A STEP IN TIME: HOW A TRUSTED ADVISOR HANDLES CLIENT CONFLICTS

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Increasingly, conflicts are at the forefront of client representation. This article will address potential conflicts throughout the stages of representation of clients, all with their own unique needs and desires. Using a hypothetical situation with facts similar to those frequently faced by many trusted real estate lawyers, and following the guidance of the ABA Model Rules of Professional Conduct, this article

will highlight potential conflicts arising throughout the course of a client relationship—at the outset, throughout the representation and at the end—and will address differing treatment of current and former clients, and alternative approaches to conflicts and waivers.

Hypothetical

You have been approached by Miranda Priestly, the former Editor-in-Chief of a fashion magazine, regarding her new LLC, Trendy Retailer LLC (Trendy Retailer). Ms. Priestly is an existing client of your firm's employment law section; she is suing her former employer for Title VII violations, as well as for an injunction against the non-compete clause in her employment contract.

Ms. Priestly is the managing member of Trendy Retailer. Trendy Retailer will specialize in mid-price teens' and women's fashions, initially with storefronts in shopping malls in several large cities. Trendy Retailer wishes to lease space in an existing shopping mall in your city owned by Large Landlord, LLC (Large Landlord). Your conflicts check reveals that you and your firm previously represented Large Landlord during the development of the mall, but your representation ended 10 years ago, after all certificates of occupancy and initial leases were finalized. Since then, neither you nor your firm has done any legal work for Large Landlord.

You know from reading the financial press that, like many owners of shopping malls, Large Landlord has seen the demand for retail space decline in recent years. Nationwide, Large Landlord has sold a number of malls that were no longer economically viable; however, the mall in your city appears to be financially stable. It is probable, however, that if Large Landlord's mall is put on the market, your firm will be engaged to represent Large Landlord in the sale.

Prospective versus current or former client

Although Ms. Priestly is a current client of your law firm, she is now seeking representation in a different matter on behalf of Trendy Retailer, the LLC of which she is the managing member. Therefore, Trendy Retailer is a prospective client, and the obligation of the lawyer is to determine whether its representation is permitted given the obligations of the firm to current and former clients, including Ms. Priestly and Large Landlord.

This determination requires analysis of Model Rules of Professional Conduct (Rule or Rules) 1.7,[1] 1.8,[2] and 1.9.[3]

At this point, you must consider the representation of Trendy Retailer in light of the representation of the current client, Ms. Priestly, and the representation of the former client, Large Landlord.

First, the representation of new client, Trendy Retailer, does not appear to give rise to a conflict with Ms. Priestly, as there is no directly adverse claim between the two.[4] Nor does there appear to be a significant risk that the representation of one of these clients will be materially limited by the lawyer's responsibilities to either of them or to another client.[5]

However, undertaking the representation of Trendy Retailer does give rise to consideration of Rule 1.13—Organization as a Client. You must make sure that Ms. Priestly understands that, if you undertake representation in this matter, you will be representing Trendy Retailer and not her individually.[6] Given the history and structure of Trendy Retailer, it appears, not surprisingly, that Ms. Priestly is using it for her own individual career purposes. Therefore, there is a danger that she will not understand that you will be representing the entity in the current matter. At the outset of representation of an entity, it is crucial that the constituents of the entity understand that they are not being represented individually unless that is, in fact, the case. The interests of the other members of Trendy Retailer are discussed hereinafter.

Second, you must determine whether Large Landlord is a current or former client and, in either case, whether your representation of it creates a conflict of interest with your representation of Trendy Retailer. The Rules do not provide any guidance about how to tell whether a client has become a

"former client." You do not appear to be performing any services currently for Large Landlord; all the services related to the initial opening of the mall appear to be completed. But consider whether Large Landlord believes that your representation continues and has the expectation that the same firm that drafted leases continues representation with respect to the leases. If the organization would expect you to provide representation with respect to the leases, then you will need to explore current client conflicts under Rule 1.7. Surely, negotiation of a lease between landlord and tenant, both of whom are clients of the firm, results in a conflict as the representation is directly adverse.[7] Nonetheless, in some instances, both the landlord and tenant client may wish to have representation from the same law firm. If the lawyer reasonably believes that competent and diligent representation can be provided to each affected client, and each client waives the conflict, then both clients can be represented by the same law firm.[8]

In a search of your law firm's document management system, however, you have found a "termination of representation" letter, an excerpt of which is as follows:

> John Smith
> VP-Development Large Landlord
> 400 Mall Boulevard
> Artown, TN 129453
>
> RE: Artown Mall
>
> Dear Mr. Smith:
>
> As you know, our engagement to represent Large Landlord in connection with the development and leasing up of the Artown Mall has been completed as the development of the mall is finished and leases for all units within Artown Mall have been negotiated, drafted, and executed. Accordingly, we are enclosing our final bill for this matter. With this bill, our engagement for this particular matter is now ended.
>
> Our Firm and I appreciated and enjoyed representing you in this engagement. We hope we will have another opportunity to serve as your counsel in the future....

Former clients

Therefore, considering the history of this relationship and the foregoing correspondence, Large Landlord will be treated as a former client, and Rule 1.9 must be analyzed to determine whether the law firm can undertake the representation of Trendy Retailer.

Given that Large Landlord is a former client, the first issue will be whether you are representing Trendy Retailer in "the same or a substantially related matter" as the matter in which you represented Large Landlord. A new lease is not the same matter, but is the drafting and negotiation of a new lease substantially related to your firm's prior representation?[9] "Substantial relationship" is measured not by the label affixed to the matter (such as "real estate matter," "mall lease," etc.) but by whether there 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."[10] Here, the law firm undoubtedly acquired information from Large Landlord, including information related to original mall tenants and the terms of those original leases as well as Large Landlord's standard lease provisions. Did the firm also acquire the kind of confidential information that would cause a lease negotiation 10 years later to be substantially related to the representation of Large Landlord in the development and initial leasing up of the mall? If the law firm can conclude that the negotiation and drafting of a new lease is not the same matter and is not substantially related to the original leasing, then the law firm can undertake the representation of this prospective tenant, Trendy Retailer.

Information about a client's general business practices is typically not considered confidential information. "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."[11] Here, your representation of Trendy Retailer will require negotiating a lease with Large Landlord. In your prior representation, you undoubtedly learned about Large Landlord's general policy regarding lease terms; however, you probably did not learn anything that would apply uniquely or specifically to the Trendy Retailer lease. Similarly, "[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."[12] If Large Landlord's practices with respect to lease terms, such as the price per square foot, have been publicly disclosed, or disclosed in prior litigation, that information would not result in a substantial relationship. Therefore, the Trendy Retailer matter is probably not substantially related to the prior representation of Large Landlord.

Second, if the matters were substantially related, would Trendy Retailer's interests be materially adverse to the interests of Large Landlord? The Rules do not define material adversity, but the interests of opposing parties to a transaction such as buyer and seller, or landlord and lessee, are generally thought of as adverse. Therefore, if the representations of Large Landlord and Trendy Retailer are substantially related, they would be materially adverse, and the consent of Large Landlord would have to be obtained in order to represent Trendy Retailer.

In *State ex rel. Wal-Mart Stores, Inc. v. Kortum*, the court refused to disqualify counsel for the plaintiff in a slip-and-fall lawsuit against Wal-Mart, even though members of the same firm had previously defended Wal-Mart in four personal injury suits, including one slip-and-fall case.[13] The firm had gained information about Wal-Mart's "general defense strategy, internal policies, and the conduct of similar lawsuits." However, the court noted that the defense of "relatively uncomplicated slip-and-fall actions are generally commonplace and routine," and that the firm had not acquired "any specialized knowledge of [Wal-Mart's] defense strategies or any other discovery advantages." Because none of the information gained by the firm in their prior representation "could be used against Wal-Mart in the instant case," the matters were not "substantially related" within the meaning of Rule 1.9(a).

Positional or issue conflict

One additional consideration in representation of Trendy Retailer in light of the representation of former client Large Landlord is positional or "issue" conflict. Under Rule 1.7(a)(2), a lawyer cannot undertake to represent a client if there exists a significant risk that the representation of a client will be materially limited by a lawyer's responsibilities to another client. Rule 1.7(b)(3) allows the representation if the other factors are met so long as the lawyer does not assert a claim against one client by another client in a proceeding before a tribunal. But Rule 1.7(b)(3) has sometimes been understood to raise the possibility of a positional conflict that must be examined.

Comment 9 to Rule 1.7 touches upon a positional conflict for lawyers who are placed in differing roles on one sole issue.[14] Comment 9 states that the duty of loyalty and independence may be materially jeopardized by duties to former clients. The fear is that a lawyer will not zealously represent the new client in light of its interest in maintaining a positive relationship with the former client. Rule 1.1 requires the lawyer to employ reasonable care and skill and use a best judgment standard to represent all clients. Loyalty and independence concerns are more identifiable in the litigation context, as addressed in Comment 24 to Rule 1.7,[15] but similar concerns arise in transactional contexts as well.

Although Rule 1.7 prohibits certain differing positions as related to a tribunal, lawyers must constantly be aware of positional conflicts in all representations regardless of whether a tribunal is involved. In the instant case, the lawyer must examine whether any information or positions taken on behalf of Large Landlord would materially limit the ability to represent Trendy Retailer. The lawyer must be able to represent Trendy Retailer loyally and zealously.

During the initial client interview with Ms. Priestly, you learn the following facts: Using the services of another firm, she formed Trendy Retailer,

contributing all the operating capital herself and using her connections in the fashion industry to secure suppliers. The limited partners are her former staff members who left the publisher when she did, outraged by the treatment Ms. Priestly received. They have contributed no capital but are providing services to Trendy Retailer. Ms. Priestly sees Trendy Retailer as a stop-gap measure; her ultimate goal is to win back her job through the Title VII lawsuit, or to invalidate the noncompete clause and go to work for a competing fashion magazine. Nevertheless, Ms. Priestly indicates that Trendy Retailer wishes to enter into a long-term lease for a large space near one of the mall's anchor tenants. Trendy Retailer is also willing to pay rent near the top of the market.

Representation of an entity but not the individual owners

In light of this information, it appears that there is a potential conflict of interest between Ms. Priestly and the other members of Trendy Retailer. Because she has put in all the capital and intends to dissolve Trendy Retailer if she gets her old job back or succeeds in invalidating the noncompete clause, the other members of Trendy Retailer may be left high and dry if Ms. Priestly pulls out. Because you would be representing the entity, and not any individual member, in this matter, the conflict is only potential. However, it can certainly ripen into an actual conflict among the members of Trendy Retailer. Therefore, if you undertake the representation, it is crucial that you also inform the other members of Trendy Retailer that you represent the entity and not them personally in this matter.

Rule 1.13 addresses representation of an organization as the client, and the Comments to Rule 1.13 provide guidance for such representation.[16] In most instances, a lawyer should not question decisions for an organization made by its constituents even if utility of the decisions is doubtful.[17] The lawyer may have to take some action to protect the organization, ranging from discussion with the constituent who may potentially harm the organization to referral to a higher authority to assist in protecting the organization.[18] The lawyer is not a decision-maker or a judge of decisions of an organization's constituents so long as those decisions are not illegal and will not materially harm the organization. Regardless, Paragraph (b) of Rule 1.13 requires that the lawyer act if the lawyer knows that an action of a constituent will likely result in substantial injury to the organization. Therefore, any action taken to further the personal goals of Ms. Priestly could require action on the part of a lawyer and may present conflict issues in the concurrent representation of the organization and Ms. Priestly. The law firm must understand that ethical duties should be examined at every step of the representation.[19]

A broader consideration is whether the law firm wants to undertake this matter on behalf of Trendy Retailer with the conflicts appearing thus far. The knowledge of Large Landlord's development and potential future representation of Large Landlord may place the firm in an untenable position in its representation of Trendy Retailer. The knowledge that Ms. Priestly could have some reservations devoting her time solely to promoting the interests of Trendy Retailer is also a potential conflict as your representation involves Trendy Retailer. The law firm must be on alert that if this representation is undertaken, a constant check of the ethical obligations must occur at every stage of the representation. At this point, it is still possible for the law firm to walk away from the representation due to the potential conflict.

Engagement letters

Your firm agrees to undertake the representation and the following engagement letter is prepared:

> Miranda Priestly Trendy Retailer, LLC
> 100 Fancy Street
> Apartment 1902
> Artown, TN 129453
>
> RE: Retention of Law Firm
>
> Dear Ms. Priestly:
>
> Please allow this to confirm that you have selected our law firm to act as your legal counsel in connection with advice on leasing retail

> space in Large Landlord's shopping mall. Please review this letter which serves to confirm the scope of our firm's representation and the fee arrangement that we have reached. It is appropriate and prudent for this agreement to be in writing....

At first glance, this engagement letter requires some revisions to ensure that the law firm does not find itself in opposition to its ethical duties. First, this letter contains an ambiguity as to the exact identity of the client. In the address section, the letter is addressed to Ms. Priestly and Trendy Retailer. The letter should be solely addressed to Trendy Retailer, attention Ms. Priestly, and in the first sentence, should confirm that the law firm has been selected 'to act as Trendy Retailer's legal counsel." By doing so, potential confusion of whether Ms. Priestly or Trendy Retailer is the client can be avoided. Second, the scope of services is overly broad. The services rendered should be addressed in very specific terms. The services do not include "advice" on leasing, but rather the drafting and negotiation on behalf of Trendy Retailer of a (multi-year, single-year?) lease agreement with one specific party—Large Landlord. Rule 1.2 allows for a lawyer to limit the scope of representation if the limitation is reasonable, and the client gives informed consent. Additionally, by noting again in the "description of services" portion of the letter that the drafting and negotiation is on behalf of Trendy Retailer, confusion again can be avoided. A statement that the client is Trendy Retailer rather than Ms. Priestly individually should also be considered.

Use of information

One issue that concerns you is that Trendy Retailer's business model appears to compete with that of another mall lessee, Novel Fashions, Inc. (Novel). The initial leases entered into a decade ago contained exclusivity clauses for a number of the retailers, including Novel. You and your firm drafted and negotiated these initial leases. You believe that Large Landlord's acceptance of Trendy Retailer's proposal might implicate Novel's exclusivity clause.

Pursuant to Rule 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules, unless the information has become "generally known." The exclusivity clauses in the novel lease are not "generally known," and therefore you cannot reveal their potential existence.

The ABA Standing Committee on Ethics and Professional Responsibility has cautioned that simply because information has been revealed in legal proceedings or is otherwise in the public domain does not mean that such information is generally known. It has offered the following as a workable definition:

> [I]nformation is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field.[20]

Another complicating factor is this: Big Box, Inc. (Big Box) is opening a new store not far from Large Landlord's mall. You and your firm represent Adjunct Properties, Inc. (Adjunct Properties) the developer of the retail complex adjacent to the Big Box store. One of the usual tenants who would ordinarily occupy the development has gone bankrupt, and your client is looking for a new, viable retail tenant. You believe this would be an opportunity for Trendy Retailer, since Big Box's profits, and the profits of its adjacent retailers, have increased during the pandemic.

At this point, you begin to see how your current representation of Trendy Retailer might implicate your duties to your former client, Large Landlord, and your duties to a current client, Adjunct Properties, Inc. as well as to this newest client, Trendy Retailer. Obviously, Trendy Retailer is a desirable tenant due to its desire for a large space and its willingness to pay rent at the top of the market. Therefore, both your former client, Large Landlord, and your current client, Adjunct Properties, would benefit from having Trendy Retailer as a tenant. However, pursuant to Rule 1.2(a), your responsibility is to carry out the "objectives" of your client, Trendy Retailer, which appear to be obtaining a lease in Large Landlord's mall, not Adjunct Properties' complex. Nevertheless, your duty to communicate matters to the client under Rule 1.4 may require you to inform Trendy Retailer of any competing opportunities that might be more advantageous. Informing Trendy Retailer that another one of your clients has a competing space, however, might be interpreted by Trendy Retailer as advocating for the Adjunct Properties' space over the mall space.

Another issue that arises with respect to the opportunity with Adjunct Properties is whether you can tell Trendy Retailer about this opportunity at all. Rule 1.6(a) protects from disclosure "information relating to the representation" and Comment 3 emphasizes that "[t]he confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Thus, the availability of the space may be confidential information; even though the tenant's bankruptcy is public knowledge, as there is no "public records exception" to Rule 1.6(a). However, information can be revealed if the disclosure is "impliedly authorized to carry out the representation." Therefore, if the scope of the representation of Adjunct Properties includes acquiring tenants, or informing prospective tenants of vacancies, then the disclosure of the opportunity to Trendy Retailer might be impliedly authorized.

Waiver of conflicts/potential client

Given the facts regarding our former representation of Large Landlord, and our current representation of Trendy Retailer and Adjunct Properties, is there a conflict of interest as defined by Rule 1.7(a)(2)? Initially the law firm concluded that no conflict existed, but in an abundance of caution wrote this letter:

> Miranda Priestly Managing Member Trendy Retailer, LLC
> 567 Main Street
> Artown, TN 129453
>
> RE: Potential Conflict of Interest – Large Landlord
>
> Dear Ms. Priestly:
>
> This is a follow-up to our telephone call of yesterday in connection with our firm's prior representation of Large Landlord. This letter is for the purpose of memorializing our conversation.
>
> As we have discussed, approximately 10 years ago, our firm represented Large Landlord in connection with the development and leasing of the Artown Mall. As I explained, the Rules of Professional Conduct for lawyers prohibit a lawyer and his or her law firm from representing one client in the same or a substantially related matter in which the client's interest is materially adverse to the former client's interest. In this instance our representation of Trendy Retailer is not substantially related to the matters that our firm handled for Large Landlord 10 years ago, and therefore we have concluded that we may undertake your representation in compliance with those Rules of Professional Conduct. Nevertheless, we do have a duty to any former client not to reveal information regarding the representation or to use information relating to the representation to the disadvantage of the former client, and of course we would not do so. …

Waiver of conflicts/current client

The Risk Management Committee has proposed this letter seeking to obtain a conflict waiver from Trendy Retailer:

Dear Ms. Priestly:

This is in follow up to our discussion with regard to our firm's representation of Trendy Retailer as it seeks to negotiate a lease with Large Landlord for retail space in the Artown Mall. As we have discussed, you know that our firm has represented Large Landlord in the past. Although we do not currently have any open matters, we consider Large Landlord a client of the law firm. This letter is to address issues relating to our representation of Large Landlord and our potential representation of Trendy Retailer.

The Model Rules of Professional Conduct (Rules) govern the conduct of our firm's lawyers, and, under the Rules, a concurrent conflict of interest exists when the representation of one client will be directly adverse to another client. Since Large Landlord is a current client, a concurrent conflict of interest would exist if our firm were to draft and negotiate a lease on behalf of Trendy Retailer as tenant with Large Landlord as landlord.

But the Rules would permit our representation of Trendy Retailer in these circumstances so long as we reasonably believe that we would be able to provide competent and diligent representation to each of Trendy Retail and Large Landlord, and that each of you consented to the representation. We do have that reasonable belief as our representation of Large Landlord regarding leases was more than 10 years ago, and that since then, Large Landlord's in-house lawyers have been handling all leasing at the mall. Our potential representation of Trendy Retailer would entail negotiation and drafting of the lease with those in-house lawyers. In this instance, with appropriate consent our firm can represent Trendy Retailer in negotiations with Large Landlord as this lease is a different transaction from those leases we drafted and negotiated 10 years ago.

The Rules also prohibit the use of information relating to representation of a client to the disadvantage of the client. This rule is geared toward ensuring loyalty to one's clients, and to protecting confidentiality. We would not consider using any information to the disadvantage of one client in favor of another, under any circumstance, nor would we reveal confidential information relating to any client. Here, where our representation of Large Landlord was so far removed in time, it is unlikely that our firm possesses any information that could be used to the disadvantage of Large Landlord.

Before we could undertake representation of Trendy Retailer in negotiation with Large Landlord, both Large Landlord and Trendy Retailer would need to give consent to our representation. It is essential that we explain the material risks of our concurrent representation of two clients. The material risks arising here include the potential that confidential information might inadvertently be disclosed to the adverse party. Another risk is that, in any dispute that arose between Large Landlord and Trendy Retailer, our law firm would not be able to represent either party.

In order to protect against disclosure of confidential information by one client that could be used to the detriment of another client, we will take steps to ensure that the lawyers and legal assistants assigned to be working on the representation of Trendy Retailer have had no involvement in the representation of Large Landlord. We also will restrict access to any materials relating to representation of either client including our internal electronic document management system. The lawyers working on your matter will not have access to documents related to our representation of Large Landlord.

Please consider these issues, and advise whether you are willing to consent to our representation of you, in light of our relationship with Large Landlord. You may wish to consult with another lawyer on this issue, and of course, please do feel free to reach out to me if you have further questions. …

The law firm will also ask Large Landlord to waive the conflict.

All of this discussion of conflict of interest causes your firm's young risk management partner to question whether the firm was permitted to represent both Large Landlord and Adjunct Properties as current clients, given the fact that they both have an interest in attracting the same types of tenant business, and are in competition for Trendy Retailer as a tenant.

Representation of clients in economic competition

It is generally understood that material adversity does not exist when current or former clients compete economically. In *Gillette Co. v. Provost*, the plaintiff sought to prohibit one of its former in-house patent lawyers from working for a competitor.[21] The Massachusetts court concluded that "[w]ith respect to the 'material adverse' prong of Rule 1.9, representation of one client is not 'adverse' to the interests of another client, for the purposes of lawyers' ethical obligations, merely because the two clients compete economically."

Similarly, New York State Bar Association Ethics Opinion 1103 concluded that "competing economic interests do not create [a Rule 1.7 conflict, nor do they] create a 'material adverse' interest within the meaning of Rule 1.9(a)."

Thus, here the law firm does not have a Rule 1.9 conflict solely because its lawyer previously represented Large Landlord, which has economic interests adverse to the current client. Material adverseness, referred to by the *Gillette* court, "requires a conflict as to the legal right and duties of the clients, not merely conflicting or competing economic interests."[22]

That same young associate general counsel insists that we could have avoided much of the struggle with the Rules of Professional Conduct if we'd only just include this waiver of future conflicts provision in all of the firm's engagement letters:

> Our firm's lawyers practice nationally and internationally, over a wide range of industries and businesses and in a wide variety of matters. Therefore as an integral part of the Engagement, you agree that our firm may, now or in the future, represent other entities or persons, including in litigation, arbitration or other dispute resolution procedure, adversely to you or any of your affiliates on matters that are not related to: (i) the legal services that we have rendered, are rendering or in the future will render to you under this Engagement; and (ii) other legal services that we have rendered, are rendering or in the future will render to you or any of your affiliates under a separate engagement.

Advance conflict waivers

As law firms grow and are no longer limited to one region or area but are nationwide and even worldwide, the importance of waivers of future conflicts, or advance conflict waivers, continues to increase.[23] Mere consent is not enough. To be effective, consent must be informed, which requires that the client understand the conflict with sufficient clarity.[24] Most recently, the ethics of advance waivers was discussed in The Professional Lawyer.[25]

Even a general, open-ended waiver of future conflicts can be effective. For example, in *Gladerma Labs, L.P. v. Actavis Mid Atlantic LLC*, Gladerma sued generic drug company Actavis for patent infringement.[26] Gladerma filed a motion to disqualify Actavis's counsel, Vinson & Elkins (V&E), on the ground that V&E concurrently represented Gladerma in employment-related matters. After terminating its representation of Gladerma, V&E opposed the motion on the ground that Gladerma, through its general counsel, had previously signed a waiver of future conflicts. The waiver read as follows:

> 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 interest 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 ours 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.

Although this waiver was open-ended, the court held that it was not per se unenforceable. Instead, the effectiveness of the waiver must be evaluated under Rule 1.7(b), which requires that the client be given "informed consent" to the conflict, confirmed in writing.

Rule 1.0(e) defines "informed consent" as "agreement by a person to a course of conduct." In the *Gladerma* case, the court found that the waiver proposed a course of conduct, namely, the ability of V&E to represent clients with interests conflicting with Gladerma's, within the boundaries set by the waiver.

Rule 1.0(e) also requires that the agreement is effective only if "the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." In the Gladerma waiver, the material risk of consent was that V&E would represent clients with interests adverse to Gladerma, which was exactly what happened. The reasonably available alternative was to "retain any other counsel of your choosing," as explicitly noted in the waiver.

Having held that the waiver satisfied the definition of "informed consent," the court went on to consider "the extent to which the client reasonably understands the material risks that the waiver entails," as counseled by Comment 22 to Rule 1.7. The court first noted that Gladerma was "a complex, global company" that "routinely encounters legal issues and the legal system." The court also noted that Gladerma was represented by independent counsel—its in-house general counsel—in agreeing to the waiver. These two factors weighed heavily in the court's determination that the waiver was effective.

In *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.*, the California Supreme Court upheld the lower court and refused to enforce an advance conflict waiver as the consent was not "informed" within the meaning of the Rules.[27] The advance waiver in the Sheppard Mullin engagement letter was as follows:

> Conflicts with Other Clients: Sheppard Mullin ... has many attorneys and multiple offices. We may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving [you]. We undertake this engagement on the condition that we may represent another client in a matter in which we do not represent [you], even if the interests of the other client are adverse to [yours] (including appearance on behalf of another client adverse to [you] in litigation or arbitration) and can also, if necessary, examine or cross-examine [your] personnel on behalf of that other client in such proceedings or in other proceedings to which [you are] ... not a party provided the other matter is not substantially related to our representation of [you] and in the course of representing [you] we have not obtained confidential information of [yours] material to the representation of the other client. By consenting to this arrangement, [you are] ... waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations. We seek this consent to allow our Firm to meet the needs of existing and future clients, to remain available to those other clients and to render legal services with vigor and competence. Also, if an attorney does not continue an engagement or must withdraw therefrom, the client may incur delay, prejudice,

or additional cost such as acquainting new counsel with the matter.

But an advance conflict waiver was found effective in *United States v. Abdelaziz*, a criminal case alleging that the University of Southern California (USC) had been defrauded by the defendant and a college admissions consultant who bribed an administrator to admit the defendant's child.[28]

The waiver, signed by the general counsel of USC, stated "by way of preamble that Nixon represents numerous clients, 'nationally and internationally, over a wide range of industries and businesses and in a wide variety of matters'" and continues:

> Thus, as an integral part of the engagement, you agree that this firm may, now or in the future, represent other entities or persons, including in litigation, adversely to you or any affiliate on matters that are not substantially related to: (i) the legal services that this firm has rendered, is rendering, or in the future will render to you under the engagement; and (ii) other legal services that this firm has rendered, is rendering, or in the future will render to you or any affiliate (an "Allowed Adverse Representation").
>
> You also agree that you will not, for yourself or any other entity or person, assert that either: (i) this firm's representation of you or any affiliate in any past, present, or future matter; or (ii) this firm's actual, or possible, possession of confidential information belonging to you or any affiliate is a basis to disqualify this firm from representing another entity or person in any Allowed Adverse Representation. You further agree that any Allowed Adverse Representation does not breach any duty that this firm owes to you or any affiliate.

The decisions on advance conflict waivers seem to be generally consistent with Comment 22 to Model Rule 1.7,[29] which stresses the importance of explaining the risks of conflict waiver and acknowledges that more sophisticated users of legal services are more likely to be able to balance the risks involved with benefits associated with waiving any conflict.[30]

Best practices

- Universal conflicts review. Regularly circulating a list of new clients and new matters to all lawyers and staff in the office, and requiring review for possible conflicts should reveal conflicts that have not been entered into the conflicts checking system, or that exist but would not have been detected otherwise.
- Independent evaluation: When a conflict is identified, a disinterested lawyer or a conflicts committee should objectively consider whether the conflict may be waived. The judgment of the lawyer who wishes to accept the representation may be clouded by the lawyer's personal interest and therefore the conflict may be ignored or minimized.
- Non-engagement letter: If the law firm or lawyer decides that an unacceptable conflict exists, then the representation should be declined, in writing, as soon as possible. By so doing, the lawyer and the firm document that this prospective client never became a client, thus preserving the right to handle matters against the prospective client's interests in the future.
- Written conflicts waiver: If it is determined that the conflict is waivable, then a waiver of the conflict must be obtained, reduced to writing, and signed by any affected client and prospective client. The lawyer must fully and completely disclose all material aspects of the representation and the potential adverse effects of commencing or continuing the representation in light of the conflict. In addition, the lawyer should advise any affected client and prospective client that the lawyer is not representing them with respect to their decision on the proposed conflict waiver and suggest consultation with another lawyer regarding the conflict waiver. The communications to obtain a waiver should be submitted to a disinterested lawyer or conflicts committee for objective evaluation of whether the communication sufficiently discloses material aspects of the representation and the potential adverse effects.

- Standing agreements for conflict waiver: In many instances, where conflicts regularly arise, law firms and clients have a standing agreement that conflicts will be waived, such as in the situation where a law firm regularly represents lenders and borrowers, or landlords and tenants. In those circumstances, it may be possible to develop a form of conflict waiver communication that adequately discloses the conflict and documents the waiver, although lawyers should carefully consider the facts and circumstances of each matter to ensure that essential information is fully disclosed.
- Written engagement agreement. A written engagement letter should specifically identify the client or clients and detail the scope of the representation and should exclude specific areas that are not included in the representation. For example, when the law firm is retained solely to handle a real estate acquisition, the written engagement agreement should expressly confirm that the law firm is not being retained to provide advice with regard to tax liability resulting from the transaction. A detailed advance waiver identifying types of future representations that could arise and the potential adverse effects of prospective conflicts may be included in the engagement letter. Although this provides evidence of valid informed consent to the waiver, it is wise to request a specific conflict waiver any time an actual conflict arises.

Notes

1 Model Rules of Pro. Resp. R. 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.

2 Model Rules of Pro. Resp. R. 1.8: Current Clients: Specific Rules:

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. ...

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

3 Model Rules of Pro. Resp. R. 1.9: Duties to Former Clients:

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.

(a) 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

(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.

(b) 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 reveal information relating to the representation except as these Rules would permit or require with respect to a client.

4 Model Rules of Pro. Conduct R. 1.7(a)(1).

5 Model Rules of Pro. Conduct R. 1.7(b)(1).

6 Model Rules of Pro. Conduct R. 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

7 Model Rules of Pro. Conduct R. 1.7(a)(2).

8 Model Rules of Pro. Conduct R. 1.7(b). See discussion of waivers infra.

9 Model Rules of Pro. Conduct R. 1.9(a).

10 Model Rules of Pro. Conduct R. 1.9, Comment 3 ("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 represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, 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. 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.").

11 Id.

12 Model Rules of Pro. Conduct R. 1.9, Comment 8 ("However, the fact that a lawyer has once served a client does not preclude the Lawyer from using generally known information about that client when later representing another client.").

13 559 N.W.2d 496 (Neb. 1997).

14 Model Rules of Pro. Conduct R. 1.7, Comment 9.

15 Model Rules of Pro. Conduct R. 1.7, Comment 24 ("Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.").

16 Model Rules of Pro. Conduct R. 1.13: Organization as Client:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

....

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

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.

17 Model Rules of Pro. Conduct R. 1.13, Comment 3.

18 Model Rules of Pro. Conduct R. 1.13, Comment 4.

19 Model Rules of Pro. Conduct R. 1.13, Comment 10 ("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.").

20 Am. Bar. Assoc. Standing Comm. On Ethics and Pro. Resp., Formal Op. 49, The "Generally Known" Exception to Former-Client Confidentiality (Dec. 17, 2017), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_479.pdf.

21 No. 1584CV00149–BLS2, 33 Mass. L. Rep. 327, 2016 WL 2610677 (Mass. App. Div. May 5, 2016).

22 Am. Bar. Assoc. Standing Comm. on Ethics and Pro. Resp., ABA Formal Op. 497, Conflicts Involving Materially Adverse Interest (Feb. 10, 2021), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-497.pdf.

23 See Am. Bar. Assoc. Standing Comm. on Ethics and Pro. Resp., ABA Formal Op. 05-436, Informed Consent to Future Conflicts of Interest; Withdrawal of Formal Opinion 93-372 (May 11, 2005), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_05_436.pdf (discussion of future waivers).

24 Additional discussion of advance conflict waivers can be found in Michael J. DiLernia, Advance Waiver of Conflicts in Large Law Firm Practice, 22 Geo. J. Legal Ethics 97 (2009) and Restatement (Third) of the Law Governing Lawyers (2000) § 122.

25 Ellen A. Pansky, Predicting the Future: Can You Ethically Obtain an Advance Waiver of Actual Conflicts of Interest?, The Pro. Lawyer, Vol. 24, No. 2 (Jun. 15, 2016), available at https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-2/predicting_future_can_you_ethically_obtain_advance_waiver_actual_conflicts_interest/.

26 927 F. Supp. 2d 390 (N.D. Tex. 2013).

27 425 P.3d 1 (Cal. 2018).

28 2020 WL 618697 (D. Mass. Feb. 10, 2020).

29 Model Rules of Pro. Conduct R. 1.7, Comment 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).").

30 For enforced advance waivers, see In re Shared Memory Graphics LLC, 659 F.3d 1336 (Fed. Cir. 2011); Galderma Laboratories, LP v. Actavis Mid Atlantic LLC, 927 F. Supp. 2d 390, (N.D. Tex. 2013); Macy's Inc. v J.C. Penny Corp., Inc., 107 A.D.3d 616, 968 N.Y.S.2d 64 (2013) ; Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100 (N.D. Cal. 2003). For unenforced advance waivers, see Lennar Mare Island, LLC v. Steadfast Ins. Co., 105 F. Supp. 3d 1100 (E.D. Cal. 2015); Western Sugar Coop. v. Archer-Daniels-Midland Co., 98 F. Supp. 3d 1074 (C.D. Cal. 2015); Mylan, Inc. v. Kirkland & Ellis LLP, 2015 BL 186120, (W.D. Pa. June 9, 2015).