ETHICS OF MULTIPLE PARTY REPRESENTATION 2011: AFTER THE REFERENDUM – NOW WHAT?

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CHOICE AND ACQUISITION OF ENTITIES IN TEXAS

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CHAPTER 4.2

RESUME OF WILLAM. D. ELLIOTT

William D. Elliott is a solo practicing tax attorney in Dallas, Texas, with a practice involving Federal and state taxation, providing a wide range of corporate, partnership, institutional and individual clients with legal and tax counsel and representation in tax and estate planning and tax controversy matters.

He is Board Certified in Tax Law, Texas Board of Legal Specialization, Board Certified in Estate Planning and Probate Law, Texas Board of Legal Specialization. A native of Sherman, Texas, William Elliott's law school education is Southern Methodist University School of Law (J.D. 1973) and New York University School of Law (LL.M. in Taxation 1974). Elliott is past-president of the SMU Law School Alumni Association.

Elliott has served in the leadership of the State Bar of Texas, including the following positions: past Chair of the Board of Directors, past-chair of Finance Committee, past member of Executive Committee, and Past Chairman, Section of Taxation, State Bar of Texas. In 2008, Elliott was award the Dan Price Award by the Texas Bar Foundation for leadership in continuing education and writing. In 2010, he was awarded the Stanley Scott Award by the Dallas Chapter of CPAs for outstanding service to the Dallas Chapter.

He has written extensively, including FEDERAL TAX COLLECTIONS, LIENS AND LEVIES, Warren Gorham & Lamont, New York, New York (2d ed. 2009) and TEXAS TAXES ANNOTATED, West (2009) (co-authored with Scott Morris).

He has extensive speaking and writing experience, including most recently:

Presented, "Ethics and Risks of Changing Law Firms," State Bar of Texas CLE Webcast, March 2010 (with Ophelia Camina)

Presented, "The Future of Ethics and Law Practice in a Flat World," State Bar of Texas CLE Webcast, March 2010 (with Ophelia Camina)

Authored, "Coping with a Nominee Lien", CCH Taxes, May 2011.

Authored, "Fifth Circuit Survey: Federal Taxation, 43 Texas Tech L. Rev. No. 3 (Spring 2011).

Authored, "Conflicts of Interest in Tax Practice," CCH Taxes November 2010.

Authored, "IRS Collection Against Trusts: Trust Language Matters," CCH Taxes September 2010.

Authored, "Assessment Irregularities," CCH Taxes July 2010 and reprinted in CCH Tax Practice and Procedure September 2010.

July 1, 2010

Authored, “Loaning Money to a Delinquent Taxpayer,” 24 J. Taxation and Regulation of Financial Institutions, No. 1, Sept/Oct. 2010.

Authored, “Responding to a Federal Tax Levy: What Should a Financial Institution Do?, 23 J. Taxation and Regulation of Financial Institutions , No. 6, July/August 2010.

Presented, “Navigating the Dangerous Waters of Multi-Party Representation in LLC and Partnership Deals, University of Texas School of Law 2010 Conference on Partnership and Limited Liability Companies, July 22-23, 2010, Austin, Texas.

Authored, “National Taxpayer Advocate’s 2009 Report to Congress: Important Information for the Tax Practitioner,” CCH Taxes, May 2010.

Authored, “Fifth Circuit Survey: Federal Taxation, 42 Texas Tech L. Rev. No. 3 (Spring 2010).

Authored, “Divorcing Delinquent Taxpayers: Unrecorded and Thus Unrequited,” CCH Taxes, March 2010.

Authored, “Ethics and Risks in Multi-Party Representation,” CCH Taxes December 2009

Authored, “Substitutes for Return,” CCH Taxes, October 2009

Authored, “Purchasing Property from a Delinquent Taxpayer,” CCH Taxes, September 2009.

ETHICS OF MULTIPLE PARTY REPRESENTATION 2011:

AFTER THE REFERENDUM – NOW WHAT?

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ETHICS OF MULTIPLE PARTY REPRESENTATION 2011:

AFTER THE REFERENDUM – NOW WHAT?[1]

By: William D. Elliott

Dallas, Texas

"Gravity is not just a good idea, it is the law."

1. OVERVIEW OF BASIC CONFLICT OF INTEREST RULES

Conflict of interest rules derive from the need to protect client confidences and assure clients of the lawyer's loyalty. Conflict of interest rules reflect competing concerns:

- Undivided loyalty of lawyer to client.
- Enhance effectiveness of legal representation.
- Safeguarding of client information.
- Avoid lawyers exploiting clients.
- Protect legal system goal of adequate presentation to tribunals and avoid compromising adversary system.[2]

The migration of lawyers from one firm to another firm is pertinent to consideration of representation of multiple parties.

The simplest formulation of a conflict of interest discussion for multiple-party representation is the singular lawyer working for more than one person. The realities facing the modern legal profession involve the migration of lawyers. The conflict of interest issues generated by one or more lawyers changing firms are more complex by a multiple factor. The transferring lawyer, the former law firm or the new law firm might be affected, or are likely to be so. Former, current and prospective clients of the transferring lawyer, and the lawyer's former and new firm will all face conflicts issues.[3]

a. Texas Conflict of Interest Rules

The primary Texas conflict of interest rules are found in:

- Rule 1.06 Conflict of Interest: General Rule

[1] Paper reviewed by George W. Coleman.

[2] Restatement (Third) of the Law Governing Lawyers, Conflicts of Interest §121, Comment b (2000).

[3] Burton, Migratory Lawyers and Imputed Conflicts Of Interest, 16 Rev. Litig. 665 (1997).

- Rule 1.09 Conflict of Interest: Former Client

Other Texas rules address conflict problems for

- Specific types of lawyers

  Rule 1.10 – Former Government Lawyers

  Rule 1.11 – Judge, Adjudicator, Or Clerk

- Specific types of clients

  Rule 1.12 – Organization As Client

Texas Rules are "disciplinary rules, not procedural rules governing disqualification of advocates in civil litigation."[4] This important principle distinguishes the Texas Rules from the ABA Rules.

b. ABA Conflict of Interest Rules

The primary rules governing client conflicts are:

ABA Rule 1.7 – Concurrent Conflicts
ABA Rule 1.8 – Conflicts Between a Client's interests and Lawyer's interests
ABA Rule 1.9 – Successive Conflicts
ABA Rule 1.10 – Imputation

Rules governing specific types of lawyers are:

ABA Rule 1.11 – Former Government Lawyers
ABA Rule 1.12 - Former Judges Or Arbitrators

Rules for specific types of clients

ABA Rule 1.13(f) – Organizations
ABA Rule 1.1.8 – Prospective Clients

2. RULE 1.06 CONFLICTS OF INTEREST: GENERAL RULE

Rule 1.06 is the foundation conflict of interest rule. Rule 1.06(a) concerns opposing parties in litigation. Rule 1.06(b) concerns all other situations, other than opposing parties in litigation. In a transaction practice, almost any multiple representation is permitted if there is adequate informed consent of all affected clients.

[4] R. Schuwerk & L. Hardwick, Handbook Of Texas Lawyer And Judicial Ethics: Attorney Tort Standards, Attorney Ethics Standards, Judicial Ethics Standards, Recusal and Disqualification of Judges, Texas Practice Series 48 Tex. Prac., Tex. Lawyer & Jud. Ethics §6.6 (2009-2010 ed.)("***Schuwerk & Hardwick***").

a. Absolute Prohibition in Litigation: Rule 1.06(a)

Rule 1.06(a) prohibits representation by a lawyer of opposing parties in litigation. If multiple parties are not in litigation, Rule 1.06(a) implies that joint representation is possible.

Text of Texas Rule 1.06(a) Conflict of Interest: General Rule:

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

The idea of Rule 1.06(a) is to prohibit a lawyer from being directly adverse to a client in litigation. Comments to Rule 1.06 indicate that the phrase "*opposing parties*" limits Rule 1.06(a) to a situation where "a judgment favorable to one of the parties will directly impact unfavorably upon the other party."[5]

Rule 1.06(a) applies to parties that are "*actually directly adverse*" and representing one client is directly adverse to another client when

> *the lawyer's . . . ability or willingness to consider, recommend, or carry out a course of action will be or is reasonably likely to be adversely affected by representing both clients.*[6]

Schuwerk & Hardwick extent Rule 1.06(a) to adverse parties prior to litigation:

> *multiple representation of formally adverse parties concerning a matter that necessarily must proceed to litigation is improper under Rule 1.06(a), even before judicial proceedings are initiated and despite the provisions of Rule 1.07.*[7]

If two parties have interests not directly adverse but potentially in conflict, then Rule 1.06(b) governs.[8]

The scope of Texas Rule 1.06(a) is actually limited: The proscription on common representation extends to

- Opposing parties

[5] Tex. Discl. Rules Prof. Conduct 1.06 comment 2.

[6] In re Halter, No. 05–98–01164–CV, 1999 WL 667288, at *2 (Tex.App.-Dallas Aug.27, 1999, orig. proceeding) (not designated for publication)

[7] Schuwerk & Hardwick, §6.6 n.22, citing Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 262 (Tex.App.—Houston [14th Dist.] 1999, pet. Denied) (lawyer violated Rules Rule 1.06(a) by formally representing one party to a divorce while following other party's instructions concerning contents of divorce decree).

[8] Tex. Discl. Rules Prof. Conduct 1.06 comment 3.

- In the same litigation

Everything else is outside Texas Rule 1.06(a).

The conflict presented in Rule 1.06(a) cannot be overcome by consent.

> **EXAMPLE**: Automobile was leaving travel center, after refueling. As driver of automobile pulled to continue southbound trip, a delivery truck was turning into the travel center and obstructed the automobile driver's view and when the driver pulled out on the highway, a freight truck traveling northbound collided with automobile, killing driver of automobile and killing all but one passenger. Suit was brought by the automobile driver and passengers by Attorney A against the freight truck company and driver, and the delivery truck company and driver. Attorney B represented the delivery truck. In depositions, Attorney B asserted that the automobile driver's negligence caused the crash and the travel center negligently designed the travel center ingress and egress.[9]

At this point in the litigation, Attorney B is representing the delivery truck company, in opposition to the automobile driver's estate and injured passengers and therefore cannot represent them.

> **EXAMPLE**: Same facts as the previous Example, except that following some discovery plaintiffs non-suit the delivery company and add the sole surviving automobile passenger and also sue the travel center company. Plaintiffs also settled with the freight company and driver, leaving as sole defendants the travel center company. Attorney B assumes role as leading plaintiffs' counsel. Full consents are obtained. [10]

The question of this Example is whether Attorney B is conflicted from representing plaintiffs, after having represented defendant that was non-suited. Further, plaintiffs have adopted the legal strategy of the delivery truck company, previously offered by Attorney B, namely that the travel center is at fault.

A Texas court held Attorney B disqualified from representing plaintiffs.[11] The court found that plaintiffs and the delivery truck company were opposing parties and were "actually directly adverse." If the travel center is found liable, then the jury could

[9] Example based upon re Seven-O Corporation, 289 S.W.3d 384 (Tex. App. – Waco 2009, pet. denied).

[10] Example based upon re Seven-O Corporation, 289 S.W.3d 384 (Tex. App. – Waco 2009, pet. denied).

[11] In re Seven-O Corporation, 289 S.W.3d 384 (Tex. App. – Waco 2009, man. denied).

apportion damages to the freight company. The delivery company and the plaintiffs are pointing their collective finger at the travel center, but the travel center can theoretically involve the delivery company. Attorney B's ability or willingness to consider, recommend, or carry out a course of action will be or is reasonably likely to be adversely affected by representing both clients.

1) Representing Multiple Parties on Same Side in Litigation

If multiple clients are not directly adverse in the same litigation, e.g. the multiple clients are co-defendants, then Rule 1.06(b) governs.

Representing multiple parties on the same side of the same litigation is permissible if:

- The risk of adverse interest is minimal, and
- Rule 1.06(b) satisfied.[12]

A conflict might arise if the same parties in litigation differ in their willingness to accept a settlement. Co-defendants might have conflicting interests, e.g. shifting responsibility among various defendants.[13]

2) Suing a Client in an Unrelated Matter

A suit against a current client is permissible in Texas in an unrelated matter.[14] This rule demonstrates the difference between Rule 1.06(a) and Rule 1.06(b).

> **EXAMPLE**: Attorney A of the firm ABC defends Rent Car Company in a personal injury action involving employee of Rent Car Company. Some years later, Rent Car Company, sues Advertising Company for breach of contract. Attorneys B and C of the firm of ABC represent Advertising Company in the suit.[15]

Rule 1.06(b), discussed immediately following, governs. In the above Example, firm ABC was not disqualified because the record before the court did not show how the receipt by the ABC firm of confidential information about the Rent Car Company or its affiliate would prejudice the affiliate company in the suit against the Advertising

[12] Tex. Discl. Rules Prof. Conduct 1.06, Comment 3.

[13] Restatement (Third) of the Law Governing Lawyers, Conflicts of Interest §128, Comment d.

[14] Restatement (Third) of the Law Governing Lawyers, Conflicts of Interest §128, Comment e.

[15] Example based on In re Southwestern Bell Yellow Pages, Inc., 141 S.W.3d 229 (Tex. App – San Antonio 2004, no pet.).

Company.[16]

3) ABA Rule 1.7 Comparison

The ABA Rule 1.7 uses a different approach. Instead of distinguishing litigation from non-litigation, the ABA Rule 1.7 asks whether the one client is "directly adverse" to another client.[17]

Text of ABA 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

(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;

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[16] In re Southwestern Bell Yellow Pages, Inc., 141 S.W.3d 229, 231 (Tex.App.—San Antonio 2004, no pet.) (refusing to disqualify counsel currently representing opposing party in unrelated matter, concluding that "[w]hile not encouraged, concurrent representation of adverse clients is permitted in Texas."); Conoco, Inc. v. Baskin, 803 S.W.2d 416 (Tex.App.—El Paso 1991, no writ) (refusing to disqualify law firm for simultaneously representing party adverse to current client in unrelated matter, in part because movant had not claimed that law firm had failed to represent movant properly in other matters, or that firm had either the incentive or ability to do so because of undertaking the adverse representation). See Schuwerk & Hardwick, §6.6 n. 38.

[17] Texas Rule 1.06(a) does not use the phrase "directly adverse", but the phrase is included in Texas Rule 1.06(b)(1). See discussion, supra.

(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 23 views ABA Model Rule 1.7(b)(3) as prohibiting representation of opposing parties in litigation.

b. Non-Litigation Situations: Rule 1.06(b).

1) General Rule: Multiple Representation Allowed

Apart from litigation, multiple representation is permitted with client informed consent of all affected clients. Indeed, lawyers daily take on multiple representation with client consent.

Lawyers who undertake multiple representation in transaction practice, take on some risk, which could increase over time as the relationship with the client changes.

Texas Rule 1.06(b) permits a lawyer representing multiple parties unless representation of one client (or prospective client) ***reasonably appears to be or become adversely limited*** by the lawyer's responsibilities to another client or to a third party, or by the lawyer's own interests.

Text of Texas Rule 1.06(b) and (c) Conflict of Interest: General Rule:

(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.

There are two parts to Rule 1.06(b).

- The substantially related matter prohibition of Rule 1.06(b)(1).
- Prohibition of representation of a client if the representation "reasonably appears to be" adversely limited by the lawyer's responsibilities "to another client." Rule 1.06(b)(2).

Representation of one client is "directly adverse" to the representation of another client if

- the lawyer's ***independent judgment*** on behalf of a client, or
- the lawyer's ability or willingness to consider, recommend or carry out a course of action
- will be or is reasonably likely to be
- ***adversely affected*** by the lawyer's representation of, or responsibilities to, the other client.[18]

> **EXAMPLE**: An attorney represents lender and drafts loan documents for residential loans to borrowers. The lender's loan commitment to its customer provides that lender will have loan documents (typically note and deed of trust) prepared by lender's attorneys and requires lender's customer to pay for loan documents.[19]
>
> Lender's attorney (without being requested by seller to do so) prepares warranty deed for execution by seller to purchaser and delivers it and loan documents to title company for closing.
>
> Attorney (or lender) delivers to lender's customer a written notice that attorney represents only lender in transaction and does not undertake to represent or advise lender's customer and that lender's customer should obtain counsel or representation from another attorney. Although seller pays for

[18] Tex. Discl. Rules Prof. Conduct 1.06, Comment 6.

[19] Example taken from Tex. Ethics Opinion 525 (May 1998), http://www.law.uh.edu/libraries/ethics/opinions/501-600/index.html.

> attorney's preparation of the deed (assuming it is used), attorney has no contact with seller and does not make any disclaimer of representation or dual representation disclosure to seller.

The Texas Ethics Opinion 525 determined that under Rule 1.06(b), an attorney who prepares loan documents for a real estate purchaser at the request for the attorney's lender-client, may not also prepare a deed for the seller to be used in the transaction unless either the seller requests her to do so or the lawyer, after first providing written notice and full disclosure to the seller, does so at the request of the lender

When the lawyer prepares a deed for seller, then the lawyer will be engaged in the dual representation of the lender and the seller. The Opinion states:

> *Before undertaking the joint representation of the seller and the lender, the lender's attorney must reasonably believe the representation of each client will not be materially affected, and must provide full dual representation disclosure to the seller and lender and obtain the consent of each after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.*[20]

Not all multiple representations involve conflict of interest require consent.

> **EXAMPLE**: Lawyer hired by husband and wife in the purchase of property as co-owners.

The lawyer can reasonably assume that representation in the Example does not involve a conflict of interest, unless the lawyer has information indicating that the goals of one client were materially different from the other client/spouse.[21]

a. Substantially Related Matter

The lynchpin standard of Texas Rule 1.06(b)(1) is "substantially related." There is no conflict unless the competing matters of two clients are substantially related.

A representation of a client (or prospective client) involves a substantially related matter in which that client's (or prospective client's) interests are materially and directly adverse to the interests of another client of the lawyer.

In non-litigation context, multiple representation permissible if

[20] Id.

[21] Restatement (Third) of the Law Governing Lawyers, Conflicts of Interest §130, Comment c.

- the lawyer reasonably believes that the representation of each client (or prospective client) ***will not be materially affected***, and
- each affected or potentially affected client (or prospective 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

To satisfy the "substantial relationship" test as a basis for disqualification of opposing counsel, the party seeking disqualification must prove that the facts of the previous representation are so related to the facts of the pending litigation that a genuine threat exists that confidences revealed to former counsel will be divulged to the present adversary.[22]

The "substantially related" was developed at common law and was brought into the Texas Rules in 1990.[23]

A "substantially related matter" is not defined in Rule 1.09. The Texas Supreme Court has defined "substantially related" in the leading case of *NCNB National Bank v. Coker*[24] to mean:

> *the moving party must prove the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary.*[25]

Comments to ABA Model Rule 1.9 define matters as "substantially related"

> *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*

[22] Metropolitan Life Ins. Co. v. Syntek Finance Corp., 881 S.W.2d 319 (Tex. 1994); see also National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996). Other former client conflict cases include NCNB Texas Nat'l Bank v. Coker, 765 S.W.2d 398 (Tex. 1989), Henderson v. Floyd, 891 S.W.2d 252 (Tex. 1995) (per curiam), and Texaco v. Garcia, 891 S.W.2d 255 (Tex. 1995) (per curiam).

[23] In re American Airlines, 972 F.2d 605, 617 (5th Cir. 1992). See also, R. Shcuwerk & J. Sutton, A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Univ. Houston L. Rev. 1, 152, n. 20, 153 n. 34 (1990).

[24] 765 S.W.2d 398, 400 (Tex. 1989); see also, Metropolitan Life Ins. v. Syntek Finance, 881 S.W.2d 319, 320 (Tex. 1994), reaffirming the *Coker* rule.

[25] 765 S.W.2d at 400.

> *prior representation would materially advance the client's position in the subsequent matter.*[26]

The Restatement's expression on "substantially related" is also helpful:

> *A subsequent matter is substantially related to an earlier matter if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client obtained in the course of representation in violation of [confidentiality rule]."*[27]

The Fifth Circuit has defined the "substantially related" standard more broadly than the Texas Supreme Court.[28] The Fifth Circuit in *In re American Airlines*,[29] has held that to be "substantially related," the prior representation

> *need only be akin to the present action in a way reasonable persons would understand as important to the issues involved.*[30]

> *[T]he substantial relationship test is concerned with both a lawyer's duty of confidentiality and his duty of loyalty, . . .[and thus] a lawyer who has given advice in a substantially related matter must be disqualified, whether or not he has gained confidences.*[31]

The Fifth Circuit stated the notion that the substantially related standard concerns both the lawyer's duty of confidentiality and the duty of loyalty. The test therefore does not merely concern whether confidential information has been adversely used by a lawyer facing multiple lawyer representation.[32]

> *The [legal] advice does not does not need to be "relevant" in the evidentiary sense to be "substantially related." It need*

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[26] ABA Model Rule 1.9, Comment 3.

[27] Restatement (Third) of the Law Governing Lawyers §132, Comment d(iii) (2000).

[28] Burton, Migratory Lawyers and Imputed Conflicts Of Interest, 16 Rev. Litig. 665, 669 n7 (1997).

[29] 972 F.2d 605 (5th Cir. 1992) (Higginbotham, J.).

[30] In re American Airlines, 972 F.2d 605, 619 (5th Cir. 1992), quoting In re Corrugated Container Antitrust Litigation, 659 F.2d 1341, 1346 (5th Cir. 1981).

[31] In re American Airlines, 972 F.2d 605, 619 (5th Cir. 1992)

[32] Burton, Migratory Lawyers, at 669.

> *only be akin to the present action in a way reasonable persons would understand as important to the issues involved."*[33]

b. Materiality and Directly Adverse

A possible conflict must be material and directly adverse to the interests of another client of the lawyer, or the law firm.

The phrase "directly adverse" as used in Texas Rule 1.06(b)(1) means

> *the representation of one client is directly adverse to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client.*[34]

If the lawyer is called upon to advocate adverse positions in the same or related matter, then the dual representation is directly adverse.[35]

> **EXAMPLE**: Lawyer is asked by Client A to represent Client A in an aspect of the hostile takeover by Client A of Lawyer's corporate Client B.[36]

If the takeover were successful, then Client B is materially and directly affected adversely.

General adversity, such as competitors in business, does not rise to the level of directly adverse. The lawyer should be mindful of the fact that a business rivalry or personal differences between two clients may be important to the degree that dual representation by the same lawyer can be contrary to the client interests.[37]

> **EXAMPLE**: Lawyer has been retained by Client to represent Client in general business matters. Client has a distribution contract with Manufacturer, and there is a chance that disputes could arise under the contract. Lawyer represents Manufacturer in

[33] Id. at 619, quoting In re Corrugated Container Antitrust Litigation, 659 F.2d 1341, 1346 (5th Cir. 1981).

[34] Tex. Discl. Rules Prof. Conduct 1.06, Comment 6.

[35] Id.

[36] Example taken from Restatement (Third) of the Law Governing Lawyers. § 121 (2000).

[37] Id.

> local real-estate matters completely unrelated to Client's business.[38]

An agreement between Lawyer and Client that the scope of Lawyer's representation of Client will not extend to dealing with disputes with Manufacturer would eliminate the conflict posed by the chance otherwise of representing Client in matters adverse to Manufacturer.[39]

Manufacturer need not consent to arrangement.

c. Likelihood of Effect

There is no conflict of interest within Rule 1.06(b) unless the conflict "reasonably appears to be or become adversely limited." Many representations of multiple parties will only present a potential or contingent risk of conflict.

> **EXAMPLE**: Lawyer has been retained by A and B, each competing for a single broadcast license, to assist each of them in obtaining the license from the FCC. The legal work will require the Lawyer to advocate for the client before the agency. Lawyer's representation will have an adverse effect on both A and B.[40]

Even though either A or B might obtain the license and thus arguably not have been adversely affected by the joint representation, Lawyer will have duties to A that restrict Lawyer's ability to urge B's application and vice versa. In most instances, informed consent of both A and B would not suffice to allow the dual representation.

d. Evaluation of Conflict Based on Factors

Question of conflict is often one of proximity and degree.[41]

Evaluating whether there is a conflict arising with multiple party representation requires looking at an array of factors:

- duration and intimacy of the lawyer's relationship with any client or any of the clients involved,
- the functions being performed by the lawyer,

[38] Example taken from Restatement (Third) of the Law Governing Lawyers. § 121 (2000).

[39] Id.

[40] Example taken from Restatement (Third) of Law Governing Lawyers. § 121, Comment c (2000).

[41] Tex. Discl. Rules Prof. Conduct 1.06, Comment 13

- the likelihood that actual conflict will arise and
- the likely prejudice to the client from the conflict if it does arise.

2) Major Exception – Lawyer Reasonably Believes Representation Will Not Be Materially Affected & Client Consents

The major exception from Texas Rule 1.06(b) is found in Texas Rule 1.06(c) which provides circumstances under which a lawyer may undertake multiple representation.

Text of Texas Rule 1.06(c, (d), (e), (f)) Conflict of Interest: General Rule):

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

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

(2) each affected or potentially affected client <u>consents</u> to such representation <u>after full disclosure</u> 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.

Even though a conflict, or potential conflict, may exist by representing co-plaintiffs or co-defendants, multiple representation is permissible under Rule 1.06(c) if:

1. lawyer ***reasonably believes*** that the representation of each client will not be materially affected,
2. ***after*** each affected or potentially affected client ***consents*** to such representation,
3. ***after full disclosure*** of the existence, nature and implications of the conflict and of the possible adverse consequences of common representation and the advantages involved, if any.

a. Privilege versus Confidentiality

Apart from attorney-client privilege, which is only present in a proceeding, the duty of confidentiality is always present.[42] The privilege rules in joint representations have been fairly well understood. If litigation erupts between the joint clients, the privilege will not apply as to information shared between them and with their lawyer. The privilege will continue to protect that information as to the outside world.

b. Client Consent

i. Informed Consent

Texas Rule 1.06(c) provides specific requirements regarding client's consent.

> *each affected or potentially affected client consent 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.*[43]

A perfunctory explanation to each client obviously is insufficient.[44]

Written disclosure is not technically required in Texas Rule 1.06(c), but recommended. Prudent course is for a lawyer to provide written summary of factors or considerations discussed.

ii. Non-Consentable Conflicts

Even if clients involved in a Rule 1.06(b) conflict consent to one lawyer representing them both, consent alone will not permit the multiple client representation. The lawyer must also reasonably believe that each client will not be materially affect by

[42] See Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979) for excellent discussion of the distinction between privilege and duty of confidentiality.

[43] Tex. Discl. Rules Prof. Conduct 1.06(c)(2).

[44] See Tex. Discl. Rules Prof. Conduct 1.06, comment 8 (stating that disclosure and consent are not mere "formalities").

the contemplated multiple representation then consent is impermissible.[45]

c. Third Party Payment of Legal Service

Third party payment of legal fee is permissible, if:

- Client is informed, and
- arrangement does not compromise the lawyer's duty of loyalty to the client.[46]

3) ABA Rule 1.7 Comparison

ABA Rule 1.7 states in regard to conflict of interest that a lawyer shall not represent a client if the representation of that client will be ***directly adverse*** to another client, unless:

1. the lawyer ***reasonably believes*** the representation will ***not adversely affect*** the relationship with the other client; and
2. each client ***consents*** after consultation

Text of ABA Rule 1.7:

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[45] Tex. Discl. Rules Prof. Conduct 1.06 comment 7. Schuwerk & Hardwick list numerous circumstances non-consentable conflicts: Tx. Ethics Op. 555 (2004) (lawyer who owns portion of chiropractor's practice may not refer lawyer's clients to chiropractor in exchange for a share of the latter's profits, even with full disclosure and client consent, because the conflict of interest involved is not one for which it would be proper to seek client consent); PEC Op. 547 (2003) (lawyer may not enter into an arrangement with a group of medical professionals pursuant to which the group would fund the law firm's television advertisements with the expectation (but not the obligation) that the law firm would refer clients to the medical group, even with full disclosure to any client so referred, because "the law firm could never meet the requirements of Rule 1.06(c)(1) with respect to the conflict of interest involved"); Tx. Ethics Op. 543 (2002) (lawyer could not enter into arrangement to serve as in-house counsel for health-care provider at reduced fee in return for client's referral of its clients suffering from personal injuries to the lawyer, because lawyer could not meet Rule 1.06(c)(1)'s standards); Tx. Ethics Op. Op. 536 (2001) (lawyer may not receive fee from investment adviser for referring lawyer's clients to adviser for investment advice, even with full disclosure and informed client consent, because "the standards of Rule 1.06(c) cannot be met under these circumstances"); Tx. Ethics Op. Op. 535 (2001) (lawyer cannot participate in a court-sponsored "lawyer-for-a-day" program, whereby lawyers volunteer to represent indigent criminal defendants, but are paid for their services only if their client pleads guilty that day, because "there could never be an adequate basis for a determination that both requirements of Rule 1.06(c) are met" in those instances). Cf. Tx. Ethics Op. Op. 500 (1994) (lawyer cannot represent multiple plaintiffs in automobile accident once it becomes clear that the funds available to satisfy their claims is substantially less than the reasonable value of those claims because, in effect, the lawyer's clients are very much like opposing parties in litigation within the meaning of Tex. Discl. Rules Prof. Conduct 1.06(a)). Schuwerk & Hardwick, §6.6 n.126.

[46] Tex. Discl. Rules Prof. Conduct 1.06, Comment 12.

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.

4) Conflict with Lawyer's Interests

Lawyer's interest may present conflict of interest just as would representing an adverse party. The critical questions are

- the likelihood that a conflict exists or will eventuate and,
- if it does, whether it will ***materially and adversely affect*** the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[47]

Client consent is required, but lawyer must also believe that there will be no materially adverse effect upon the interests of either client.

[47] Tex. Discl. Rules Prof. Conduct 1.06, Comment 4.

Lawyer's detached advice may be adversely affected by:

- Lawyer's desire for income
- Probity of lawyer's conduct
- Lawyer's related business interests
- Lawyer's ownership interest in client

c. Prohibited Transactions: Rule 1.08 Conflict of Interest: Prohibited Transactions

Text of Texas Rule 1.08:

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyers employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living

expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;

(2) there is no interference with the lawyers independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

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

(j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

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3. RULE 1.09 CONFLICT OF INTEREST: FORMER CLIENT

A lawyer's duty to a client does not end at the end of the engagement. The lawyer's duty of preserving client confidences and avoiding conflict of interest continues for former clients.

Rule 1.09 governs conflicts that arise out of the fact that a lawyer previously represented one client and is now representing a different client in a matter that is adverse to his former client.

There are three parts to Rule 1.09:

- Rule 1.09(a) concerns when a lawyer is personally disqualified.
- Rule 1.09(b) concerns imputed disqualification to the lawyer's law firm.
- Rule 1.09(c) concerns former partners and associates of the lawyer whose association with his or her prior firm has terminated.

The conflict of interest rule for former clients is less stringent than for current clients. This is because Texas Rule 1.06 differs from Texas Rule 1.09, which is only a qualified prohibition in representing interest adverse to former client. It does not forbid a Texas lawyer from ever representing interests adverse to a former client.

Of note is the observation of William Freivogel, noted ethics expert, "More cases deal with former client issues than just about any other issue relating to conflicts of interest."[48]

a. Texas Rule 1.09(a) Conflict of Interest: Former Client

Text of Texas Rule 1.09(a):

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

[48] Freivogel on Conflicts, A Guide to Conflicts of Interest for Lawyers, http://web.me.com/billfreivogel/Freivogel/Former_Client_I.html (last accessed 4/14/2011)

Rule 1.09(a) sets forth the limitation on a Texas lawyer's ability to represent an interest adverse to a former client. Paragraph (a) of Rule 1.09 provides that, without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

- in which such other person questions the validity of the lawyer's services or work product for the former client;
- if the representation in reasonable probability will involve a violation of Rule 1.05, the rule generally requiring a lawyer to maintain the confidences of clients and former clients; or
- if it is the same or a substantially related matter.

The language of Rule 1.09(a) speaks of the lawyer being personally disqualified.

The underlying assumption of Rule 1.09(a) is that the lawyer acquired confidential information from the former client and the information is material to the new representation. [49]

1) Three Circumstances in Rule 1.09 Preventing Conflict with Former Client

Rule 1.09 does not present an absolute bar, but makes representation of a current client vis-à-vis a former client improper in three circumstances.

- **Questioning Prior Work**. Lawyer may not represent a client who questions the validity of the lawyer's services or work product for the former client.[50]

  EXAMPLE: Lawyer who drew a will leaving a substantial portion of the testator's property to a designated beneficiary would violate paragraph (a) by representing the testator's heirs at law in an action seeking to overturn the will.[51]

- **Possible Violation of Rule 1.05**. A lawyer may not represent a current client if there is a "reasonable probability" that the representation would cause the lawyer to violate the obligations owed the former client to keep client

[49] R. Rotunda & J. Dzienkowski, Legal Ethics - The Lawyer's Deskbook on Professional Responsibility §1.9-1(a) (2010).

[50] Tex. Discl. Rules Prof. Conduct 1.09(a)(1).

[51] Example taken from Tex. Discl. Rules Prof. Conduct 1.09, Comment 3.

information confidential under Rule 1.05.[52]

If there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information under Rule 1.05 (b)(l) or an improper use of such information to the disadvantage of the former client under Rule 1.05 (b)(3) , then the representation would be improper.[53]

- **Substantially Related Matter**. A lawyer cannot represent a current client if representation involves the same or a substantially related matter of a former client.[54]

EXAMPLE: A lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.[55]

Rule 1.09(a) "prevents a lawyer from switching sides and representing a party whose interests are adverse to a person who sought in good faith to retain the lawyer."[56] "It can apply even if lawyer declined the representation before the client had disclosed any confidential information."[57]

2) ABA Model Rule 1.9(a)

The ABA Model Rule 1.9(a) compares to Texas Rule 1.09(a). The titles of the sections are the same. The Texas and ABA rules for former clients are structured differently, and vary substantively.

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[52] Tex. Discl. Rules Prof. Conduct 1.09(a)(2). One leading commentator has criticized this second condition as being confusing and overlapping substantially the first situation with the result that the scope of this second situation is uncertain. Wolfram, Former Client Conflicts, 10 Geo. J. Legal Ethics 677, 678 n.9 (1997).

[53] Taken from Tex. Discl. Rules Prof. Conduct 1.09(a)(2), Comment 4.

[54] Tex. Discl. Rules Prof. Conduct 1.09(a)(3).

[55] Example taken from ABA Model Rule 1.9, Comment 3.

[56] Tex. Discl. Rules Prof. Conduct 1.09, Comment 4A.

[57] Id.

ABA Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

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

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

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

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

Both the Texas and ABA rules concerning former clients appear to generally agree that a lawyer who has formerly represented a client in a matter should not thereafter represent another person in a 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 consents after consultation.

Such representation also may be permitted procedurally if the conflict has been waived (e.g., by delay in asserting the existence of a conflict) or some other justification exists. Both rules concern themselves with the protection of client confidences, though the phraseology of the rules and the precise parameters of the rules differ.

Texas Rule 1.09 deals with imputed disqualification in paragraph (b); the Model

Rules address this subject matter not so much in Model Rule 1.9 itself, but in Model Rule 1.10, the general rule on imputed disqualification.

There are several obvious differences between the Texas and ABA rules. The consent or waiver of the client is required to be informed and at least confirmed in writing, per the ABA rule.

- Texas uses the phrase "personally" represented in its Rule 1.09(a).
- The Texas rule explicitly includes a qualified prohibition on representing a person in a matter in which a person "questions the validity of the lawyer's services or work product for the former client[.]"
- The ABA's Model Rule 1.9(a) captures both the Texas Rule 1.09(a) and (a)(3).
- The ABA requires "materially adverse" while Texas requires only "adverse."

3) Adversity of Interest to Former Client

A lawyer representing a current interest against the interest of a former client does not violate Rule 1.09 unless the current representation is "adverse to former client."

> ***Rule 1.09:***
>
> ***(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:***

The conflict has to be more than a potential conflict. It must be direct and adverse.[58]

4) Appearance of Impropriety

The phrase "appearance of impropriety" was contained in Texas rules before 1990.[59] The ABA dropped the phrase also when the ABA Model Rules were enacted.

[58] Arteaga v. Texas Dept. of Protective and Regulatory Services, 924 S.W.2d 756 (Tex. App.- Austin 1996, writ denied).

[59] See John F. Sutton, Jr. & Dean Newton, Proposed Texas Disciplinary Rules of Professional Conduct: Commonly Asked Questions, 52 Tex. B.J. 561, 562 (May 1989) (noting that the "vague" appearance of impropriety language "was eliminated from the ABA Model Rules" as well as the Texas Rules; further observing that the Texas Rules "eliminated this vague non-standard" because the appearance of impropriety standard's ambiguity "has been part of the problem with the existing Code of Professional Responsibility").

Texas cases sometimes use the phrase.

5) The Presumptions

One of the two important points of focus of Rule 1.09(a) is on whether the lawyer acquired confidential information concerning prior client that could be used to disadvantage the prior client or to favor a current client or another person. [60]

a. First Presumption

To avoid disclosure of former client confidences, the lawyer is to look to the prior representation, the matters involved and the likelihood that confidences imparted by the former client could be used adversely in the subsequent representation.

- **Litigation.** If the prior matter was litigation, then a conclusive presumption would arise that the confidential information pertained to the issues in the litigation.
- **Non-Litigation.** If the prior matter was not litigation, then the inquiry goes to the work performed in the prior matter and the information a lawyer would ordinarily have to carry out the prior work.

b. Second Presumption

Once the presumption is created that a lawyer received confidential information from the lawyer's former client, then Texas courts have invoked a second conclusive presumption that the lawyer shares the client's confidential information with all of the other lawyers in the firm. The use of the presumptions extends the lawyer's knowledge of client confidences, vicariously, across the lawyer's firm.

The Texas Supreme Court has explained the use of the second presumption is because

1. a former client would face an impossible burden in proving that attorneys in a single firm had not shares the confidences,
2. clients will be more secure in their relationship with their lawyer, and
3. the integrity of the practice is assured by removing suspicions.[61].

The Fifth Circuit in *Kennedy v. Mindprint (In re ProEducation International, Inc.),*[62] allowed an attorney leaving a firm to demonstrate that the departing attorney does

[60] Tex. Discl. Rules Prof. Conduct. 1.09, Comment 5.

[61] National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996). See also Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 299 (Tex. App. – Dallas, 1988), orig. proceeding), and Burton, Migratory Lawyers at 670.

[62] --- F.3d ----, 2009 WL 3489401 (C.A.5 (Tex.2009).

not have any client information, thus changing the presumption into a rebuttable presumption.

6) Prospective Clients & Taint Shopping

Suppose a potential client contacts a lawyer and reveals confidential information to the lawyer, but does not then hire the lawyer. Taint shopping refers to this situation, but with the added dimension that prospective client intentionally told the lawyer a confidence for the purpose of excluding the lawyer from the case and the adversary.

b. Rule 1.09(b): Extension of Rule 1.09(a) to All Firm Lawyers

Rule 1.09(a) by its terms applies only to a lawyer who "personally has formerly represented" the former client in question. Rule 1.09(b) extends Rule 1.09(a) to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing.[63]

Text of Texas Rule 1.09(b):

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

As long as the lawyer with the disqualification is with that law firm, then the law firm is disqualified. Under Texas Rule 1.09(b), the personal conflicts of one attorney are imputed to all other members of a firm.

> **EXAMPLE:** Corporation X wants to sue partnership Y. Further the ABC law firm formerly represented Y in a matter substantially related to the dispute between X and Y. Additionally X approaches lawyer B, who formerly was associated with the ABC law firm. Does the fact of lawyer B's former association with the ABC law firm disqualify him or the firm he has recently joined from assuming the representation of X against Y?

The effect of Rule 1.09(b) is to extend the Rule 1.09(a) prohibition of a lawyer to undertake representation against former client to all other lawyers who are or become members of or associated with any firm in which that lawyer is practicing.

Thus, the inquiry is focused on whether Lawyer B personally represented Y.

[63] Tex. Discl. Rules Prof. Conduct 1.09, Comment 5.

> **EXAMPLE**: A woman consulted with attorney A of law firm ABC regarding a possible divorce, but did not actually hire attorney A to represent her when she later filed for divorce." The wife paid a $400 fee to attorney A for his services. Attorney C, although a partner at law firm ABC when attorney A consulted with the wife, did not personally obtain any confidential information regarding the wife while employed by law firm ABC. Attorney A and attorney C never discussed attorney A's consultation with the wife. Attorney C "subsequently withdrew from law firm ABC and formed a new law firm, law firm CDE, in which attorney A is not associated in any capacity. After attorney C formed law firm CDE and approximately 18 months after the wife consulted with attorney A, the wife's husband hired attorney C to represent him in his divorce from the wife.[64]

The Ethics Committee framed the issue as follows:

> *Since attorney C was no longer in the same law firm as attorney A at the time that attorney C accepted the representation of [the] husband, and attorney C never personally represented or consulted with the wife, the primary issue is whether attorney C is now vicariously disqualified, or disqualified by imputation, from representing the husband because his former partner, attorney A consulted with [the] wife at the time that attorney A and attorney C were partners in law firm ABC.*

The Committee reasoned that

> *attorney A would be prohibited from representing [the] husband because any such representation would involve the same matter as previously discussed between attorney A and [the] wife, which is a violation of Rule 1.09(a)(3), and because Texas Disciplinary Rule 1.09(a)(2) proscribes a representation that in reasonable probability involves disclosure of confidential information contrary to Texas Disciplinary Rule 1.05.*

The Committee concluded, however, that attorney C would not be disqualified under Texas Rule 1.09:

[64] Example taken from Tex. Comm. on Professional Ethics, Op. 510, 58 Tex. B.J. 1058 (1995). Also available at http://www.law.uh.edu/libraries/ethics/opinions/501-600/index.html.

Attorney C is no longer associated with attorney A and law firm ABC, and attorney C does not personally possess any confidential information imparted by the wife to attorney A. Under the Statement of Facts, such representation of the husband by attorney C does not violate Texas Disciplinary Rule 1.09(c), and there appears to be no reasonable probability of a violation of Texas Disciplinary Rule 1.05 or a violation of any other Texas Disciplinary Rule. Attorney C may represent the husband in the divorce proceeding against the wife.

If a client severs the attorney-client relationship with a lawyer who remains in a firm, the entitlement of that individual lawyer to undertake a representation against that former client is governed by Rule 1.09(a); and all other lawyers who are or become members of or associated with that lawyer's firm are treated in the same manner by Rule 1.09(b).[65]

1) ABA Rule 1.9(b) is similar to Texas Rule 1.09(b)

The relevant Model Rule, Rule 1.9(b), uses slightly different language than the Texas Rule 1.09(b).

Text of ABA Rule 1.9(b):

A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (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.

The Texas Rule 1.09(b) and ABA Rule 1.9(b) produce the same effect. Both rules require that a departing lawyer must have actually acquired confidential information about the former firm's client or personally represented the former client to remain under imputed disqualification.[66]

[65] Tex. Discl. Rules Prof. Conduct 1.09, Comment 5.

[66] In re ProEducation Intern., Inc., 587 F.3d 296, 301 (5th Cir. 2009); Burton, Migratory Lawyers and Imputed Conflicts of Interest, 16 Rev. Litig. 665, 677, 684-85 (1997)(applying both Texas Rule 1.09 and Model Rule 1.9(b) and reaching the same conclusion-"the transferring lawyer is no longer deemed to have imputed knowledge about his former firm's client").

2) Removal of the Imputation

When a lawyer leaves the law firm, the imputation of conflict of interest of one attorney no longer extends to the firm. The departing lawyer who remains subject to disqualification, but the former law firm is no longer disqualified.

The only reason the law firm was disqualified was imputed disqualification, i.e. on account of the knowledge possessed by the lawyer, who has departed. When the lawyer left the law firm, no one else in the firm retained actual knowledge of the representation that was imputed to other members of the firm.[67]

c. Rule 1.09(c): Former Partners or Associates

The only rule in the Texas Disciplinary Rules addressing directly imputed conflicts of interest arising out of a departure of a lawyer from a firm and joining a new firm is Rule 1.09(c).[68] Rule 1.09(c) address the perspective of the lawyers left behind.

Text of Texas Rule 1.09(c):

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(l) or if the representation in reasonable probability will involve a violation of Rule 1.05.

The former partners or associates are prohibited from

- questioning the validity of such lawyer's work product and
- from undertaking representation which in reasonable probability will involve a violation of Rule 1.05 (i.e. confidentiality of information).

The official comment 6 to Texas Rule 1.09 explains the application of this provision as follows:

> *Paragraph (c) addresses the situation of former partners or associates of a lawyer who once had represented a client when the relationship between the former partners or associates and the lawyer has been terminated. In that situation, the former partners or associates are prohibited from questioning the validity of such lawyer's work product*

[67] Tex. Discl. Rules Prof. Conduct 1.09, Comment 7.

[68] Burton, Migratory Lawyers at 672.

> *and from undertaking representation which in reasonable probability will involve a violation of Rule 1.05. Such a violation could occur, for example, when the former partners or associates retained materials in their files from the earlier representation of the client that, if disclosed or used in connection with the subsequent representation, would violate Rule 1.05(b)(1) or (b)(3).*[69]

Comment 7 thus concludes:

> *Thus the effect of paragraph (b) is to extend any inability of a particular lawyer under paragraph (a) to undertake a representation against a former client to all other lawyers who are or become members of or associated with any firm in which that lawyer is practicing. If, on the other hand, a lawyer disqualified by paragraph (a) should leave a firm, paragraph (c) prohibits lawyers remaining in that firm from undertaking a representation that would be forbidden to the departed lawyer only if that representation would violate subparagraphs (a)(1) or (a)(2). Finally, should those other lawyers cease to be members of the same firm as the lawyer affected by paragraph (a) without personally coming within its restrictions, they thereafter may undertake the representation against the lawyer's former client unless prevented from doing so by some other of these Rules.*

Remember, Rule 1.09(a) provides that, in the absence of client consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client if it is the same or a substantially related matter, if the representation and reasonable probability will involve a violation of the rule protecting client confidences (i.e., Texas Rule 1.05), or if it is a matter in which such other person questions the validity of the lawyer's services or work product for the former client.

> **EXAMPLE:** Transferring lawyer left Firm A to go to Firm B. Former partners or associates at Firm A where a transferring lawyer previously worked wish to represent a person (Client X) whose interests are adverse to a client formerly represented by the transferring lawyer (Client Y) in a matter worked on by the transferring lawyer while he was employed by Firm A.[70]

[69] Texas Rules Rule 1.09 cmt. 6.

[70] Example taken from Tex. Discl. Rules Prof. Conduct 1.09, Comment 6.

1) Conflict Facing Transferring Lawyer

The transferring lawyer could not represent Client X under Rule 1.09(a). The matters involved are the same matters. This would be the case even if Client X and Client Y had substantially related matters.

2) Conflict Facing Remaining Lawyers at Firm A, After Departure of Transferring Lawyer

After the transferring lawyer leaves Firm A, then Rule 1.09(c) prohibits lawyers remaining in Firm A from undertaking a representation that would be forbidden to the departed lawyer but only if that representation would violate Rule 1.09(a) (1) or (a) (2):

1. If representation of Client X would involve the validity of the transferred lawyer's services or work product for Client Y, or
2. If the representation of Client X will in reasonable probability involve a violation of confidential information by Firm A under Texas Rule 1.05.

There is no reference in Rule 1.09(c) to Rule 1.09(a)(3) – the substantially related test. This omission means that the transferring lawyer might have a conflict in representing Client X and Client Y on account of the fact that the two representations are the same matter or a substantially related matter, but that is irrelevant with respect to whether the lawyers in Firm A have a conflict. Rule 1.09(b) does not apply either since the transferring lawyer is no longer at Firm A. There is no conclusive presumption applicable to the lawyers at Firm A with respect to information possessed by the transferring lawyer.[71]

> **EXAMPLE**:[72] A physician had his privileges terminated by Medical Center, for reasons that included the physician's failure to report a malpractice suit filed against him. The physician had received legal advice from Lawyer A that the malpractice suit was groundless and the physician did not need to report the suit to Medical Center. Lawyer A was the physician's lawyer in the malpractice case. Lawyer B represented Medical Center in the matter involving the physician. Lawyer A and Lawyer B were formerly law partners at the time the malpractice action arose against the physician. Lawyer B did not participate in the malpractice case while at the former firm with Lawyer A, nor did Lawyer B have any confidential information concerning the physician. The physician sought to disqualify Lawyer B from representing Baylor.

[71] Burton, Migratory Lawyers at 674.

[72] These Example is a summary of the facts in In re Basco, 221 S.W.3d 637 (Tex. 2007)(per curiam).

In a case presenting facts similar to the Example, the Texas Supreme Court held in *Basco*[73] that Lawyer B was disqualified from representing Medical Center because to do so would require Lawyer B to question the legal work from Lawyer A in the malpractice action. The physician relied upon the legal advice of Lawyer A in his not reporting the malpractice action to Medical Center, which now forms one of the grounds of his denial of privileges.

Schuwer & Hardwick believes that the Supreme Court decided Basco incorrectly.[74] They argue that Lawyer B is not subject to Rule 1.09(a) or (b) and thus was not tainted by his association with Lawyer A.

Rule 1.09(a) applies to the lawyer who personally represented the former client. Here, Lawyer A represented the former client – the physician. Rule 1.09(a) does not apply to other lawyers in Lawyer A's firm. Rule 1.09(b) does not apply either because that provision is not invoked unless one lawyer in the former firm is the lawyer who would be prohibited by Rule 1.09(a) from representing the physician.[75]

Rule 1.09(c) is the rule to consider with respect to Lawyer B. The transferring lawyer's former law firm may not represent a client that, if assumed by the departed lawyer, would violated Rule 1.09(a)(1), which the rule preventing a lawyer from questioning the validity of the lawyer's own work.

Rule 1.09(c) also provides that the transferring lawyer's former firm may undertake representation if by doing so there is a reasonable probability of violating Rule 1.05 (confidential information). The focus is the actual knowledge of the law firm which the transferring lawyer just left, not imputed knowledge.[76]

Rule 1.09(c) does not apply to the transferring lawyer, but the former law firm. Thus, Rule 1.09(c) does not apply to Lawyer B in any respect.

3) Substantial Relationship Test

Disqualification of a lawyer is likely when representing a client against a former client and subject matter is closely related between current and former client. The fear is that confidences obtained from the former client might be useful in the representation of the present client.[77]

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[73] In re Basco, 221 S.W.3d 637 (Tex. 2007)(per curiam).

[74] Schuwerk & Hardwick at §6.9

[75] Id.

[76] Id.

[77] Tex. Discl. Rules Prof. Conduct 1.09, Comment 8.

A lawyer is not subject to discipline under this Rule unless the new representation by the lawyer in reasonable probability would result in a violation of those provisions. [78]

Lawyer is advised to discuss with new client the issues arising from the lawyer's prior representation of former client. The possibility that a disqualification might be sought by the former client or granted by a court, however, is a matter that could be of substantial importance to the present client in deciding whether or not to retain or continue to employ a particular lawyer or law firm as its counsel. [79] Client decides.

d. A Seven-Step Framework for Analyzing Conflicts with Former Clients.

1. Was there ever an attorney-client relationship between the lawyer and a person or entity that may object to the representation?
2. Is the client truly a former client of the lawyer's?
3. Are the interests of the current and former clients adverse?
4. Is there a substantial relationship between the two representations?
5. Has the former client consented to the current representation, or waived objections to it?
6. Is the presumption that the lawyer gained confidential information from the former client rebuttable in this jurisdiction?
7. Has the presumption been rebutted?[80]

[78] Tex. Discl. Rules Prof. Conduct 1.09, Comment 8.

[79] Tex. Discl. Rules Prof. Conduct 1.09, Comment 9.

[80] Taken from Joan C. Rogers, Look For Seven Guidelines Through Law Governing Former-Client Conflicts, ABA/BNA Lawyers' Manual on Professional Conduct, Current Report, 18 LMPC 490 (Aug. 14, 2002).

4. RULE 1.12 ORGANIZATION AS CLIENT

Rule 1.12 establishes that an organization can be the client, and a lawyer engaged to represent an organization takes direction and reports to the organizations "duly authorized constituents."

Text of Texas Rule 1.12:

> ***(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph***
>
> > ***1. the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.***
> >
> > ***2. A constituent of the organization "has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;"***
> >
> > ***3. the violation "is likely to result in substantial injury to the organization;" and***
> >
> > ***4. the violation is "related to a matter within the scope of the lawyer's representation of the organization."***
>
> ***(b) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due***

consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

1. ***asking reconsideration of the matter;***

2. ***advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and***

3. ***referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.***

(c) Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

Rule 1.12(a) makes clear that a lawyer performing legal services for an organization represents the entity. The lawyer is to protect the best interests of the

organization.

Rule 1.12(b) concerns conditions requiring the lawyer to take remedial action if:

- A constituent of the organization "has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;"
- the violation "is likely to result in substantial injury to the organization;" and
- the violation is "related to a matter within the scope of the lawyer's representation of the organization."

Rule 1.12(c) defines the remedial actions and measure the lawyer should consider. Rule 1.12(d) pertains to terminations of the legal relationship.

The basic idea of Rule 1.12 is not conflicts of interest, but who speaks to the lawyer for an organization and describe the relationships between the lawyer and the constituents of the organization.

a. Entity as Client

1) Lawyer's Duty Runs to Entity

Rule 1.12(a) adopts an entity theory. The entity is the client of the lawyer, "as distinct from its directors, officers, employees, members, shareholders or other constituents." By stating that the lawyer's client is the organization, the corollary is that the organization's constituent is not the client. The corporate director or officer may regularly deal with the lawyer and perhaps develop a close personal or working relationship, but absent a dual representation, the organization remains the client.

The lawyer's duty is to serve the best interests of the entity, rather than that of the constituent partners or shareholders individually.

When representing an entity, the lawyer confronts the same issues of client identity and document the relationship. Further, the engagement letter should specify who speaks for the entity.

2) Communications Through Constituents

A potentially troublesome issue is communications with entity. Obviously, the entity cannot consult with the lawyer, or direct the lawyer. Communications to and from the entity are through constituents, who are not considered clients under Rule 1.12(a). The constituents are not clients, but are the agents for the client – the entity.

> **EXAMPLE**: L is corporation counsel to City, which has been sued by a citizen who claims to be the victim of police brutality. After discovery has been completed, the plaintiff offers to settle the case for a sum that L considers to be reasonable. Furthermore,

> although L is convinced that there is a realistic chance to win the lawsuit, she also believes that the plaintiff has a powerful case as to liability, and fears that the reputation of City and its police department will be tarnished in a public trial, no matter what the outcome.
>
> The Chief of Police, aware of the settlement offer, is firmly opposed to it, and demands that L "back up the Department." Upon being briefed, the Mayor is convinced that the police officers were innocent of any wrongdoing, but believes that the case may be lost anyway, and that the adverse publicity (even in the event of eventual vindication) would be harmful both to City and to his own image. Accordingly, he favors the settlement.[81]

Rule 1.12(a) directs the lawyer to take direction from the entity's "duly authorized constituents." Thus, the lawyer needs to determine who acts for the entity. The City presumably will have a council, who authorizes funds for the settlement. If so, then the lawyer's duty runs to the council. Perhaps the mayor of the city could be the constituent. Presumably, the mayor is more senior than the policy chief. [82]

3) Loose Knit Group as an Organization

The entity theory of Rule 1.12 applies to many types of formal organizations apart from corporations, partnership, LLCs. Labor unions, unincorporated associates, governmental units are entities also for purposes of Rule 1.12.

Two or more persons could be an informal partnership or joint venture. The problem of identifying an organization can arise in loosely formed organizations or associations. A loose-knit group can be formed solely to hire counsel.

> **EXAMPLE**: Seventeen homeowners together hired lawyer L to bring a nuisance action against a nearby factory that has recently added a night shift operation. The clients have agreed in writing that in the event a settlement is offered, an agreement by any twelve to accept the offer will bind the others.[83]

When facing an informal group, the lawyer's job is to make clear whether the lawyer represents the group as a entity or the multiple members as individual clients, or

[81] Example taken from G. Hazard & W. Hodes, The Law of Lawyering, Third Edition, 1543 PLI/Corp 571, 587 (May 2006).

[82] Id.

[83] Example taken from G. Hazard & W. Hodes, The Law of Lawyering, Third Edition, 1543 PLI/Corp 571, 589 (May 2006).

both. Further, the lawyer confirms who speaks for the entity.

While the Example could present a circumstance of multiple individuals hiring the lawyer, the better view is that the individuals formed an entity and the individuals have determined that 12 members speak for the majority. The lawyer should make this clear in the engagement letter.[84]

4) Conflict Between Entity and Constituents

When a constituent hires a lawyer for an entity, the entity is the client of the lawyer, not the constituent. Both the constituent and the lawyer are agents of the entity. That is the point of Rule 1.12.

The authority of the constituent is that authority derived from the entity. As agent of the entity, the duly authorized constituent exercises the authority to benefit the entity. The circumstance could arise when the lawyer forms a view that the constituent is harming the entity or acting against the entity's interest.[85]

> **EXAMPLE**: L is counsel for a small close corporation, the majority of whose stock is held by P, the president, and T, the treasurer. W, the widow of a former principal in the corporation, holds the remaining stock--a significant minority interest. L discovers that P and T, without the knowledge of W, have been engaged in self-dealing, with substantial adverse effects on the corporation's profits. When L questions P about the self-dealing transactions, P discharges L, and threatens to sue L if she discloses any information--including to W-- learned while employed as counsel to the corporation.

According to Rule 1.12(a), L represented only the corporation. Once discovering wrongdoing, the lawyer's obligation was protect the interests of the organization. What is unclear is whether W is a "higher authority" in the company. After all, W can be outvoted by P and T together. Perhaps the shareholder group is the "higher authority" though two of the three shareholders already know of the situation. Ultimately, Lawyer should inform W about the situation and seek guidance.[86]

The most obvious concern is when the director or officer reveals a personal confidence to the organization's lawyer. The lawyer would then be facing a conflict. Rule 1.12(e) instructs that

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[84] Id.

[85] See Tex. Discl. Rules Prof. Conduct 1.12(b), (c).

[86] G. Hazard & W. Hodes, The Law of Lawyering, Third Edition, 1543 PLI/Corp 571, 592-93 (May 2006).

> *a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.*

5) Problems when Control of Entity in Doubt

The lawyer faces increasing challenges in representing an entity when internal strife erupts inside the entity.

> **EXAMPLE**: L represents a three-person general partnership organized to own and operate a large apartment building. P, one of the partners, manages the building--a full-time job. The managing partner, M, decides to terminate P's services, as permitted by the employment contract. At about the same time, however, the partnership was required to refinance the mortgage on the building, and the lender required each individual partner to assume personal liability at the closing. Fearful that P would not cooperate in closing the loan, but would instead withdraw from the partnership, M directed L not to inform P about his impending dismissal until after closing. Following these instructions, L attended the closing with P, and secured the refinancing of the building, which included P's personal guarantee.[87]

In *Rice v. Strunk*,[88] from which the Example was drawn, P sued L for breach of fiduciary duty, and argued that L represented all three individuals, the group and that L breach his duty to P by not informing P of the situation before closing.

The court ruled in *Rice* that the entity theory of representation applied to general partnerships. Further, L acted properly because L had no duty running to P. In fact, L would have become exposed to malpractice if L had refused to obey the entity's instructions.

Who is to say what is in the entity's best interest? Did L have a duty to refuse to carry out instructions the lawyer believes are fraudulent or violate fiduciary duty?

Also, Rule 1.12(e) imposes a duty on the lawyer to warn individual constituents such as P that they are unrepresented.

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[87] Example taken from . G/ Hazard & W. Hodes, The Law of Lawyering, Third Edition, 1543 PLI/Corp 571, 593 (May 2006), which based the Example on Rice v. Strunk, 670 N.E.2d 1280 (Ind. 1996)..

[88] 670 N.E.2d 1280 (Ind. 1996).

Did the lawyer owe P any duty, even apart from lawyer-client duties? Did lawyer's duty to the partnership extend to individual partners?

6) Dual Representation of Entity and Constituent

Dual representation is a possibility, though the risk of conflict facing the lawyer increases. Appropriate consents should be obtained.[89]

> **EXAMPLE:** An attorney was retained by a corporation. An officer of the corporation was the primary liaison between the corporation and retained counsel. The attorney had personally represented this officer in the past but was not retained by the officer. In investigating a claim of the corporation, this officer disclosed to the attorney facts amounting to a criminal offense and breach of duty to the corporation not only by the officer but by other directors of the corporation.[90]

Issues raised in Example:

- Should the attorney report the facts to the Board of Directors?
- Should the attorney report the facts to the Stockholders?
- Should the attorney report the facts to appropriate investigatory authority?
- Was the conversation privileged?

Professional Ethics Committee Opinion 387 (decided under ethics rules before 1990) opines that the lawyer is not free to disclose the facts revealed by the corporate officer to the organization because of the reasonable belief by the officer that he was a client of the lawyer:

> *If it be considered that both the corporation and the officer are clients, the answer is easy. They are multiple clients and the attorney's duty to each conflicts and he should withdraw from representing both. The revelation of a past crime is privileged and he has no duty or right to reveal the confidential communications to anyone.*

If, however, the corporation were considered to be the only client—as would be the case had the lawyer clearly explained his role before any disclosure had been made—the lawyer would have been "free to disclose the official's conduct to the directors of the

[89] Schuwerk & Hardwick at §6.12.

[90] Example based upon Tex. Ethics Opinion 287 (April 1977).

corporation and, if necessary, to its shareholders."[91]

Today, Opinion 387 might be framed differently. The lawyer would confront Rules 1.02, 1.05 and 4.01 concerning the lawyer's duty to reveal a crime, or persuade the client to take corrective action.

b. Decisions by Constituent

The lawyer must deal and communicate with the entity through its constituents.

Rule 1.12(e) requires lawyers to explain that the entity, and not the constituents, is the client "when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part."

Comment 4 to Rule 1.12 indicates that whether such warnings are necessary "may turn on the facts of each case." When such a warning is necessary, the best practice is to put the warning in writing to avoid later disputes as to whether adequate warning was given.

Engagement letters should identify the point of contact in the organization.

c. Entity Formation

When a lawyer is involved in forming an entity, a number of options for explaining the nature of the representation have been used.

- Lawyer represents one of the constituents of the contemplated entity, and then may represent the entity later.
- Lawyer represents all of the constituents during formation, and may involve representation of the entity later.
- Lawyer may disclaim representation of individual constituents completely, and only represent the entity both at the formation and later stages.

The idea that the lawyer represents the entity is difficult to sustain when there is no entity.

1) Representing Only the Entity

A few cases and commentators have suggested that a lawyer can represent the entity from the start. This approach appears to be a model commonly used by lawyers in

[91] Id. See Schuwer, & Hardwick, §6.12.

entity formation.[92] To date, no Texas case law or ethics opinion addresses the "entity only" model of representation.

Because partnership and incorporation statutes permit ratification of actions prior to formalization of the entity, Arizona Ethics Opinion 02-06 reasons that a lawyer may represent the entity only if the forming constituents are notified and they ratify pre-formation actions of the entity after formation of the entity. Interestingly, the opinion does not address who the client is in the event that the entity is not ultimately formed.

Arizona Opinion 02-06 details how the lawyer should deal with constituents.

- Besides the requirements of notifying the constituents that they are not the client and subsequent ratification of pre-formation actions, all of the constituents should be warned that confidential information must be shared with other constituents, though not with others outside the organization.
- The lawyer should regularly remind the constituents that the organization is the client, rather than each of the constituents individually.

As one would expect with an ethics opinion, the details of potential liability with regard to this model are not discussed. Also missing from the opinion is any discussion of how the lawyer may be subject to liability for an implied attorney client relationship despite the existence of the documentation regarding the organization as client.

In Manion v. Nagin,[93] the court acknowledged that it was possible for a lawyer to represent only the entity, but noted that giving legal advice to a constituent as to their individual situation created an attorney client relationship.

The practical issue in many situations is how the lawyer can avoid giving legal advice to constituents when forming an entity. Consider whether answering the following questions, which may be raised in the course of working with constituents in forming an entity, could constitute individual legal advice:

- What is my potential liability under the entity alternatives?
- What are the tax implications?
- What are my options if I want to withdraw from the entity?

It may be difficult for a lawyer to repeat at all times necessary that she or he represents only the entity. Lawyers who rely on this model should understand the follow

[92] The best exposition of this model of representation is found in Arizona Ethics Opinion 02-06 (2002). The Arizona opinion analyzes rules very close to Texas Rules 1.05 (Confidentialty), 1.06(General Conflict Rule) and 1.12(Organization as Client).

[93] 394 F.3d 1062 (8th Cir. 2005).

through necessary to make certain that they represent only the entity.

The disciplinary rules expressly dealing with representation of entities fail to address the issue of who is represented when the entity is in the formation process. At the time formation is in progress, the entity usually does not yet exist. The nature of this representation has been the subject of conflicting analysis by ethics commentators.

2) Representing the Entity and One Constituent

Commonly, a lawyer represents one constituent in the formation of an entity. Often, the lawyer is representing a long-time client who is putting a transaction together with others and the lawyer is to represent the long-time client and the organization to be formed.

The risks are stated by Schuwerk & Hardwick,

> *Where a lawyer is considering representing an organization and its constituent in the same matter, the likelihood of such conflicts is quite high. As a consequence, the lawyer should exercise special care in ensuring that the matter is suitable for joint representation, and that all contemplated clients have been fully advised of the possible risks and disadvantages of such a course.*[94]

Thus, the ethical issues noted in the representation of a single constituent apply to representation of multiple constituents. Engagement letters and contracts should identify the client.

As to unrepresented constituents, the lawyer "should not give advice to an unrepresented person."[95] An attorney client relationship can be implied by the act of giving legal advice.[96] Thus, if legal advice is given to unrepresented constituents, the lawyer may have an affirmative duty to avoid conflicts.

Lawyers should document, preferably by a signed acknowledgment, that unrepresented constituents are not the client and have not been given individual legal advice.

Conflicts require disclosure and consent "when there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected . . . by the

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[94] Schuwerk & Hardwick, §6.12.

[95] Comment to Tex. Discl. Rules Prof. Conduct 4.03.

[96] See, e.g. Bituminus Casualty Corp. v. Texas Window Specialties, 2006 WL 864277 (W.D. Tex. 2006)(issue of fact as to whether there was an attorney client relationship when lawyer provided both corporate and personal legal services to a constituent).

lawyer's duties to another current client . . . ."[97]

> **EXAMPLE:** A former employee sues Company X and Supervisor Y in an employment-related matter. Company X wants to pay for Y's defense. Law firm has been representing Company X for several years in its labor and employment matters. Thus, Company X enlists law firm in the representation of both X and Y. Prior to entering into representation of X and Y, law firm consults with Y and discusses the implications of this dual representation.
>
> The engagement letter with X and Y makes clear that there are no conflicts between them, and they have revealed all relevant information to each other, and that if a conflict arises in the future, then this information is to be revealed and the law firm can continue to represent X in the litigation.
>
> In the course of law firm's investigation for the defense of former employee's suit, it discovers that while Y is innocent of the former employee's charge in the suit, he is not a suitable supervisor. Y has committed no criminal or fraudulent acts. X and Y are informed of law firm's discovery and Y is fired by X. Law firm withdraws from Y's representation and continues to represent only X in the present litigation.[98]

In Opinion 487, the specific provisions of the engagement letter permitting the law firm to continue to represent X are critical to enabling the law firm to continue work on the case on behalf of X.

3) Representing the Entity and All Constituents

A common situation is for a lawyer to represent all constituents in an entity formation.

The Restatement provides discussion of a scenario involving partnership formation under Illustrations 4 and 5 of Section 130 which notes conflicts requiring informed consent arising from different contributions to the partnership by the partners.

It is also common for there to be unresolved differences that are subject to negotiation when a partnership is formed. When there are unresolved differences, lawyers must consider Rule 1.07, the intermediary rule, before deciding to take on the representation.

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[97]Restatement of Law (Third) Governing Lawyers § 121. See Tex. Discl. Rules Prof. Conduct 1.06(a)-(c).

[98] Example based on Tex. Ethics Opinion 487 (Dec. 1992).

Mediating disputes between clients is permitted with informed consent if neither "contested litigation" or "contentious negotiations" are anticipated.[99]

Lawyer may have a hard time objectively analyzing whether potential negotiations will be contentious.

A variation on the multiple constituent representation model can arise when a lawyer has a long time client who is involved in the entity formation.

Comment i to Section 132 of the Restatement analyzes whether a lawyer can represent a long time client in a matter as well as a new client on a one time basis, and retain the ability to represent the long time client in the event of a dispute among the parties.

The Restatement calls this new client an accommodation client.

The Restatement allows for this type of arrangement, if the new client is aware of the long time representation and does not expect the lawyer to keep confidences.

The Texas Rules arguably allow for accommodation clients if "prior consent is obtained."[100] This suggests that for accommodation client status to work, a lawyer needs to get such consent in writing before beginning representation.

The difficulty in relying on accommodation client status is that nothing changes the basic conflict rule that the lawyer must able to adequately represent all of the clients. When a lawyer relies on accommodation client status to represent a long time client, in a malpractice claim the new client may argue that the lawyer had only the long term client's interests at heart during the time that the lawyer represented both clients.

d. Representing an Affiliate or Another Entity

The attorney might be asked to represent another entity, either a subsidiary or affiliate or joint venture. The immediate question is whether the affiliate or subsidiary is to be treated as a separate entity for conflict purposes? For attorney-client purposes? For work-product purposes?

If there is common ownership, can the lawyer rely on the highest authority in the corporate group, as in any entity representation?

Professor Hazard points out that there are three points of view:

- All affiliated entities, even those not wholly-owned, are a single client organization

[99]Tex. Discl. Rules Prof. Conduct 1.07, Comment 4.

[100]Tex. Discl. Rules Prof. Conduct 1.06(d).

- Each corporate entity is a separate client[101]
- Intermediate position - corporate affiliates generally constitute a single entity for most purposes (at least when they are all components of a common primary corporate organization), but that the remedy of disqualification for conflict of interest may be refused unless actual harm to one of the affiliates is threatened.[102]

As with any multiple representation, the lawyer should take special care to make all organizations aware of any conflicts of interest inherent in the legal structure and that both entities have consented.

Consent should be obtained through appropriate officials of both organizations.

> **EXAMPLE**: Corporation intends to form joint venture (in corporate or partnership form) with another entity. To be cost effective, the corporation will make its in-house counsel available to the venture.[103]

Opinion 512 opined that even though a conflict or potential conflict of interest existed in the lawyer's representation of the employing corporation and the joint venture to which the lawyer is loaned, such multiple representation is permissible if (1) the corporation and joint venture consent after full disclosure and (2) the lawyer reasonably believes that the lawyer's representations of the corporation and of the joint venture will not be materially affected.[104]

The opinion pointed out that it is the simultaneous representation of the joint venture and the corporation that presents the potential for conflict under Rule 1.06(b)(2). The rule prohibits a lawyer from representing a person if the representation "*reasonably appears to be or become adversely limited by the lawyer's responsibilities to another*

[101] E.g. California State Bar Formal Op. 1989-113; ABA Formal Op. 95-390.

[102] G/ Hazard & W. Hodes, The Law of Lawyering, Third Edition, 1543 PLI/Corp 571, 601-02 (May 2006). For example of intermediate approach, Hazard cites Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990)(Gould Corporation initially sued a number of defendants in a trade secrets matter. Subsequently, a corporation that was an unrelated existing client of the law firm representing Gould acquired one of the defendants. The court nonetheless refused to disqualify the firm from continuing to represent Gould. The court ordered the law firm to cease representation of one or the other of the clients, and to wall off the lawyers who had worked on matters for the client thus dropped. The law firm of course chose to maintain its relationship with Gould Corporation, its long-term client.).

[103] Example taken from Tex. Ethics Opinion 512 (June 1995).

[104] Id.

client to or a third person . . . . "[105]

Even though a conflict, or a potential conflict, may exist in simultaneous representation of the corporation and the joint venture, such multiple representation is permissible if Rule 1.06(c) is observed.

a) **Lawyer's Reasonable Belief**. The lawyer must reasonably believe that the representation of each client will not be materially affected, and

b) **Consent**. Corporation and the joint venture must consent to such representation after full disclosure. In these circumstances, the required consent could not be given on behalf of the joint venture by the corporation employing the lawyer; instead, consent must be obtained from an authorized employee of the joint venture, if the joint venture has its own employees, or from the other joint venturers.[106]

c) **Consent to Payment of Fee Arrangement**. The disclosure to the joint venture and the joint venture's consent should also include the fact that the lawyer may be paid by the corporation and not the joint venture. Under Rule 1.08(e), a lawyer may be paid from a source other than the client if (1) the client is informed of that fact and consents, (2) the arrangement does not compromise the lawyer's

e. Governmental Agencies as Client

Governmental agencies are within Rule 1.12.[107] The lawyer representing a governmental agency, however, faces more complexity in that the forces introduced by other statutes and rules will need to be reconciled with Rule 1.12. Also, client identity might prove more difficult than in the private sector. Government lawyers are held to the same standards as private practitioners.[108]

5. INFORMED CONSENT

a. Circumstances When Client Consent is Permissible

Rule 1.06(c)(2) permits client consent in non-litigation situations when the lawyer contemplates representing a client with a substantially related matter to another client of the lawyer or firm. The lawyer may represent the client if the lawyer believes the

[105] Tex. Discl. Rules Prof. Conduct 1.06(b)(2).

[106] Tex. Discl. Rules Prof. Conduct 1.12, comment 5.

[107] Tex. Discl. Rules Prof. Conduct 1.12, Comment 9.

[108] See State v. DeAngelis, 116 S.W.3d 396, 404–06 (Tex.App.—El Paso 2003, no pet.).. See Schuwerk & Hardwick at §6.12 highlighting *See In re* Lindsey, 148 F.3d 1100 (D.C.Cir.1998) (lawyer serving as "White House counsel" was not personal attorney for President Clinton as a matter of law, so that the President could not assert the attorney-client privilege with respect to his communications with White House counsel concerning the Monica Lewinsky affair that might involve criminal activity).

representation of each client will not materially affect each client and each client consents to the representation, after full disclosure.

Rule 1.06(d) further prohibits a lawyer from representing one of multiple clients who are in a dispute, unless prior consent is obtained.

Prior consent is present in Rule 1.09(a) permitting a lawyer to represent a client in a matter adverse to a former client if conditions are met. Prior consent will permit the adverse representation.

In the normal consent situations, the lawyer or firm seeks a client waiver of a conflict of interest, but there are situations when client consent will not repair a conflict. Rule 1.06(c)(1) requires the lawyer to "reasonably believe" that representation of each client will not materially affect each client. If the lawyer does not form this belief, then client consent does not matter. This test requiring a lawyer's judgment introduces, in the words of the Schuwerk & Hardwick treatise,

> *an objective standard that requires the lawyer to consider not only the lawyer's own views of the severity of the conflict, but also those of a hypothetical reasonably competent, prudent, and disinterested lawyer, as well as those of a similarly endowed client.*[109]

Comment 7 of Rule 1.06 provides:

> *when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for [the client to waive the conflict and consent to the lawyer's representation] or provide representation based on the client's consent.*[110]

b. Risk to Non-Litigator of Failing to Obtained Informed Consent

Conflict of interest matters arise most frequently in disqualification motions in litigation cases, failing to obtain informed consents in non-litigation practice creates risk to the non-litigator. The dangers to the non-litigator include:

- Lawsuit against lawyer or firm for injunction from representation.[111]
- Action for damages,[112]

[109] Schuwerk & Hardwick at §6.6.

[110] Tex. Discl. Rules Prof. Conduct 1.06, Comment. 7;

[111] Schuwerk & Hardwick at §6.6 n.125, citing Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277 (1992)..

- Action for fee forfeiture.[113]

c. What is Informed Consent?

The nature of an informed consent is explained in Texas Rule 1.06(c)(2), which requires that

> *each affected or potentially affected client consent 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.*[114]

The idea of an informed consent is not a mere formality.[115]

The ABA defined Informed Consent as:

> *the agreement by a person to a proposed course of action after the lawyer has communicated adequate information and explanation about the material risks of and reasonable alternatives to the proposed course of conduct.*[116]

The Restatement (Third) of the Law Governing Lawyers offers an excellent commentary on the nature of informed consent and the steps required to be taken by the lawyer in order to provide sufficient information, both quantitatively and qualitatively, to the client.

Informed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. Information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.

Requisite information forming basis of an informed consent normally should address

- the interests of the lawyer and other client giving rise to the conflict; contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict;

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[112] Id. citing Maritrans, supra, 602 A.2d at 1284–88; Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).

[113] Id.

[114] Tex. Discl. Rules Prof. Conduct 1.06(c).

[115] Tex. Discl. Rules Prof. Conduct 1.06, Comment 8.

[116] ABA Model Rule 1.0(e).

- the effect of the representation or the process of obtaining other clients' informed consent upon confidential information of the client;
- any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and
- consequences and effects of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients.[117]

Circumstances of the conflict will affect the nature of information to be supplied.

Conflict arises solely because a proposed representation will be adverse to an existing client in an unrelated matter: knowledge of the general nature and scope of the work being performed for each client normally suffices to enable the clients to decide whether or not to consent.

Consent relates to a former-client conflict: former client must be aware that the consent will allow the former lawyer to proceed adversely to the former client.

The lawyer is responsible for providing sufficient information.

But the client might already know the information or learns it from other sources.

If the client is independently represented, then less information will be required.

Provide information in writing, though a written informed consent is not technically required by Texas Rules.[118]

d. Advanced Waivers

Often, especially in large firm practice, engagement letters will seek client consent relating to future representations adverse to present client, which are unknown or in the future and non-specific.[119]

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[117]Restatement (Third) of the Law Governing Lawyers §122, Comment c(i). See, Conoco, Inc. v. Baskin, 803 S.W.2d 416, 419 (Tex.App. - El Paso, 1991, no writ) (full disclosure of existence, nature, implications, and possible adverse consequences of multiple representations).

[118]Tex. Discl. Rules Prof. Conduct 1.06, Comment 8 ("While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.")

[119] Schuwerk & Hardwick at §6.6 ns.125, 136, citing Richard W. Painter, Advance Waiver of Conflicts, 13 Geo. J. Legal Ethics 289 (2000); ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT, Current Reports, Is Representing One Client Against Another Ever Worth It? , v. 21, no. 16 (Aug. 10, 2005), at 420; id., Current Reports, Speakers Share Ideas on Obtaining Effective Written Waivers of Conflicts, v. 21, no. 12 (June 15, 2005), at 308. See also Wolk v. Flight Options, Inc., 2005 WL 2230240 (E.D. Pa. 2005) (inclusion of an advance waiver of future conflicts clause in contingent fee agreement does not automatically invalidate that agreement). See also Alice

The ABA has been liberalizing its views and permitting advanced waivers permissible.[120] In a 1993 ABA Opinion advanced waivers were permitted if four conditions were satisfied:

- there is no adverse effect on the present representation (or on any intervening ones) from undertaking the subsequent representations;
- the particular future conflict of interest as to which the waiver is invoked was of the sort reasonably contemplated at the time the waiver was given;
- consent to undertake the conflicting subsequent representation is not taken as consent to use or disclosure of the present client's confidential information; and
- the waiver is in writing.[121]

This 1993 opinion was withdrawn in 2005 because ABA Rule 1.7(b) was adopted.[122] ABA Model Rule 1.7(b) imposes the following requirements for advance waivers:

- the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- the representation is not prohibited by law;
- the representation does not involve the assertion of a claim by one client against another client represented in the same litigation or other proceeding before a tribunal; and
- each affected client gives informed consent confirmed in writing.[123]

E. Brown, Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?, 19 Geo. J. Legal Ethics 567 (2006) (Note) (arguing that ABA's approach is not sufficiently protective of the legitimate interests of a lawyer's client)..

[120] Schuwerk & Hardwick at §6.6 ns.125, 136, citing ABA Formal Op. 05-436 (2005) and suggesting the following articles: Michael J. DiLerna, Advanced Waivers of Conflicts of Interest in Large Law Firm Practice, 22 Geo. J. Legal Ethics 97 (2009); Nathan M. Crystal, Enforceability of General Advance Waivers of Conflicts of Interest, 38 St. Mary's L.J. 859 (2007); Michael J. DiLerna, Advance Waivers of Conflicts of Interest in Large Law Firm Practice, 22 Geo. J. Legal Ethics 97 (2009); Lauren Nicole Morgan, Finding Their Niche: Advance Conflicts Waivers Facilitate Industry-Based Lawyering, 21 Geo. J. Legal Ethics 963 (2008) (Note); Alice E. Brown, Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?, 19 Geo. J. Legal Ethics 567 (2006) (Note).

[121] ABA Formal Op. 93–372 (1993).

[122] ABA Formal Op. 05-436 (2005) (withdrawing ABA Formal Op. 93-372 (1993).

[123] ABA Model Rule 1.7(b)(1) to (4) (2005)

In Texas, there is limited guidance but suggests some acceptance of advance waivers.[124]

6. SUGGESTIONS ON CONSIDERING MULTIPLE PARTY REPRESENTATION

a. Documentation.

The key lesson of the ages in avoiding malpractice issues is documentation, communication and then more documentation.

1) Before commencement of representation

Use client intake forms

Identify client.

Identify conflicts of interest

Prior representation of one of the joint clients.

Identify who controls client.

Client intake forms should not ask for every bit of information needed to carry out representation, but should instead be focused on gathering information sufficient to decide if the lawyer is willing to receive confidential information.

Modern law practice more frequently involves matters concern foreign business activities. Consider dealing with the Foreign Corrupt Practices Act issues in initial client set up documentation.

Once confidential information has been received, a potential client is entitled to protection of the confidence, even if the lawyer subsequently rejects the matter.

If representation is declined, then document it. Use a declination letter.

2) Commence of representation

Important documentation: engagement letter.

Heart of engagement letter[125]

The heart of an engagement letter or client contract should focus on:

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[124] Schuwerk & Hardwick at §6.6 n. 132, citing PEC Op. 487 (1992)(law firm may represent both an organization and its allegedly culpable employee, despite the existence of a potential conflict of interest, and then withdraw from representing the employee, continue to represent the organization, and even use the employee's confidential information against him and for the benefit of the organization, once that conflict materializes, because the employee had been informed of that course of conduct at the outset and consented to it).

[125]Taken from Texas Lawyers Insurance Exchange Newsletter, No. 3 (2005), reprinted at http://www.tlie.org/newslet/adv0512/0512-2.htm (last accessed May 11, 2009).

- Client identity
- Accept or reject
- Declination letters to non-clients
- Scope of the engagement
- Fee arrangement
- Disclosure and consent to potential conflicts
- Exit from relationship

Client Identity. Establishing client identity in engagement letter forces lawyer to analyze confusing client situations up front.

> **PRACTICE TIP:** Group of persons seeks to form a corporation. Lawyer needs to determine whether one or more of the individuals should be the client and determine if individual needs may conflict with the corporate interest.
>
> **PRACTICE TIP**: When a third party is paying for the legal services. A letter to the third party disclaiming any attorney client relationship can avoid claims that the lawyer failed to act in the interest of the third party.

Scope. The scope of the engagement should be established early, and may need to be altered as a matter progresses.

The scope of engagement includes a definition of the tasks to be undertaken by the lawyer, the client, and by third parties.

If the client has been warned in the engagement letter about the work they will have to do in connection with discovery, the chances that the lawyer will be sanctioned for the client's lapses diminishes.

When the services of an accountant or other professionals are necessary to obtain the benefit of a tax reduction strategy, including this in the scope of engagement documentation can avoid lawyer liability for the accountant's errors.

Fee Agreements

Written fee agreement are recommended, and often required by the disciplinary rules.

Contingent fee agreements must be in writing. Rules prefer written fee arrangements.

Fee issues often precede client dissatisfaction and malpractice claims.

Best practice is affording clients with multiple opportunities to understand the

basis of fees. This leads to reduced dissatisfaction and fewer malpractice claims.

Disclosures.

Documenting disclosure and consent to potential conflicts is not required by Rules, except for certain situations.

Oral discussion of potential conflicts with client is unsatisfactory; flawed memory.

Lawyer should act consistently with engagement letter. Departing from scope of engagement letter is ill-advised, without supplementing the engagement letter.

Subsequent events can moot terms of engagement letter.

> **EXAMPLE**: Addition of new parties to litigation should force a re-examination of conflict issues, for example.

3) During Representation.

Strong likelihood that engagement letter should be changed during engagement. Think of it as a "change order" in a construction context. A short letter will suffice, if client signs an agreement to the change.

If unrepresented parties encountered during representation, representation disclaimer letters will need to be provided them.

The balancing act: To what degree should a lawyer document advice given during representation.

Clients have better understanding if advice is in writing.

Written record for file is improved with confirming advice letters.

Giving pros and cons to advice forecloses client complaint that lawyers failed to recommend a course of action.

What amount of the legal time on a matter is spent documenting the lawyer's file?

When clients appear to not follow advice, then lawyer should be concerned; an optimum time to give written confirmation of advice given is when lawyer realizes or senses that advice will not be followed.

4) At Conclusion of Representation

When representation concludes, among the most important documents from the lawyer is a letter clearly stating that no further services will be provided in connection with the matter.

This concluding letter is strongly recommended whether the matter has come to a natural conclusion or amounts to a withdrawal.

The lawyer is telling the client in this writing that the client must seek to engage the lawyer on any subsequent matter. Further, it avoids the impression of continuous responsibility.

Upon withdrawal, the lawyer should provide client with detailed description of the status of the matter and urge client to seek other counsel.

Lawyer should also notify client in a conclusion letter of the file retention policy and timing for destruction of client file.[126]Records retention issues are a separate subject. Considerations:

Different matters call for a different period of records retention. Each file should be evaluated separately.

Consider statute of limitations on malpractice claim arising from file.

File should contain research, briefs, forms.

Clients get originals at end of representation.

Electronic scanning is a viable option for retaining file, or parts of it, while reducing pressure on physical space requirements.

> **EXAMPLE**: Two persons come to a lawyer and ask her to represent them both in a business transaction. Most of the time,, the lawyer may legally and ethically represent both persons.

Documentation is critical.

An important and troublesome issue in joints representation concerns confidences. The lawyer is torn between his or her duty of confidentiality under Rule 1.09 and his or her duty to keep all her clients informed under Rule 1.03.

Keep the distinction between privilege and confidentiality in mind. An excellent discussion of this distinction appears in *Brennan's, Inc. v. Brennan's Restaurants, Inc*.[127]

The attorney-client privilege deals with when a client's communication with a lawyer can be discovered in litigation or revealed at trial. Without a proceeding, the privilege plays no role.

A lawyer's duty of confidentiality under Rule 1.09 is always present.

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[126]See excellent article on record retention at Lee Nemcheck, Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools, 93 Law Library Journal 7 (2001), reprinted at www.aallnet.org/products/pub_llj_v93n01/2001_01.pdf (last accessed at May 11, 2009).

[127]590 F.2d 168 (5th Cir. 1979).

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These resources cited here were important references for this paper. There are specific footnote citations to these works in the paper, but these reference works were invaluable in the preparation of this paper, whether cited or not.

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Internet Based Resources

American Legal Ethics Library, Cornell University Law School, http://www.law.cornell.edu/ethics. The subsection of this resources dedicated to Texas legal ethics is found at http://www.law.cornell.edu/ethics/tx/narr/index.htm#1.9:100. This narrative is mostly written by various lawyers at Vinson & Elkins.

Freivogel on Conflicts, A Guide to Conflicts of Interest for Lawyers, http://web.me.com/billfreivogel/Freivogel/Freivogel_on_Conflicts.html. Extensive collection of annotations and discussion on conflict of interest issues. A stroll through this annotated presentation of cases should dispel any notion that multiple client representation is risk-free.