorporating a substantial relationship test into the analysis of what constitutes a conflict. A lawyer is generally prohibited from representing a person if the representation “involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm,” but he may take the representation if each affected client consents to such representation.

While this rule has been applied by Texas courts (see In re Southwestern Bell Yellow Pages, Inc., 141 S.W.3d 229 (Tex App. 2004)), the Fifth Circuit has declined to apply the Texas rule in the context of a motion to disqualify based on direct adversity, holding that “[m]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law.” (see In re Dresser Indus., Inc., 972 F.2d 540 (5th Cir. 1992), at 543).

Also, it should be noted that two committees have undertaken a review of Rule 1.06 and have submitted proposed revisions to Rule 1.06 to the Texas Supreme Court. In the proposals of both the State Bar of Texas Committee on Disciplinary Rules of Professional Conduct and the Texas Supreme Court Task Force the “substantially related matter” element has been removed from the conflict analysis (see Appendices 5
and 6). TDRPC Rule 1.05 set outs the confidentiality requirements applicable to Texas lawyers.

V. WITHDRAWAL

Even after an advance waiver has been obtained, a lawyer’s withdrawal from representation of one or more clients may be required in certain circumstances. An advance waiver can be rendered ineffective by either a material change of circumstances surrounding the waiver, or a revocation of the waiver by the client. Comment 22 to Model Rule 1.7 states that an advance waiver will become ineffective “if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).” Similarly, Comment (f) to Restatement § 122 provides that “if a material change occurs in the reasonable expectations that formed the basis of a client’s informed consent, the new conditions must be brought to the attention of the client and a new informed consent obtained.”

The second way in which an advance waiver may be rendered ineffective is through a revocation of consent by a client. Comment 21 to Model Rule 1.7 states that the client “may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time.” However, revocation of consent by a client does not necessarily mean that a lawyer must withdraw from representing other clients. According to Comment 21, whether or not a lawyer must withdraw “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.”

Like Comment 21 to Model Rule 1.7, Comment (f) to Restatement § 122 provides that a client may at any time revoke consent to conflicts of interest. As with Comment 21, whether or not a lawyer may continue to represent other clients depends on a number of factors, including “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.”

One potential way to avoid future disputes over whether the lawyer may continue representing other clients following a revocation is to include a provision addressing this point within the waiver itself (see D.C. Bar Legal Ethics Committee Opinion 317, dated November 19, 2002 - “We reiterate that an advance agreement can avoid many, if not most, uncertainties surrounding repudiation of a conflict waiver. Such an agreement could specify, for example, the effect of repudiation upon such aspects of the matter as the lawyer’s right to continue representing other clients.”)

This approach is supported by Comment (f) to Restatement § 122 which notes that where a client has “reserved the prerogative of revoking consent, that agreement controls the lawyer’s subsequent ability to continue representation of other clients.”

VI. EXAMPLES

Several example advance waiver provisions are included in the appendices to this paper:

• Appendix 6 is the sample waiver form from the Texas Real Estate Forms Manual;
• Appendices 7 and 8 are sample advance waiver provisions for larger firms;
• Appendix 9 is the sample advance waiver provision from Opinion 309;
• Appendix 10 is a sample advance waiver provision from D.C. Bar Legal Ethics Committee Opinion 317 (2002), which explicitly allows a lawyer to continue representing other clients following revocation of an advance waiver;
• Appendices 11 and 12 are sample advance waiver provisions from the 2006 NY Bar Opinion to be used for blanket advance waivers where substantially related matters are not included in the waiver; and
• Appendix 13 is a sample advance waiver provision from the 2006 NY Bar Opinion to be used for advance waivers where substantially related matters are included in the waiver.

VII. CONCLUSION

Given recent trends, it seems likely that law firms will continue to grow and corporate clients will continue to use multiple law firms for their legal work. Advance waivers serve a vital role in making sure that the resulting tangle of conflicts of interests will not unnecessarily dissuade lawyers from taking on new clients. Advance waivers also ensure that clients will have access to counsel of their choice. Recent developments under the Model Rules and the Restatement, along with many bar ethics opinions reflect a clear trend towards the recognition and enforcement of advance waivers.

However, the standards which determine whether an advance waiver will be enforceable are still vague, and a waiver that is ultimately held to be unenforceable is not worth the paper it is (hopefully) written on. If a client contests the validity of an advance waiver, the burden will be on the lawyer to prove that the waiver represented the “informed” consent of the client at the time it was provided, as per the standards set forth under the Model Rules, the Restatement and the
applicable local ethics rules. To that end, the lawyer drafting an advanced waiver should do the following:

- memorialize the waiver in writing;
- include as much detail as possible and clearly lay out the potential risks to client in granting the waiver;
- advise the client to have other counsel advise as to the effect the waiver (or, if that is not feasible, at least reference that the client was afforded the opportunity to consult other counsel in the waiver);
- include a provision specifically stating that the lawyer may continue to represent other clients following a revocation by the client of the advanced waiver; and finally,
- if the waiver is intended to apply to substantially related matters, make this explicit.
APPENDIX 1

Model Rule 1.7 and Comments 21 and 22

Rule 1.7 Conflict Of Interest: Current Clients
(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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(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

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

Selected Comments to Model Rule 1.7
Revoking Consent
[21] 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.

Consent to Future Conflict
[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such 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).
APPENDIX 2

Restatement §§ 121 and 122 and Comments (d) and (f) to § 122

§ 121. The Basic Prohibition Of Conflicts Of Interest

Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

§ 122. Client Consent To A Conflict Of Interest

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.

(2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

(a) the representation is prohibited by law;
(b) one client will assert a claim against the other in the same litigation; or
(c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Selected Comments to Restatement § 122

(d) Consent to future conflicts. Client consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. 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. A client's informed consent to a gift to a lawyer (see § 127) ordinarily should be given contemporaneously with the gift.

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.

(f) Revocation of consent through client action or a material change of circumstances. A client who has given in-formed consent to an otherwise conflicted representation may at any time revoke the consent (see § 21(2)). 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 be-cause 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 rep-resented concurrently with another (see Topic 3) 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 (see Comment (g)(iii) hereto), 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 (see § 121, Comment e).

A client who has given informed consent to be represented as a joint client with another would be justified in revoking the consent if the common lawyer failed to represent that client with reasonable loyalty (see Comment h hereto). The client would also be justified in revoking consent if a co-client materially violated the express or implied terms of the consent, such as by
abusing the first client's confidential information through disclosing important information to third persons without justification. Improper behavior of the other client or the lawyer might indicate that one or both of them cannot be trusted to respect the legitimate interests of the consenting client.

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.

The terms of the consent itself can control the effects of revocation of consent. A client's consent could state that it is conditioned on the client's right to revoke consent at any time for any reason. If so conditioned, the consent would cease to be effective if the client exercised that right.
APPENDIX 3

TRDPC Rule 1.06

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

   (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

   (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

   (1) the lawyer reasonably believes the representation of each client will not be materially affected; and

   (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.
APPENDIX 4

Committee on Disciplinary Rules of Professional Conduct
Proposed Revision to TRDPC Rule 1.06 and Rule 1.07

Rule 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not, even with informed consent:

   (1) knowingly represent opposing parties in the same matter before a tribunal;

   (2) represent a client in a matter when the lawyer knows or reasonably should know that the lawyer’s representation of the client in that matter is or will be both materially and adversely limited by that lawyer’s responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer;

   (3) represent two or more clients in the same matter if the proposed representation would violate Rule 1.07.

(b) A lawyer may represent a client even when the lawyer knows or reasonably should know that the lawyer’s representation of the client in that matter is or likely will be limited by that lawyer’s responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer, only if:

   (1) the representation does not violate Rule 1.07;

   (2) the lawyer reasonably believes that the limitation on the lawyer’s personal representation is not both material and adverse; and

   (3) the client gives informed consent.

(c) If a lawyer has accepted representation in violation of this Rule, or if a representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(d) While lawyers are affiliated 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 this Rule, unless the prohibition is based on a personal interest of the prohibited lawyer, and the affiliated lawyer reasonably believes that the representation of the client will not be materially and adversely limited by the personal interest of the prohibited lawyer.

Rule 1.07 Representing Multiple Clients in A Matter.

(a) A lawyer shall not undertake or continue to represent two or more clients in a matter if the proposed representation would violate this rule or any other of these rules.

(b) A lawyer shall not undertake or continue to represent two or more clients in a matter unless:
Drafting Advance Waivers Of Conflicts Of Interest

Chapter 4.1

(1) the lawyer reasonably believes that:

(i) the representation does not violate Rule 1.06;

(ii) the clients can agree among themselves to a resolution of any issue concerning the matter;

(iii) each client is capable of understanding what is in that client’s best interest and making informed decisions;

(iv) the lawyer can deal impartially with each of the clients; and

(v) multiple representation is unlikely to result in material prejudice to the interests of any of the clients; and

(2) prior to undertaking the representation, or as soon as practicable thereafter, the lawyer discloses to the clients in writing the following aspects of joint representation in the matter:

(i) that the client might gain some advantages if represented by separate counsel;

(ii) that the lawyer cannot serve as an advocate for one client in the matter against any of the other clients, but instead must assist all of them in pursuing their common purposes, as a consequence of which each must be willing to make independent decisions without the lawyer’s advice concerning whether to agree to any proposed resolution of any issues concerning the matter;

(iii) that the lawyer must deal impartially with each of the clients;

(iv) that information received by the lawyer or by any affiliated lawyer or firm from or on behalf of any jointly represented client concerning the matter may not be confidential as between the clients;

(v) that the lawyer will be required to disclose information concerning the matter to any jointly represented client if the lawyer knows that information would likely materially affect the position of that client, even if requested by another jointly represented client not to do so;

(vi) that the lawyer will be required to correct any false or misleading statement or omission concerning the matter made by or on behalf of any jointly represented client, if the lawyer knows failure to do so would likely materially affect the position of any client, even if requested by another jointly represented client not to do so;

(vii) that the lawyer may not be able to continue representing any of the clients if discharged by any one of them or if the lawyer is required to withdraw from representation under these rules; and

(viii) that while the representation of all clients by a single lawyer or firm could expedite handling of the matter and reduce associated attorneys’ fees and expenses, it also could result in delays and increased attorneys’ fees and expenses; and

(3) the lawyer obtains each client’s informed consent to the representation after making the determinations required by subparagraph (b)(1), and as soon as reasonably practicable after making the disclosures required by subparagraph (b)(2).

(1) the duty to disclose information described in subparagraph (b)(2)(v) may be waived by all clients’ informed consent that the lawyer will keep mutually agreed upon specified information confidential,
and

(2) the lawyer may rely on this informed consent only if a disinterested lawyer would reasonably conclude that all clients could make adequately informed decisions about the matter without having the information otherwise required to be disclosed under subparagraph (b)(2)(v).

(d) A lawyer representing multiple clients in a matter;

(1) must withdraw from representing each client in the matter if the lawyer, for whatever reason, will not make disclosures required in subparagraph (b)(2)(v), unless the failure to make such disclosures is permitted by paragraph (c);

(2) must withdraw from representing each client in the matter if the lawyer, for whatever reason, will not make disclosures required in subparagraph (b)(2)(vi).

(e) A lawyer shall not represent a client in a matter when the lawyer knows or reasonably should know that an affiliated lawyer is representing another client in the same matter, and that a single lawyer could not represent those clients without violating Rule 1.06(a) and (b).

(f) When a lawyer represents multiple clients pursuant to a court order or appointment, and the court orders or permits the lawyer to conduct the representation in accordance with standards that differ from those set out in paragraphs (a)-(e), the lawyer may comply with those different standards notwithstanding this rule.
APPENDIX 5

Texas Supreme Court Task Force
Proposed Revision to TRDPC Rules 1.06

Rule 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) Except as otherwise provided in paragraph (c), 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.

(c) Notwithstanding the existence of a concurrent conflict of interest under paragraph (b), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(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

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

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Rule 1.07. Representing Multiple Clients in A Matter.

(a) A lawyer shall not undertake or continue to represent two or more clients in a matter, whether or not the matter involves some other person not represented by that lawyer, if the proposed representation would violate this Rule or any other of these rules, including Rule 1.06.

(b) A lawyer shall not undertake or continue to represent two or more clients in a matter unless:

(1) the lawyer reasonably believes that:
(i) the clients can agree among themselves to a resolution of any issue concerning the matter;

(ii) each client is capable of understanding what is in that client’s best interests and making informed decisions, concerning whether and, if so, to what extent to forego those interests if the lawyer conducts the representation in accordance with this Rule;

(iii) the lawyer can deal impartially with each of the clients; and

(iv) multiple representation poses little risk of material prejudice to the interests of any of the clients; and

(2) prior to undertaking the representation or as soon as practicable thereafter, the lawyer discloses and consults with the clients concerning the following aspects of joint representation in the matter:

(i) that the client might gain or lose some advantages if represented by separate counsel;

(ii) that the lawyer cannot advocate for any of the clients in the matter against any other client in the matter;

(iii) that the lawyer must deal impartially with each of the clients;

(iv) that, as between the clients, information received by the lawyer or by any affiliated lawyer or firm from or on behalf of any jointly represented client concerning the representation is not confidential and may be disclosed even over the objections of some of the clients; and

(v) that when a lawyer withdraws from representing one or more clients, the lawyer may thereafter continue to represent any remaining client in the matter if permitted by these rules or consented to in writing.

(3) the lawyer obtains each client’s informed written consent to the representation after making the determinations called for by subparagraphs (b)(1) and as soon as reasonably practicable after making the disclosures called for by subparagraph (b)(2).

(c) A lawyer representing two or more clients in a matter shall, with respect to that matter:

(1) not advocate on behalf of any of the clients against any other of those clients;

(2) deal impartially with each of the clients.

(d) If a lawyer is prohibited from undertaking or continuing a representation of two or more persons in a matter, no lawyer or firm affiliated with that lawyer may do so.

(e) A lawyer may represent two or more clients in a matter in accordance with standards that differ from paragraphs (a)-(d) if:

(1) the multiple clients either lack legal capacity to retain a lawyer or are persons who are unknown, unascertained, or not yet in being;

(ii) the lawyer represents those clients before a tribunal pursuant to a valid appointment; and

(iii) the lawyer complies with subparagraphs (b)(1)(iii) and (b)(1)(iv) in conducting the multiple representation;

or

(2) the lawyer represents multiple parties involved in a class action, and
(i) the multiple parties are involved, the representation of those parties complies with paragraphs (b) and (c) of this Rule; and

(ii) the lawyer otherwise conducts the representation in accordance with all statutes, rules, and court orders applicable to the class action.
APPENDIX 6

Form – Advance Waiver from the Texas Real Estate Forms Manual

[Name and address of prospective client]

Re: [describe transaction]

[Salutation]

I would like to express my appreciation for the opportunity to represent [name of corporation] in connection with [describe transaction]. However, before I can serve as your counsel, it is important that you have a clear understanding of a potential ethical conflict that could exist in this matter. If you have any questions about any matter in this letter, please give me a call.

[Describe potential conflict, e.g., Our firm has decided not to represent any clients with an adverse position to First Local Bank or a related party because we represent First Local Bank. We do not believe a borrower from First Local Bank is in an adverse position, and I assure you that we will represent your interests to the very best of our abilities. But if you should decide to sue the bank, our firm would not be able to represent you. Of course, we would not represent the bank in any matter adverse to you.]

Please give careful thought to the matter discussed in this letter and respond in the space below.

Sincerely yours,

[Name of attorney]

☐ I consent to the representation subject to the foregoing limitation.

☐ I do not consent to the representation.

[Name of prospective client]
Date:
APPENDIX 7

Form – Advance Waiver Provision for a Large Firm (#1)

1. **Limitation on Scope of Engagement.** Unless specifically retained, our representation of ________________ does not include representation of any of its parents, subsidiaries, affiliates, stockholders, officers or directors (“ _______ Affiliates”). In short, the Firm serves as legal counsel for ______________, but not for any of _______ Affiliates. Accordingly, it is understood and agreed that any representation by the Firm of another client adverse to any _______ Affiliate does not constitute a conflict of interest and does not require the consent of ______________.

2. **Advance Waiver of Unrelated Conflicts of Interest.** [Firm] is a large law firm with offices in various locations throughout the United States, and with related practice entities located in Europe, Asia, Africa and Australia. We may currently or in the future represent one or more other clients in unrelated matters or transactions in which the interests of ________________ or those of the ________________ Affiliates are adverse to those other clients. For example, we may represent other clients in corporate matters involving or concerning ________________ or the ________________ Affiliates (including mergers and acquisitions, takeovers, and other change-in-control issues and transactions), or in commercial transactions with ________________ or the ________________ Affiliates (including preparation and negotiation of agreements, licenses, leases, loans, securities offerings or underwritings), or in other matters and transactions involving ________________ or the ________________ Affiliates. We may also represent other clients on legislative or policy matters, or in administrative proceedings that may involve or affect ________________ or the ________________ Affiliates. This will confirm that ________________ waives all such conflicts of interest, and consents to the Firm’s current and future representation of such other clients in any of such matters without the need for any further notice or consent from ________________ even though ________________’s interests are adverse, provided that such matters are not the same, or substantially related to, a matter in which we represent ________________. We do not view this advance waiver and consent regarding unrelated matters to permit us to institute litigation against ________________ nor to permit unauthorized disclosure or use of any ________________’s confidential or privileged documents or information which ________________ has provided to us as ________________’s lawyers.
APPENDIX 8

Form – Advance Waiver Provision for a Large Firm (#2)

We understand and agree that this is not an exclusive agreement, and you are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client with interests materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with yours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.
APPENDIX 9

Form – Advance Waiver Provision from Opinion 309 (2001)

Sample Advance Waiver of Conflicts of Interest
Below is a sample of text for an advance waiver of conflicts of interest. The committee does not view this text as 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.”
You have the right to repudiate this waiver should you later decide that it is no longer in your interest. Should the conflict addressed by the waiver be in existence or contemplated at that time, however, and should we or the other client(s) involved have acted in reliance on the waiver, we will have the right—and possibly the duty, under the applicable rules of professional conduct—to withdraw from representing you and (if permitted by such rules) to continue representing the other involved client(s) even though the other representation may be adverse to you.
APPENDIX 11

Form – Advance Waiver Provision from the 2006 NY Bar Opinion
Blanket Advance Waiver Not Including Substantially Related Matters (#1)

Other lawyers in the Firm currently do [XXX] work for [existing client] and its affiliates, and expect to continue to do such work. In order to avoid any misunderstanding in the future, we ask that you confirm that the Company agrees to waive any conflict of interest which may be deemed to arise as a result of such representation. Please also confirm that neither the Company nor any of its affiliates will seek to disqualify our Firm from representing [existing client] or its affiliates in existing or future [XXX] or other matters.

Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliate in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects, to a large number of clients both in the United States and internationally, some of whom are or may in the future operate in the same area(s) of business in which you are operating or may operate. (A summary of our current practice areas and the industries in which we represent clients can be found on our web site at www.XXX.com.) You acknowledge that you have had the opportunity to consult with your company’s counsel [if client does not have in-house counsel, substitute: “with other counsel”] about the consequences of this waiver. In this regard, we have discussed with you and you are aware that we render services to others in the area(s) of business in which you currently engage.
APPENDIX 12

Form – Advance Waiver Provision from the 2006 NY Bar Opinion
Blanket Advance Waiver Not Including Substantially Related Matters (#2)

This firm is a general service law firm that [insert client name here] recognizes has represented, now represents, and will continue to represent numerous clients (including without limitation [the client’s] or its affiliates’ debtors, creditors, and direct competitors), nationally and internationally, over a wide range of industries and businesses and in a wide variety of matters. Given this, without a binding conflicts waiver, conflicts of interest might arise that could deprive [the client] or other clients of the right to select this firm as their counsel.

Thus, as an integral part of the engagement, [the client] agrees that this firm may, now or in the future, represent other entities or persons, including in litigation, adversely to [the client] or any affiliate on matters that are not substantially related to (a) the legal services that [this firm] has rendered, is rendering, or in the future will render to [the client] under the engagement and (b) other legal services that this firm has rendered, is rendering, or in the future will render to [the client] or any affiliate (an “Allowed Adverse Representation”).

[The client] also agrees that it will not, for itself or any other entity or person, assert that either (a) this firm’s representation of [the client] or any affiliate in any past, present, or future matter or (b) this firm’s actual, or possible, possession of confidential information belonging to [the client] or any affiliate is a basis to disqualify this firm from representing another entity or person in any Allowed Adverse Representation. [The client] further agrees that any Allowed Adverse Representation does not breach any duty that this firm owes to [the client] or any affiliate.
APPENDIX 13

Form – Advance Waiver Provision from the 2006 NY Bar Opinion
Advance Waiver Including Substantially Related Matters

You also agree that this firm may now or in the future represent another client or clients with actually or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without waiving the generality of the previous sentence, you agree that we may represent [to the extent practicable, describe the particular adverse representations that are envisioned, such as “other bidders for the same asset” or “the lenders or parties providing financing to the eventual buyer of the asset”].

This waiver is effective only if this firm concludes in our professional judgment that the tests of DR 5-105 are satisfied. In performing our analysis, we will also consider the factors articulated in ABCNY Formal Opinion 2001-2, including (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information-control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.
APPENDIX 14

Suggested Further Reading:

- *All’s OK Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, Lawrence J. Fox, 29 HOFSTRA L. REV. 701 (2001)
- *Honoring Choice by Consenting Adults: Prospective Client Waivers as a Mature Solution to Ethical Gamesmanship – A Response to Mr. Fox*, Jonathan J. Lerner, 29 HOFSTRA L. REV. 971 (2001)
- *Proposed Changes in the State Bar Disciplinary Rules Which Will Affect Real Estate Lawyers: Conflicts of Interest and Confidential Information*, James H. Wallenstein, Presented: University of Texas Mortgage Lending Institute (September 28, 2006)