7 DEADLY SINS OF CONFLICT WAIVERS

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CHAPTER 16

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Hull's family has been a predominant force in the security and corrections industry for more than one hundred years. His great-grandfather founded the Southern Steel Company (world's largest manufacturer of jail/prison hardware) in 1897 in San Antonio, and it remained family-owned and run until 1981. Hull literally 'grew up' in the security and public project industry, and has represented clients across the United States and internationally, in most every phase of public and private projects.

Government contracting, project finance and related disputes and litigation have been at the heart of Hull's international practice for more than 3 decades. The majority of Hull's work has been devoted to representing private industry doing business, and having disputes with, local, state and federal entities in the development, financing, construction, refinancing, dispute resolution and operations of public projects and their privatization across the United States, as well as in Israel, Great Britain, and Costa Rica.

Hull has been a leader in improving education for lawyers for 30 years, has served the State Bar of Texas in many leadership roles, including Chair of its Board of Directors, and was one of the three founders of the San Antonio Bar Foundation. Hull is a prolific writer and speaker for CLE programs, and he is probably best known for his "7 Deadly Sins" series of Articles and Presentations for the State Bar of Texas and around the country. In 2012 Hull published the "Design/Build Handbook" for Texas. Hull also claims to be a "part-time professional" magician, and recently served as President of the Texas Association of Magicians.

Representative Experience

- Represented private contractor in appeal to GAO in successful dismissal of disqualification from a $1.2 billion proposal.
- Represented developer in bio-fuel production plants
- Represented developer in commercial water distribution project
- Represented operator in contracting for O&M of several energy plants for university system
- Represented lenders, developers and operators in the assessment, development, lobbying, contracting, financing, re-financing, construction, or operation of more than 100 public projects in 12 states, United Kingdom, Virgin Islands, Israel and Costa Rica.
- Counselled clients in disqualification and debarment proceedings arising from financial disclosure controversy.
- Represented clients in county, state and federal competitive bidding and contract award disputes.
- Counselled contractor in negotiation of international agreement regarding US Embassy.
- Represented contractor in negotiation of the healthcare services agreement for the largest privatized Bureau of Prisons facility in the United States.
- Defended private operator, Texas county, and Texas sheriff in prison conditions dispute with ACLU
- Defended the state of Colorado, Commonwealth of Virginia, Governor of the State of Colorado and directors of the Departments of Corrections from Virginia and Colorado in various prisoner lawsuits in Texas.
- Represented contractor in numerous acquisitions of security related entities.
- Represented contractors in Department of Justice and Department of Labor investigations.

Education & Honors

- Baylor University, Waco, Texas, BBA, 1974
- Baylor University School of Law, JD, 1976
  - 1st Place Team - Baylor Mock Trial Competition (1976)
  - Outstanding Advocate Award (1976)

Admissions

- Texas
- United States District Court, Western, Southern and Northern Districts of Texas
- United States Court of Appeals, Fifth Circuit
- U.S. Claims Court, Washington, D.C

Selected Professional Activities

- San Antonio Bar Foundation – Co-Founder and Fellow (1984 to date)
  - Trustee (1984 to 1987)
- State Bar of Texas –
  - Chair of Board of Directors (1987 -1988),
  - Director (1985 – 1988)
  - Executive Committee (1986 – 1989)
  - Chair – MCLE Committee (2000 – 2004)
  - Continuing Legal Education Committee (2008 to date)
- Texas Center for Legal Ethics and Professionalism
  - Trustee (2004 - 2007)
  - Vice Chair, Board of Trustees (2005 - 2007)
  - Member (1995 to Date)
- Texas Bar Foundation
  - Chair of the Fellows (2006 -2007)
  - Vice Chairman of the Fellows (2005 – 2006)
  - Secretary of the Fellows (2004 - 2005)
  - Sustaining Life Fellow (1984 to date)
  - Fellow (1980 to date)

Other Activities

- Texas Association of Magicians (Member 1967 to date)
  - President 2009/2010
  - Chair – 2010 TAOM Convention
  - Vice President 2008 /2009
  - Order of Willard (Member 2009 to Date)
  - Legal Advisor to Board of Directors (2011 to Date)
- Society of American Magicians (Member 2004 to date)
  - Chair – International Insurance Committee (2006 - 2009)
  - Member, Assembly #206 – Austin, Texas (2004 to date)
  - President (2008 & 2009)
- International Brotherhood of Magicians (Member 2005 to date)
  - Member, Ring 18 – San Antonio, Texas (2007 to date)
  - Member, Ring 60 – Austin, Texas (2005 to date)

Legal Publications and Presentations

Hull is a prolific writer and speaker on legal topics including contract drafting, indemnification, financing, and ethics. He is one of the country's most sought after legal education speakers, having given more than 300 presentations in Texas, California, Florida, Hawaii, Colorado, Washington, Arkansas, Tennessee, and the District of Columbia. In 2012 Hull published the ***Design/Build Handbook,*** and in 2014 he published the ***2014 Edition of the Design/Build Handbook with Checklist and Forms***. Selected publications and presentations during the last 10 year are listed below.

The 7 Deadly Sins Series (State Bar of Texas - webcasts and live seminar presentations):

7 Deadly Sins of Conflict Waivers
7 *Deadly Sins of Indemnity*
7 Deadly Sins of Opinion Letters
7 Deadly Sins of Boilerplate
7 Deadly Sins of Contract Drafting
7 Deadly Sins of Settlement Agreements
7 Deadly Sins of NDAs (Non-Disclosure Agreements)
7 Deadly Sins of Engagement Letters
7 Deadly Sins of Recovering Attorney's Fees (with Mark White, Lubbock)

2014: "*Structuring Enforceable Nondisclosure Agreements",* Webinar panelist, Strafford Publications, Co-hosted with Katie Pfeifer; *"7 Deadly Sins of Opinion Letters"*, 2014 Essentials of Business Law Course, State Bar of Texas; "*Design/Build Handbook – with forms and checklists – 2014 Edition", Author, 2014.* 2013: "*Responsible Third-Parties and Settling Parties"*, 2013 Fiduciary Litigation Course, State Bar of Texas; "*7 Deadly Sins of Settlement Agreements*", Advanced Litigation Strategies Seminar, State Bar of Texas; "*7 Deadly Sins of Boilerplate*" 11th Annual Advanced Business Law Seminar, State Bar of Texas; "*7 Deadly Sins of Contract Drafting*" Advanced Civil Trial Course, State Bar of Texas; *"7 Deadly Sins of Recovering Attorney's Fees"*, Webcast Panelist, State Bar of Texas, co-hosted with Mark White, Lubbock Texas; *"7 Deadly Sins of NDAs"*, 2013 Corporate Counsel Institute, UT CLE. 2012: "*7 Deadly Sins of Engagement Letters",* Live Webcast, State Bar of Texas; "*7 Deadly Sins of Settlement Agreements",* Live Webcast, State Bar of Texas; "*7 Deadly Sins of Settlement Agreements",* Advanced Trial Strategies, State Bar of Texas; "*7 Deadly Sins of Settlement Agreements";* Advanced In-House Counsel Institute, University of Texas CLE; "*Design/Build Handbook – with forms and checklists",* Author, 2012. 2011: "*7 Deadly Sins of Boilerplate",* Entertainment Law Institute 2011, State Bar of Texas; "*Landmines in Deal Documents",* Business Torts Institute 2011, State Bar of Texas; "*Update on Heavy Duty Contract Drafting",* Advanced In-house Counsel Institute 2011, State Bar of Texas; "7 *Deadly Sins of Boilerplate",* 29th Annual Colorado Advanced Real Estate Seminar, Real Estate Section of the Colorado Bar Association; *"Top 5 Things To Consider Before Building a Jail", Panelist,* Texas Jail Association; *"Risk Transfer Provisions in Commercial Contracts",* Webcast Panelist, Strafford Publications; "7 *Deadly Sins of Boilerplate",* Essentials of Business Law 2011, State Bar of Texas. 2010: *"Risk Transfer Provisions in Commercial Contracts",* Webcast Panelist, Strafford Publications; *"Drafting and Enforcing Complex Indemnification Provisions",* The Practical Lawyer, August 2010 – Co Author; "7 *Deadly Sins of Boilerplate",* CLE Presentation, San Antonio Young Lawyers Association; "7 *Deadly Sins of Boilerplate",* Business Strategies (Dallas), State Bar of Texas; "*Drafting Indemnification Provisions for LLC's and Partnerships",* 2010 Partnerships and Limited Liability Companies, University of Houston Law Foundation; "*7 Deadly Sins of Boilerplate*", Webcast Presentation, State Bar of Texas. 2009 : "*Drafting and Enforcing Complex Indemnification Provisions"*, Webcast Panelist & Course Director, ALI-ABA. 2008: "*Protecting and Piercing the Corporate Veil – How to Protect the Owners; How to Get the Responsible Party",* Advising Small & Mid-size Businesses (Dallas & Houston), University of Houston Law Foundation; "*Failure to Fund and Unfunded Obligations", S*uing, Defending and Negotiating with Financial Institutions, State Bar of Texas; *Indemnification: Drafting Complex Provisions,* Webcast Panelist & Course Director, State Bar of Texas. 2007: "*Developments in MRSA Related Liti*gation", American Corrections Association – Winter Meeting, Association of Private Corrections and Treatment Organizations. 2006:*Indemnification: Causes and Clauses, W*ebcast Panelist & Course Director, State Bar of Texas; *"Piercing the Corporate Veil and Successor Liability",* Advising Small/Start-Up Businesses (Dallas & Houston); *"Ethical Issues in Litigation – 2006 Update",* University of Houston Law Foundation. 2005: *"Piercing the Corporate Veil – 2005 Update",* Advanced Civil Litigation (Dallas & Houston), University of Houston Law Foundation; *"Piercing the Corporate Veil – 2005 Update",* Monthly Meeting, Houston Consumer Law Section; *"Ethical Issues in Litigation – 2005 Update",* The Jury Trial (Dallas & Houston), University of Houston Law Foundation; Seminar Advisory Committee, Advanced Civil Discovery, University of Houston Law Foundation; Seminar Advisory Committee, Advanced Evidence and Discovery, University of Houston Law Foundation.

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7 DEADLY SINS OF CONFLICT WAIVERS

Although the classic Seven Deadly Sins[1] do not ordinarily impact the process of negotiating or drafting waivers of conflict of interest, the dramatic title of this article is appropriate since it will focus on seven issues that arise regarding conflict waivers that can present significant difficulties for practitioners and their clients. A waiver of a conflict of interest can appear at many different stages in the relationship between a potential or existing client and an attorney or law firm. A conflict waiver can appear in a variety of formats, ranging from a simple paragraph in an engagement letter to a 25-page long-form with an astonishing array of disclaimers, carve-outs and attachments (not to mention the volumes of support documentation and affidavits).

Specifically, this paper will address seven topics regarding Conflict Waivers that may assist the practitioner in improving their clarity and predictability, while limiting the risk of unexpected consequences.

CAVEAT:

This article is NOT a compendium of every issue that may arise in every situation in which a waiver of conflict of interest may be applicable. That topic requires a separate, and substantially longer treatise.

While this article will refer to the Texas Disciplinary Rules of Professional Conduct, it will not address every possible ethical issue nor malpractice claim which may arise from, or be affected by, a waiver of conflict of interest.

SPECIAL THANKS:

Special thanks to Craig Anderson, DLA Piper – Dallas, who has given the author permission to cite, quote and rely upon his well-written article **"Drafting Advance Waivers of Conflict of Interest"** prepared for the 11th Annual Advanced Real Estate Law Course, sponsored by Texas Bar CLE. The following Sections I –V, are taken from his excellent paper.

Also, special thanks to Mary McDonald of Texas Bar CLE for her support and patience during the preparation of this Article.

I. INTRODUCTION[2]

Some of the most difficult ethical dilemmas faced by lawyers and law firms involve identifying and addressing actual and potential conflicts of interest among clients. A conflict of interest arises where

> "*there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.*"

(The Restatement (Third) of the Law Governing Lawyers (hereafter, the "Restatement"), §121 (Emphasis Added). Each client is entitled to the undivided loyalty of his lawyer and, by application of imputation rules, affiliated lawyers in that lawyer's firm. Balanced against this expectation is the client's fundamental right to select counsel of his choice. When a lawyer has a conflict of interest these two principles come into opposition. The mechanism for resolving the tension between these principles is for the client to consent to or waive the conflict.

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

Given these developments, both clients and law firms face an increasingly constricted market for legal services. Unless waived by the client, such a conflict of interest would preclude the lawyer and the lawyer's firm from representing the new client. For example, a real estate lawyer in the Dallas office of a law firm may be reluctant to take on a new client, especially for a one-off deal, out of a concern that another lawyer in the firm in a different

[1] Wrath, greed, sloth, pride, lust, envy, and gluttony.

[2] Craig Anderson, "Drafting Advance Waivers of Conflict of Interest" 11th Annual Advanced Real Estate Law Course, Texas Bar CLE, Sections I –V, are quoted herein.

practice area in the New York office may be conflicted out of existing and future representations. As a result, the real estate lawyer loses a potential client and the client may be deprived of his first choice for counsel.

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

Sections I through VII of this Article, will examine the principal sources of law for waivers (including advance waivers), and discuss when withdrawal may be necessary in spite of an advance waiver. Sample waiver language will be suggested at the end of the Article.

II. WHAT IS AN ADVANCE WAIVER?

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

In an advance waiver situation, the client is not consenting to a known conflict, but rather to potential future conflicts. In D.C. Bar Legal Ethics Committee Opinion 309, dated September 20, 2001 (hereafter, "Opinion 309"), the committee defined an "advance waiver" as a waiver "granted before the conflict arises and generally before its precise parameters (e.g., specific adverse client, specific matter) are known." By its nature an advance waiver involves conflicts the details of which are unknown to either lawyer or client.

Reconciling this uncertainty with the requirement that any waiver be "informed" is at the heart of any analysis of the effectiveness of an advance waiver.

Whether an advanced waiver will be found effective depends in large part on the degree of specificity of the waiver. Advance waivers can be divided into four basic types:

i) a general waiver which does not identify either the subject matter of waived conflicts or the potential adverse parties;
ii) a matter specific waiver that identifies the subject matter, but not adverse parties;
iii) an adverse party specific waiver that identifies adverse parties (either specifically or as a class), but not the subject matter; and
iv) a specific waiver that identifies both subject matter and adverse parties.

As a general rule, the more sophisticated the client, the less specificity as to both adverse party and type of matter covered by the waiver is required.

III. A LITTLE HISTORY

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

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

B. Current Attitude

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

IV. SOURCES OF LAW

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

A. ABA Model Rule 1.7 and Comment 22

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

1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2) The representation is not prohibited by law;
3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4) Each affected client gives informed consent, confirmed in writing.

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

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

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

Comment 22 distinguishes between "general" and "matter specific" advance waivers and between sophisticated and unsophisticated clients. A "matter-specific" advance waiver will typically be effective, while a "general"

advance waiver will not. However, even a "general" advance waiver may be enforceable against "an experienced user of the legal services involved" particularly if "the client is independently represented by other counsel" and "the consent is limited to future conflicts unrelated to the subject of the representation."

The American Bar Association Committee on Professional Ethics Formal Opinion 05-436, dated May 11, 2005 (hereafter, the "2005 Opinion") provides further guidance for evaluating the effectiveness of an advance waiver. In determining whether a client has the requisite understanding to render an advance waiver effective, the 2005 Opinion notes several factors to be considered. These include

1) the comprehensiveness of the lawyer's description of potential conflicts and adverse consequences,
2) the sophistication of the client with respect to the legal services involved,
3) the generality of the waiver as to both type of conflict and identity of potentially adverse parties, and
4) whether the client is independently represented by other counsel in giving consent.

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

For a detailed comparison of Model Rule 1.7 and the applicable Texas Rules see: Section 1.7:100, Comparative Analysis of Texas Rule, http://www.law.cornell.edu/ethics/tx/narr/, section 1.7.100.

B. Restatement § 122 and Comment d.

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

1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.
2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

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

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

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

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

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

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

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

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

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

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

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.
(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.
(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

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

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

While this rule has been applied by Texas courts (see *In re Southwestern Bell Yellow Pages, Inc.,* 141 S.W.3d229 (Tex. App. 2004». the Fifth Circuit has declined to apply the Texas rule in the context of a motion to disqualify based on direct adversity, holding that "[m]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law." (See *In re Dresser Indus., lnc.,* 972 F.2d 540 (5th Cir. 1992). at 543).

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

V. WITHDRAWAL

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

The second way in which an advance waiver may be rendered ineffective is through a revocation of consent by a client. Comment 21 to Model Rule 1.7 states that the client "may revoke the consent and, like any other client; may terminate the lawyer's representation at any time." However, revocation of consent by a client does not necessarily mean that a lawyer must withdraw from representing other clients. According to Comment 21, whether or not a lawyer must withdraw "depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result."

Like Comment 21 to Model Rule 1.7, Comment (f) to Restatement § 122 provides that a client may at any time revoke consent to conflicts of interest. As with Comment 21, whether or not a lawyer may continue to represent other clients depends on a number of factors, including "whether the client was justified in revoking the consent (such as because of a material change in the factual basis on which the client originally gave informed consent) and whether material detriment to the other client or lawyer would result".

One potential way to avoid future disputes over whether the lawyer may continue representing other clients following a revocation is to include a provision addressing this point within the waiver itself (see D.C. Bar Legal Ethics Committee Opinion 317, dated November 19, 2002 - "We reiterate that an advance agreement can avoid many, if not most, uncertainties surrounding repudiation of a conflict waiver. Such an agreement could specify, for example, the effect of repudiation upon such aspects of the matter as the lawyer's right to continue representing other clients.") This approach is supported by Comment (f) to Restatement § 122 which notes that where a client has "reserved the prerogative of revoking consent, that agreement controls the lawyer's subsequent ability to continue representation of other clients."

VI. DISQUALIFICATION.

While this article is not intended to be the definitive compilation of all authorities related to the disqualification of counsel, Rule 1.09 of the TDRPC addresses this topic, once again in terms of consent". Rule 1.09 (and comment 10 to that Rule) states:

1.09 Conflict of Interest: Former Client

(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.

(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).

(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)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05 *[confidential information]*.

Comment 10. This Rule is primarily for the protection of clients and its protections can be waived by them. A waiver is effective only if there is consent after disclosure of the relevant circumstances, including the lawyer's past or intended role on behalf of each client, as appropriate. See Comments 7 and 8 to Rule 1.06.

Once again, the TDRPC focus is upon the "consent" of a client being the only manner in which conflicts with former clients can be waived. Likewise, once again, the waiver is only effective if there is consent AFTER disclosure of the relevant circumstances, including the lawyer's past or intended role on behalf of each client.

Although the disciplinary rules are not intended as standards for procedural decisions, courts often look to them as guidelines in deciding whether to grant a motion to disqualify counsel. *In re Nitla*, 92 S.W.3d at 422; *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 132 (Tex.1996) (orig. proceeding). When a movant seeks disqualification based on an alleged violation of a disciplinary rule, he must carry the burden to establish the violation with specificity. See Spears, 797 S.W.2d at 656. "Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules" do not satisfy the exacting standard. Id. In addition, the party seeking

disqualification based on violation of a disciplinary rule must also "demonstrate that the opposing lawyer's conduct caused actual prejudice that requires disqualification." *In re Nitla, 92 S.W.3d at 422*; see also *In re Meador*, 968 S.W.2d 346, 350 (Tex.1998) (" a court should not disqualify a lawyer for a disciplinary violation that has not resulted in actual prejudice to the party seeking disqualification"). Quoted from: *In re Texas Windstorm Ins. A*ss'n, 417 S.W.3d 119, 130 (Tex.App.-Houston [1 Dist.] 2013)

VII. FEDERAL COURT CONSIDERATIONS.

In *Galderma Laboratories v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 - Dist. Court, ND Texas 2013, the Court explained the view of the Fifth Circuit when considering conflict of interest issues and the scope of consent required by a former client. The Court stated:

> Fifth Circuit precedent requires the court to consider several relevant ethical standards in determining whether there has been an ethical violation. Disqualification cases are guided by state and national ethical standards adopted by the Fifth Circuit. *In re American Airlines*, 972 F.2d 605, 610 (5th Cir.1992). In the Fifth Circuit, the source for the standards of the profession has been the canons of ethics developed by the American Bar Association. *In re Dresser*, 972 F.2d at 543. Additionally, consideration of the Texas Disciplinary Rules of Professional Conduct is also necessary, because they govern attorneys practicing in Texas generally. *See FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir.1995). The Court also considers, when applicable, local rules promulgated by the local court itself. *Id.* Because motions to disqualify are substantive motions, which affect the rights of the parties, a party cannot be deprived of its right to counsel on the basis of local rules alone.

In re Dresser, 972 F.2d at 543.

No Northern District rule speaks directly to the issues raised in this case — informed consent and unrelated conflicts of interest pertaining to current clients. Local rules do require that all lawyers who practice before the Northern District of Texas follow the Texas Disciplinary Rules of Professional Conduct. Loc. R. 83.8(e). The Texas rule on conflicts of interest involving current clients is more lenient than the Model Rules. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06*reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005). That rule permits representing clients against current clients so long as the two matters are not substantially related or reasonably appears to be or become adversely limited. *Id.* Under the Texas rule, there is no need for informed consent. *See id.* A lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise. *Id.*, Cmt 11.

In a past case, the Fifth Circuit noted that the dissimilar, arguably contradictory standards set by the Model Rules and the Texas Rules requires a court to weigh the relative merits of each of the various competing disqualification rules as the court proceeds through each step of the analysis. *U.S. Fire Ins. Co.*, 50 F.3d at 1312. Unlike *U.S. Fire Ins. Co.*, it is undisputed that there is a conflict of interest. The difference between the Model Rule and the Texas Rule goes to the central issue in this case, the need for informed consent. To give weight to the Texas Rule over the Model Rule in this case would vitiate the cornerstone of the national standard, the requirement of informed consent. Thus, while the Court has considered the applicable Texas Rules, the Model Rules and authority related to them must control in determining Galderma's motion to disqualify. *See In re Dresser*, 972 F.2d at 543-45 (reversing the district court for applying Texas Disciplinary Rules instead of the more restrictive national standards).

Under the Model Rules, a client's waiver of future conflicts is valid when the client gives informed consent. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2010). Clearly, all clients, even the most sophisticated, must give informed consent. *Id.* What disclosure from an attorney is reasonably adequate to allow for informed consent for a particular client is not clear. The Model Rules, the Comments to the Model Rules, and the Formal Opinions of the ABA's Committee on Ethics and Professional Responsibility outline a number of factors for courts to consider in determining whether a client has given informed consent to waive future conflicts of interest.

VIII. THE 7 DEADLY SINS OF CONFLICT WAIVERS (ADVANCE AND OTHERWISE)

1. **Sin of Substantial Relationships**
2. **Sin of Adversity**
3. **Sin of Mid-Representation Waiver**
4. **Sin of Non-Client Clients**
5. **Sin of Concealment**
6. **Sin of Uninformedness**

7. Sin of Standardness

A. Sin#1 – Sin of Substantial Relationships

Rule 1.06 establishes that the basis for a lawyer to be engaged in a matter that is material and adverse to a former client and "substantially related" to a prior engagement of that lawyer, the lawyer must secure a waiver. Rule1.09 uses the same "substantially related" test to determine if a lawyer may take a matter that is adverse to the interest of a former client. Thus, the threshold determination for any waiver is to determine if the new matter is substantially related to a prior matter of a client. **If there is no such substantial relationship between the new engagement and the old engagement, no waiver is required.**

Much authority for the determination of what is and is not 'substantially related" arises in motions to disqualify counsel based upon the 'substantially related' matter requirement of Rule 1.09. " Under Rule 1.09(a)(3), the party moving to disqualify an attorney must prove:

> (1) the existence of a prior attorney-client relationship; in which the factual matters involved were related to the facts in the pending litigation; and a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary. To be entitled to disqualification under Rule 1.09(a)(3), the moving party must establish "a preponderance of the facts indicating a substantial relation between the two representations." In other words, "[t]he 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." A superficial resemblance between issues in a case is not enough to constitute a substantial relationship."

(Citations Omitted) See: *In re Colony Insurance Co.*, 05-14-00947-CV (Sept. 2014)

1. Selected Cases

In *In re Kahn*, 14-13-00081-CV, CCA 14th, 3/2013, the parties did not dispute that a prior attorney-client relationship existed. Therefore, the Court turned to the question of whether the factual matters involved were so related that there was a genuine threat that confidences revealed to former counsel will be divulged to the present adversary.

In the 2007 suit, Khan alleged Khan and Siddiq entered into an agreement for Siddiq to purchase the Rodrigo property. Khan alleged he executed a warranty deed for the property, but that Siddiq never paid "the required consideration." In the petition, Khan alleged the deed recited consideration of $10.00, but Siddiq had agreed to pay more than $450, 000 for the property. He alleged the property was posted for sale in 2007 for $1,758, 000. Khan sought to have the deed set aside or title to the property transferred back to him. In the 2010 suit, Khan alleged that he, Siddiq, Ashraf, and Lakhani entered into an agreement under which Khan agreed to transfer "a substantial asset of 2000 IIG, Inc." to Siddiq in return for $225,000 plus fifty percent of the future profits of the Rodrigo property. Because no payments allegedly were made to Khan, he sued for breach of contract. Khan also alleged fraud and conspiracy under the same set of facts. Khan further sought a declaratory judgment that the Rodrigo property was improperly transferred to Siddiq and that the property should be returned either to Khan or 2000 IIG. In the alternative, Khan sought rescission of the deed to the property. On August 16, 2012, Khan re-filed a counterclaim against 2000 IIG in the 2010 suit. In the counterclaim, Khan seeks to set aside a release entered into between the parties in a 2008 suit. According to the counterclaim, Khan, under the terms of the settlement agreement in the 2008 suit, "reserved his claims related to the issues regarding the Rodrigo property that are involved in the instant litigation." Khan argues that the suits are not substantially related because the 2007 suit was for rescission of the deed, and the 2012 counterclaim is for rescission of a settlement agreement. The 2012 counterclaim, however, arises out of the 2010 suit, which is virtually identical to the 2007 suit. The record reflects that in both cases Khan argues he did not receive sufficient consideration for the transfer of the Rodrigo property. The factual recitations in each of the petitions set forth the facts surrounding the warranty deed allegedly issued to Siddiq for the Rodrigo property.

The 14th Court of Appeals held:

> "In determining similarity, we are to consider whether the issues in the two cases are similar, not the remedy sought by the plaintiff. See *Home Ins. Co. v. Marsh*, 790 S.W.2d 749, 754 (Tex. App.-El Paso 1990, orig. proceeding). Disqualification of counsel is not improper, however, merely because factual differences exist between the prior and current representation. See *Texaco v. Garcia*, 891 S.W.2d 255, 256 (Tex. 1995) [summary omitted] In this case, it was not unreasonable for the trial court to conclude that the

> 2007 and 2010 suits and the 2012 counterclaim dealt with substantially related matters. Therefore, we cannot say the trial court abused its discretion in disqualifying Underwood as Khan's counsel."

In *In re Hilliard*, 13-05-223-CV, the 13th Court of Appeals stated: "Having reviewed the pleadings and evidence, we conclude that the trial court abused its discretion in finding that the grievance proceeding and the spousal maintenance suit are substantially related. The grievance proceeding involved the interaction between the right to freedom of speech and the professional requirements imposed upon attorneys by the Texas Disciplinary Rules of Professional Conduct. In contrast, the spousal maintenance suit involves Robert's ability, or lack thereof, to pay alimony as stated in the Agreement." In analyzing the relationship between the two cases the Court held as follows:

> "Robert contends that in the grievance proceeding he shared his opinions about judicial tort reform with Harris and that judicial tort reform is the reason that he cannot pay spousal alimony in the instant suit. However, this allegation simply does not establish a substantial relationship between the two proceedings. The two matters do not involve similar facts, liability issues, scientific issues, defenses, or strategies. While tort reform may well have impacted Robert financially, an issue we do not address herein, his opinions about tort reform during the Havner proceeding, or at the present time, can hardly be said to affect Robert's ability to comply with the Agreement. We conclude that the matters are not substantially related. And further, we would note that Robert's attitudes and opinions regarding tort reform cannot be said to constitute "confidences."

His feelings are clearly and abundantly detailed in the Havner motion for rehearing and the affidavit that he provided to the grievance committee, both of which are a part of the record herein. Finally, the record before us is devoid of any evidence that Harris's representation of Jennifer has caused Robert actual prejudice or harm. See Nitla, 92 S.W.3d at 422.

In determining whether the factual matters in the pending suit are substantially related to the matters in the previous suit, the factual matters "do[] not need to be relevant' in the evidentiary sense . . . . [They] need only be akin to the present action in a way reasonable persons would understand as important to the issues involved." *In re Sharplin*, 02-05-386; *In re Corrugated Container Antitrust Litig*., 659 F.2d 1341, 1346 (5th Cir. 1981), overruled on other grounds by *Gibbs v. Paluk*, 742 F.2d 181 (5th Cir. 1984); *Ghidoni*, 966 S.W.2d at 602.

An actual disclosure of confidences need not be proven; the issue is the existence of a genuine threat of disclosure because of the similarity of the matters. *In re Epic Holdings, Inc*., 985 S.W.2d 41, 51 (Tex. 1998) (quoting *Texaco, Inc. v. Garcia*, 891 S.W.2d 255, 256 (Tex. 1995)).

In *In re Relators BELL HELICOPTER TEXTRON, INC.*, 87 S.W.3d 139 (Tex.App. —Fort Worth 2002) in a case against Bell Helicopter, the Court disqualified the Plaintiff law firm, based upon the confidential information that the Plaintiff's expert had acquired while an employee of Bell Helicopter, and finding that the expert could not be screened with a "Chinese Wall".

By proving the substantial relationship between the two representations, the moving party (seeking disqualification) established as a matter of law that an appearance of impropriety existed. "Although the former attorney will not be presumed to have revealed the confidences to his present client, the trial court should perform its role in the internal regulation of the legal profession and disqualify counsel from further representation in the pending litigation." See *NCNB Texas Nat. Bank v. Coker*, 765 S.W.2d 398 (Tex. 1989) and *Texaco, Inc. v. Garcia*, 891 S.W.2d 255 (Tex. 1995).

In *In re Butler*, 987 S.W.2d 221 (Tex.App. —Houston [14 Dist.] 1999), Relator contended there existed factual differences in the two lawsuits, and thus disqualification was improper. "Disqualification of counsel is not improper, however, merely because factual differences exist between the prior and current representation. See *Texaco*, 891 S.W.2d at 256. In *Texaco*, the plaintiffs alleged that Texaco contaminated their property by improperly disposing of chemical and hazardous waste. See id. The Supreme Court upheld the disqualification of plaintiffs' counsel because he had previously represented Texaco and its affiliates in several environmental contamination cases, including one that involved different facts, but "similar liability issues, similar scientific issues and similar defenses and strategies." See id. at 256-57. "As in Texaco, there are factual distinctions between the Inman and Rose lawsuits. For example, the Inman lawsuit deals with the alleged wrongful cancellation of an automobile liability policy by the insurer's recording agent while the Rose lawsuit dealt with coverage of a purchaser's vehicle under an automobile dealership's garage policy. Both lawsuits, however, allege breach of the duty to defend based on the erroneous denial of coverage by essentially the same insurer. Insofar as both lawsuits revolve around the reasonableness of the insurer's conduct in relation to the underlying policy claims, they both involve similar liability issues and similar defenses and strategies. A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." See *Walker*, 827 S.W.2d at 839 (citing *Johnson v. Fourth Court of Appeals*, 700

S.W.2d 916, 917 (Tex.1985)). Here, it was not unreasonable for the trial court to conclude that the Rose and Inman lawsuits dealt with substantially related matters.""

In summary, to establish that matters are substantially related, the authorities have relied upon the following factors:

a) Existence of an attorney-client relations by with both parties.
b) Factual matters involved in the former matter 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.
c) Actual disclosure of confidences is not required.
d) Similarity of liability issues, similar scientific issues, and similar defenses and strategies.
e) Similarity of remedies sought is not determinative.
f) Requires evidence of specific similarities capable of being recited in the disqualification order – not superficial resemblance.

B. Sin#2 – Sin of Adversity

Rule 1.06(b)(1) establishes 'materially adverse" as the one of tests in determining if a conflict of interest exists. Specifically, Rule 1.06(b)(1) states:

> A lawyer shall not accept a new matter if it "… 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 person's interests are materially and directly adverse to the interests of another client of the lawyer:
>
> > A subjective standard is not used to determine adversity. The determination of "adversity" under Rule 1.06 is necessarily objective.
>
> *In re Seven-O Corp*., 289 S.W.3d 384 (Tex.App.-Waco 2009). Nothing in the disciplinary rules or in relevant case law evinces a test based on the subjective view of the attorney at issue.

See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 6 ("The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.") (Emphasis added); id. cmt. 7 ("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 such agreement or provide representation on the basis of the client's consent") (emphasis added); see also Tex. Comm. on Prof'l Ethics, Op. 500, 58 TEX. B.J. 380 (1995) (applying disinterested-lawyer standard for determining whether lawyer would conclude that client should not agree to dual representation); *In re Roseland Oil & Gas, Inc*., 68 S.W.3d 784, 786 (Tex.App.-Eastland 2001, orig. proceeding (viewing claims and evidence objectively in finding that attorney should be disqualified). See *In re Seven-O Corp*., 289 S.W.3d 384 (Tex.App.-Waco 2009)

"Adversity" is a product of the likelihood of the risk and the serious of its consequences. See *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996). Even if the risk that a former client will be affected by counsel's participation in subsequent litigation is small, if the consequences to the former client are great, then disqualification is appropriate. See *Godbey*, 924 S.W.2d at 133.

A person seeking to disqualify his former counsel need not always be a party to the subsequent suit. Nevertheless, there still must be some demonstration that the second representation is "adverse" to the disqualification movant. Id. R. 1.09(a). No adversity exists if nothing indicates that the movants seeking disqualification are at risk of unfair prejudice or any other personal risk because of the prior representation. To find "adversity" the evidence must suggest adverse consequences that might arise from disclosure of as-yet undisclosed confidences. *In re Texas Windstorm Ins. Ass'*n, 417 S.W.3d 119 (Tex.App.-Houston [1 Dist.] 2013). See *In re Chonody*, 49 S.W.3d 376, 380 (Tex. App.-Fort Worth 2000, orig. proceeding) (granting mandamus where party moving for disqualification failed to present evidence showing a genuine threat exists that the attorney may divulge confidential information obtained in the other representation).

However, it is not "adverse", as that term is used in Rules 1.06 and 1.09, for a lawyer with a direct claim against a former client, in the *same litigation*, to pursue that claim 'pro se', though such representation may be ill advised. See *In re Aguilar*, 04-13-00425-CV, 4Th Court, 8/2013.

In *In re Seven-O Corp.*, 289 S.W.3d 384 (Tex.App.-Waco 2009) the Real Parties - the plaintiffs and third-party defendant, contended that they were not opposing parties because they had the same litigation strategy and liability

theory being espoused by their common attorney. The Court stated: "…having the same litigation strategy and the same theory of liability is not the test for determining whether parties are opposing. Cf. *Roseland*, 68 S.W.3d at 787 (stating the meaning of adversity is "broader than being 'on the same side of the suit'").

The comments to Rule 1.06(a) set out the test for whether parties are opposing:

> The term 'opposing parties' as used in this Rule contemplates a situation where a judgment favourable to one of the parties will directly impact unfavourably upon the other party."

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 2.

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." *In re Hal*ter, No. 05-98-01164-CV, 1999 WL 667288, at *2 (Tex.App.-Dallas Aug.27, 1999, orig. proceeding) (not designated for publication) (citing and quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmts. 3, 6). "Adversity is a product of the likelihood of the risk and the seriousness of its consequences." *Godbey*, 924 S.W.2d at 132. "Where there is a small, yet serious risk, it is enough for the parties to be considered 'adverse.' *Roseland*, 68 S.W.3d at 787. Under traditional third-party practice, a third-party defendant is generally an opposing party to the plaintiff, directly or indirectly, because a third-party defendant is or may be ultimately liable to the plaintiff for all or part of the plaintiff's claim. See TEX.R. CIV. P. 38(a). "A third-party action under rule 38, including a claim for contribution, is not an independent action, but is derivative of the plaintiff's claim against the third-party defendant." *Omega Contracting, Inc. v. Torres,* 191 S.W.3d 828, 837 (Tex.App.-Fort Worth 2006, no pet.). See *In re Seven-O Corp*., 289 S.W.3d 384 (Tex.App.-Waco 2009)

For guidance in determining the meaning of "adverse" in Rule 1.09(a), the district court in *Godbey* looked to the definition of "directly adverse" in the related setting of Rule 1.06(b)(1), which provides that "... a lawyer shall not represent a person if the representation of that person ... 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". Comment 6 to Rule 1.06 states:

> Within the meaning of Rule 1.06(b), 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. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) [barring a lawyer from representing opposing parties to the same litigation] nor (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation.
>
> "The district court concluded that an action against a former client would, as a matter of law, be adverse to the former client; that an action which did not fall within comment 6 to Rule 1.06 would, as a matter of law, not be adverse to the former client; and that anything in between, as the present case is, would be a question of fact. The court determined to resolve this question by considering all relevant, present circumstances, without regard to possible future changes in those circumstances. Among the factors the court found important were the likelihood that any detriment that would result to the former client from the current representation, the kind of detriment that would result to the former client from the current representation, the likelihood that client confidences from the prior representation would be used in the current representation, whether this particular potential conflict was or in the exercise of reasonable diligence should have been known, and whether this type of conflict in one that as a general matter could easily be discovered in the exercise of reasonable diligence."

Godbey, 924 S.W.2d at 132

In *In re Texas Windstorm Ins. Ass'n*, 417 S.W.3d 119 (Tex.App.-Houston [1 Dist.] 2013) the Court stated:

> The evidence fails to suggest any adverse consequences that might arise from disclosure of as-yet undisclosed confidences. The trial court found that Eiland sought counsel from Martin regarding his representation of Galveston County and his demand for payment of O & P and sales tax. The evidence shows that Martin wrote an email indicating that Eiland's position with respect to O & P was "well supported" but that a governmental unit that did not incur sales tax likely would not be entitled to recover sales tax, all based on case law, Texas Department of Insurance Commissioner's Bulletins, and Martin's survey of insurance industry practices. In essence, this was a general discussion of the strengths and weaknesses of legal arguments applicable to aspects of windstorm insurance claims as asserted by governmental entities— a representation that would not give rise to an issue conflict or otherwise ordinarily preclude a lawyer " from later acting adversely to that client's interests in a litigated matter." (Citations omitted)

Finally, there is the concept of clear **"adversity" that is not 'adverse"** under Rule 1.06, and therefor is not a conflict that requires a waiver, but may still cause great harm to the lawyer or be perceived as harm by the exiting client. This is sometimes referred to as a "business conflict". Simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) nor (b) of Rule 1.06 is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation. Rule 1.06 Comment 6.

In summary, to determine "adversity" pursuant to Rule 1.06, the following factors should be considered:

a) Determine adversity upon an objective standard. Would a disinterested lawyer counsel his clients to waive the conflict?
b) Evaluate the likelihood of the risk and the serious of its consequences. Even if risk is small, if the consequences are potentially great, adversity exists.
c) There should be unfair prejudice or other personal risk because of the prior representation to constitute 'adversity'.
d) Will the lawyer be called upon to espouse adverse positions in the same matter or a related matter?
e) Will the lawyer's independent judgment for a client be adversely affected by the lawyer's representation of, or responsibilities to, the other client?
f) Will 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.
g) The same litigation strategy and the same theory of liability is not the test for determining whether parties are opposing or adverse.
h) Adversity is broader than being 'on the same side of the suit'.
i) The client's view of what is "adverse" to their interests, is not nearly as limited as Rule 1.06.

C. Sin #3 – Sin of Mid-Representation Waivers.

Conflicts arise during the course of a representation. And, in recognizing the application of Murphy's Law to the legal profession, those conflicts typically arise at the worst possible time. In considering the ramifications of asking an existing client for a waiver of a conflict of interest, especially in the midst of representing that client, the waiver should be viewed as an amendment to the agreement to provide legal services (unless an enforceable advance waiver was included in the engagement agreement), or at the least, as a 'transaction with a client". Either situation can be fraught with risk.

> A lawyer seeking the waiver of a conflict from an existing client must consider whether the current client, AND the prospective new client, can be provided with a full and clear description of all of the potential risks associated with the conflict and the requested waiver. Either the current or potential client may oppose any such disclosure that might harm their interests otherwise require that confidential information be disclosed at all. If this limitation imposed by the either client means that a full and complete description of the conflict cannot be provided to both the current client and the prospective client, without disclosing the confidences of either client, the lawyer is not in a position to fully advise the clients, and should refuse the new engagement.

Rule 1.06 Comment 7

There is a presumption of unfairness attaching to a fee contract entered into during the existence of the attorney-client relationship, and the burden of showing the fairness of the contract is on the attorney. *Archer v. Griffith,* 390 S.W.2d 735, 739 (Tex.1964). While the authorities espousing this concept relate to amendments to engagement agreements that affect fees paid to the lawyer, the concept that a fiduciary should not use its superior position, knowledge and relationship with the beneficiary, for the benefit of the fiduciary, is applicable to the request by a lawyer, that its current client waive a conflict of interest.

Any amendment to an existing agreement for legal services, can also be viewed as a transaction with a client. In doing so, the attorney should scrupulously follow the requirements of Rule 1.08(a) regarding transactions with clients:

Rule 1.08 Conflict of Interest: Prohibited Transactions

(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.

First note that if Rule 1.08(a)(3) applies to the requested waiver, then the consent of the existing client MUST be in writing. This is contrary to the general "conflicts" standard in Texas, where no written consent is required for a waiver of conflict.[3] However, every commentator, observer and expert, and anyone else with any common sense, suggests, and urges that such consents be documented in writing.[4]

The negotiations for any amendment to an existing contract for legal services, or a transaction with a client, must be carefully documented to provide evidence that will rebut the presumption of unfairness.[5] Clearly the scope of this documentation will be tied directly to the significance of the change in terms of the agreement, the risk being taken by the current client, the impact on the compensation that will be paid to the attorney, *whether the attorney is using superior knowledge of the legal matter in question (or the relationship developed with the client) to the personal benefit of the lawyer or law firm* – and to the disadvantage of the client, etc.

Alternatively, if the lawyer takes the position that the waiver required is needed from a former client, who is no longer a client of the lawyer, then Rule 1.09 (requiring 'prior consent' before the conflicting representation begin) applies.

Some items to consider when amending an existing contract for legal services, may include the following efforts:

1) gather records, letters, affidavits, etc. showing that the change in the contract for legal services is fair and reasonable;
2) confirm that you have completed reasonable inquiry into, and full and fair disclosure to the Client of, all relevant facts and law
3) document the delivery of all of the data to the client;
4) suggest and/or insist to the client that they retain independent counsel to represent the client in evaluating the proposed change;
5) document the sophistication of the client, including use of the legal system, understanding of the lawyers firm and practice, and business savvy.

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[3] See Rule 1.06(c)(2)

[4] 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. Rule 1.06, Comment 8.

[5] Comment 1 to Rule 1.08 states: Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer

has no advantage in dealing, with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

6) provide more than 1 suggestion for independent counsel to be retained by the client, if the client does not have their own preferences.
7) after client has secured positive advice from independent counsel, document the advice of independent counsel
8) document the amendment in writing, and have it signed by the Client. Seek approval of the amendment documents from independent counsel.
9) Include a description of the data gathering, delivery, disclosure and third party counsel in the preamble or terms of the amendment, that is signed by the Client and independent counsel.

Some of the factors to consider in determining whether the modification was fair and reasonable are whether:

a) the client was aware that there is no obligation to agree to the change;
b) there was legal consideration for the modification; and
c) the client had the availability of independent advice regarding the proposal.

Miller v. Miller, 700 S.W.2d 941, 941 (Tex.App.-Dallas 1985, writ ref'd n.r.e).

Also to be considered are:

1) the age and experience of the client (*Texas Bank & Trust*, 595 S.W.2d at 508-09);
2) whether undue influence was exercised by the fiduciary over the beneficiary (*Cooley v. Buie*, 291 S.W.2d 876, 883 (Tex. Comm'n App.1927)); and
3) the reasonableness of the fee modification for the services rendered on the case (*Archer*, 360 S.W.2d at 740).

Once again, while these authorities focus on changes in fees to be paid to the lawyer, the concept of a fiduciary taking advantage of the beneficiary is clearly applicable. Stated differently, the test is whether the fiduciary made reasonable use of the confidence placed in him by the beneficiary or took advantage of his position of trust to the detriment of the beneficiary. *Gum v. Schafer*, 683 S.W.2d 803, 806 (Tex.App.-Corpus Christi 1984, no writ).[6]

D. Sin#4 – Sin of Non-Client Clients.

It is presumed that conflicts only arise between a lawyer and the client (or former client) of that lawyer. Thus, it would also be presumed that a waiver is only required when a lawyer may become adverse to an existing **client**, or a former ***client,*** in a substantially related matter (a set forth in Section 1.06). But that is not always the case. **The establishment of any fiduciary duty, with a NON-client can bring the conflict rules into play, and require that a lawyer secure a waiver of a conflict from a NON-Client.**

In *Westinghouse Electric Corp. v. Kerr-McGee Corp*., 580 F.2d 1311 (7th Cir.) (Sprecher, C.J.), cert. denied, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978), a law firm represented a trade organization of corporations in the oil and gas industry. The firm agreed to keep information obtained from association members in strict confidence. After the firm prepared a report on various aspects of the industry, including uranium production, it undertook representation of a plaintiff in an antitrust suit against three association members. Although the firm never represented the three defendants individually, but only the trade association to which they belonged, the court held that the firm was disqualified from representing the plaintiff in the suit against the members because confidential information the firm had received was directly related to the claims in the lawsuit. The court held that the firm had an obligation to association members even though it never represented them. The court observed that an attorney might be disqualified from suing non-clients in a number of situations:

> In the case of *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996), the Texas Supreme Court opined that "There are several fairly common situations where, although there is no express attorney-client relationship, there exists nevertheless a fiduciary obligation or an implied professional relation"
>
> When information is exchanged between co-defendants and their attorneys in a criminal case, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants, even though that co-defendant is not the one which he represented in the criminal case.

[6] *Jampole v. Mathews*, 1997 WL 414637 (Tex.App.-Hous. (1 Dist.)), 14 – Not designated for publication.

Wilson P. Abraham Const. Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir.1977) (disqualification case).

> "Disqualification will ordinarily be required whenever the subject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant."

Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 750 (2d Cir.1981)

In *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir.1983)(Posner, J.), a lawyer was retained by a corporation's employee to structure a stock transaction between the employee and the corporation. The corporation provided the lawyer the confidential financial, sales and management information he needed and paid his bill. Later, the lawyer's firm undertook representation of one of the corporation's competitors in an antitrust suit against the corporation. Although it was not clear whether the firm had represented the corporation or its employee in the earlier transaction, the court held that the firm was disqualified from suing the corporation. Id. at 1267-1268. Whether the attorney had represented only the client and not the corporation was inconsequential; what mattered, as in Westinghouse, was that the corporation had furnished the attorney confidential information that the law firm was bound to protect. Having shown the attorney its confidences, the corporation "had a right not to see [the firm] on the opposite side of a litigation to which that data might be highly pertinent." Id. at 1269.

A fiduciary duty can arise when dealing with confidential information. As mentioned previously, the concept of confidentiality, and the delivery of confidential information into the hands of an "outsider" brings with it the possible extension of a close relationship of trust between the delivering party and the receiving party.[7]

In SEC v. Cuban[8] Judge Sidney Fitzwater held:

> *Rule 10b5–2(b)(1) provides that "a 'duty of trust or confidence' exists ... [w]henever a person agrees to maintain information in confidence[.]"*

While the trial court's opinion was vacated based upon differences in factual evaluations, the Fifth Circuit did not reverse the trial court's observations on the effect of agreements imposing a duty of confidentiality.[9] Judge Fitzwater found that a fiduciary duty can arise from an agreement imposing the obligation of confidentiality, but only if there is also an obligation not to use that confidential information for personal gain.[10]

E. Sin#5 – Sin of Concealment.

While an engagement letter is a contract, its construction is governed by special legal principles. For example, engagement agreements[11] must comply with the Texas Disciplinary Rules of Professional Conduct (the "Rules"). A court may deem the Rules to be an expression of public policy, so that a contract violating them is unenforceable as against public policy.[12] One court has opined that any agreement between a lawyer and client must be judged by the concept of 'perfect fairness".[13] Such a test of transparency and fairness will no doubt be applied to a waiver of conflicts.

A fiduciary duty can arise when dealing with confidential information. As mentioned previously, the concept of confidentiality, and the delivery of confidential information into the hands of an "outsider" brings with it the possible

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[7] United States v. Chestman, 947 F.2d 551, 571 (2d. Cir. 1991) (reasoning that "fiduciary status" could be established by "a pre-existing fiduciary relation or an express agreement of confidentiality"); *SEC v. Northern*, 598 F.Supp.2d 167, 175 (D.Mass.2009) (holding that SEC's allegation that person had "expressly agreed to maintain the confidentiality of ... information is sufficient to state a claim that he had a 'similar relationship of trust and confidence' ")

[8] 634 F. Supp. 2d 713, 721 (N.D. Tex. 2009), vacated and remanded, 620 F.3d 551 (5th Cir. 2010).

[9] SEC v. Cuban, 620 F.3d 551 (5th Cir. 2010).

[10] SEC v. Cuban, 634 F. Supp. 2d at 725 ("The agreement, however, must consist of more than an express or implied promise merely to keep information confidential. It must also impose on the party who receives the information the legal duty to refrain from trading on or otherwise using the information for personal gain. With respect to confidential information, nondisclosure and non-use are logically distinct. A person who receives material, nonpublic information may in fact preserve the confidentiality of that information while simultaneously using it for his own gain").

[11] The author regularly mixes the use of "engagement letter" and "engagement agreement".

[12] *Cruse v. O'Quinn* (App. 14 Dist. 2008) 273 S.W.3d 766, rehearing overruled, review denied, rehearing of petition for review denied.

[13] *See Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex.App.-Tyler 2000, pet. denied) (citing *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex.1964))

extension of a close relationship of trust between the delivering party and the receiving party.[14] Thus, any time a lawyer has confidential information from a client or former client, a fiduciary duty to protect that confidential information remains in place. Moreover, as a fiduciary to a former client (even though no attorney client relationship remains) a fiduciary has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes.[15]

In Texas, attorneys are held to the highest standards of ethical conduct in their dealings with their clients. The duty is highest when the attorney contracts with his or her client or otherwise takes a position adverse to his or her client's interests. As Justice Cardozo observed:

> "[a fiduciary] is held to something **stricter than the morals of the marketplace**. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interest in mind. See: *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560-61 (Tex. 2006)

A final, and more sobering, warning about the scope of the "perfect fairness" owed to clients (including during early stages of the relationship while the fee agreement is being negotiated) is this quote from Dallas Court of Appeals:

> **The breach of the duty of full disclosure by a fiduciary is tantamount to fraudulent concealment.**

Chappell, 37 S.W.3d at 22 (citing *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex.1988))[16] (Emphasis added)

Rule 1.06(c)(2) imposes upon the lawyer the obligation to disclose a conflict of interest to a former client, if the lawyer seeks to take on the conflicting litigation. This is typically applicable to a lawyer that is considering a new engagement. When this duty to disclose is coupled with the clear obligation of clarity, transparence, and perfect fairness imposed upon a fiduciary, the obligation of full disclosure is a burden that must be carefully addressed.

The only practical conclusion is that lawyers must apply a fiduciary standard to the disclosures, negotiation and drafting of waivers of conflicts. Some suggestions for meeting this standard may include:

1) Insist on uncommon clarity.
2) Be aware of the surrounding facts and circumstances, and do not use them for your benefit.
3) The "Optics" should not be harmful.
4) Avoid negotiation of a waiver of conflicts during stressful or time-pressured circumstances that might lend credence to a claim of duress.
5) Make certain that the waiver is completely unambiguous.
6) NEVER underestimate the obligation to draft for the benefit of the client.
7) Always document that you suggested the Client engage separate counsel, and that the client had the opportunity to do so.
8) Always document the sophistication of the client.

F. Sin#6 – Sin of Uninformedness.

Is it no surprise that full disclosure (under the Texas Rules) and "informed consent" under the Federal Court requirements, is the standard required of a client or former client who is waiving any conflict of interest. The issue is what is "full disclosure" or "informed consent"?

1. Waiver of Current Conflicts

The TDRPC require "full disclosure of the **existence, nature, implications and possible adverse consequences** ...", but do not specifically require a written confirmation (TDRPC, R.1.06). When a client waives

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[14] United States v. Chestman, 947 F.2d 551, 571 (2d. Cir. 1991) (reasoning that "fiduciary status" could be established by "a pre-existing fiduciary relation or an express agreement of confidentiality"); *SEC v. Northern*, 598 F.Supp.2d 167, 175 (D.Mass.2009) (holding that SEC's allegation that person had "expressly agreed to maintain the confidentiality of ... information is sufficient to state a claim that he had a 'similar relationship of trust and confidence' ")

[15] *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex.App.-Tyler 2000, pet. denied) (citing *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex.1964))

[16] *Bright v. Addison*, 171 S.W.3d 588, 597 (Tex. App. 2005)

a concurrent conflict, the scope of the conflict is generally clear, both as to the subject matter of the conflict and the identity of the adverse parties.[17]

2. Waiver of Conflicts in Advance

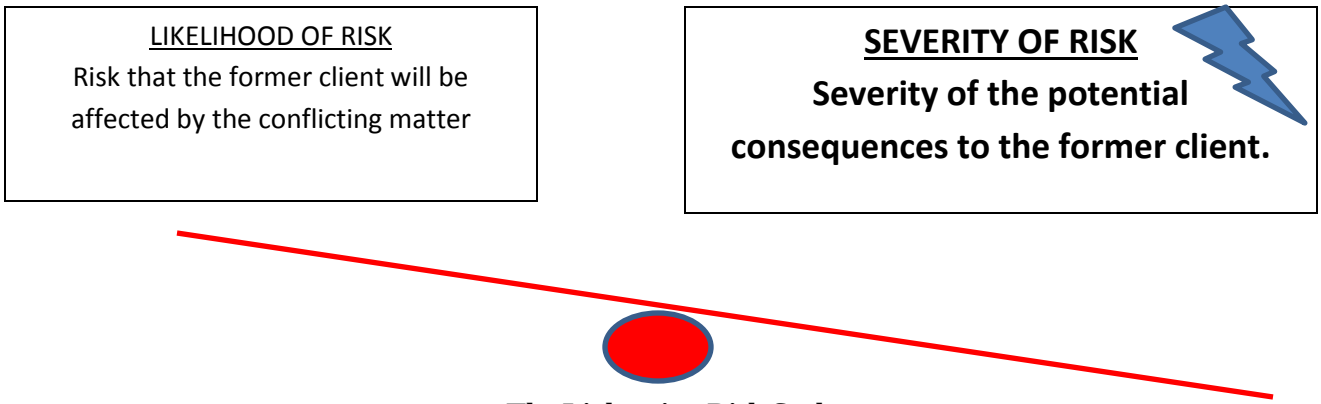
When an advance waiver is sought, the client is not consenting to a known conflict, but rather to potential future conflicts. In D.C. Bar Legal Ethics Committee Opinion 309, dated September 20, 2001 (hereafter, "Opinion 309"), the committee defined an "advance waiver" as a waiver "granted before the conflict arises and generally before its precise parameters (e.g., specific adverse client, specific matter) are known." **By its nature an advance waiver involves conflicts the details of which are unknown to either lawyer or client. Reconciling this uncertainty with the requirement that any waiver be "informed" is at the heart of any analysis of the effectiveness of an advance waiver.**[18] (Emphasis added)

A double sliding scale, or more accurately, a double sliding see-saw, is used to determine whether the client has been properly informed. **Disclosure Scale:** On one side of the Disclosure Scale is the scope, detail and clarity of the disclosures provided to the client regarding the conflict. On the other side of that scale is the sophistication of the client from whom the consent is requested.

The Disclosure Scale

The point of The Disclosure Scale is to provide an example of how a court might weigh the quality of the disclosures against the need for the disclosures. Obviously, the more sophisticated and protected the client, the less detail the disclosures must be to be found effective.

But that is just one of the scales. Overriding The Disclosure Scale is the **Lightening Risk Scale.**



The Lightening Risk Scale

"Adversity" is a product of the likelihood of the risk and the serious of its consequences. See *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996). Even if the risk that a former client will be affected by counsel's participation in subsequent litigation is small, if the consequences to the former client are great, then disqualification is appropriate. See *Godbey*, 924 S.W.2d at 133. As stated by the court,:

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[17] Craig Anderson, **"Drafting Advance Waivers of Conflict of Interest",** 11th Annual Advanced Real Estate Law Course, State Bar of Texas, 2011

[18] Id.

> **"[t]he chances of being struck by lightning are slight, but not slight enough, given the consequences, to risk standing under a tree in a thunderstorm."**

In re C.G.H., 12-12-00433-CV, 12th Court of Appeals, 7/2013. (Emphasis added).

The point of these insightful graphics is to highlight the need to disclose the severity of potential consequences to the former client, and the understanding that the risk to the former client of any significant consequences may be the determining factor in assessing "adversity".

The lengthy opinion of the Northern District of Texas in *Galderma Laboratories, LP v. Actavis Mid Atlantic LLC*, 2013 WL 655053, Case No. 3:12-cv-2038 (N.D. Tex. Feb. 21, 2013) is recommended as a starting point for an analysis of what constitutes informed consent by a sophisticated client. While no summary will do justice to the Court's full analysis, suffice it to say that the following advance waiver language in an engagement agreement, was found to fulfill the more onerous Federal duty of "informed consent" by Gladerma Laboratories, LP (a very sophisticated entity), when they signed the engagement agreement.

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

Regarding this particular client, the court held that the law firm requesting the waiver provided reasonably adequate information to plaintiff for several reasons. The court recognized plaintiff's size and sophistication, noting that it "routinely retains different, large law firms to advise the corporation on various matters across the country." Additionally, plaintiff's in-house counsel was an attorney with more than 20 years' experience who had executed advance conflict waivers with other outside counsel. The court stated: "When a client has their own lawyer who reviews the waivers, the client does not need the same type of explanation from the lawyer seeking the waiver because the client's own lawyer can review what the language of the waiver plainly says and advise the client accordingly." See *Galderma Laboratories, LP v. Actavis Mid Atlantic LLC, supra.*

G. Sin#7 – Sin of Standardness.

There is no "standard" form for a waiver of conflicts.

While there is no "standard" form for a waiver of conflicts, each lawyer should consider including advance waiver provisions in their engagement letters. The presence of the advance waiver language may provide the firm with a basis to claim consent to future conflict. While all the rules discussed in this article will be applicable to the provision, without that provision, the law firm will not have the basis to claim an advance waiver, should the need arise. Suggested language for an advance waiver provision is set forth below.

Waivers of current conflicts should contain detailed descriptions of the subject matter of the conflicting matter, as well as the adverse parties. Advance waivers, where neither the issues are parties are specifically known, should seek the same clarity that is possible with a waiver of an existing conflict. As a general rule, the more sophisticated the client, the less specificity as to both adverse party and type of matter covered by the waiver is required.[19]

It is not possible to provide a "Form" for a waiver the provides the detailed disclosures that may be required to meet the standard of full disclosure[20] or informed consent[21] for every possible client (regardless of their sophistication) in every possible fact scenario. However, in an effort, to ease the drafting burden, the following provisions may offer guidance and suggestions.

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[19] Id.

[20] The test of 'full disclosure' is required by Texas Rule 1.06 when determining if a waiver of conflict of interest is enforceable against a former client.

[21] The test of 'informed consent' is required by Federal Courts when determining if a waiver of conflict of interest is enforceable against a former client.

CAVEAT:
These are forms and must be tailored to fit the specific facts, law and clients in each situation where a waiver of conflict is sought. Use of these provisions without such customization is not suggested or recommended, and may not provide the user with an enforceable waiver.

[The following language is used to secure an advance agreement that a firm may take on adverse representation that is not substantially related to the engagement.]

> As we have discussed, you are aware that we are a relatively large law firm, and that we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes with *[name of client]* during the time that we are representing *[name of client]*. Therefore, as a condition to our undertaking this matter for you, you have agreed that this firm may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for *[name of client]*, even if the interests of such clients in those other matters are directly adverse to *[name of client]*, including litigation in which *[name of client]* is a party. We agree, however, that the prospective consent to conflicting representation reflected in the preceding sentence shall not apply in any instance where as the result of our representation of *[name of client]* we have obtained sensitive, proprietary or otherwise confidential information that, if known to any such other client of ours, could be used in any such other matter by such client to the material disadvantage of *[name of client]*.

[The following language is an example of a conflict waiver.]

> We have run an internal conflict check and have discovered no conflicts of interest that would preclude our representation of you in this matter. As you are aware, however, *[law firm]* represented *[ABC Corporation ("ABC")]* in *[specify matter]* with you and continues to represent *[ABC]* in connection with various matters related to that agreement. You have indicated that the subject matter of the case is absolutely unrelated to the *[----------]* agreement between you and *[ABC]*, and we have therefore concluded that our continuing representation of *[ABC]* does not conflict with the representation of you in this case. You acknowledge that *[law firm]*'s representation of *[ABC]* in connection with the *[----------]* agreement is likely to continue, and agree that *[law firm]* may continue to represent *[ABC]* even if a dispute should arise between you and *[ABC]* (even if that dispute should result in litigation). In sum, you agree not to assert a claim of conflict of interest or move to disqualify *[law firm]* from representing *[ABC]* based on the firm's representation of you in this case.

[The following language may be appropriate in a joint representation.]

> As discussed, we will be pleased to represent both the *[X Company]* and its president, *[Mr. Y]*, in connection with this case. At this time we perceive no conflict of interest in representing both the *[X Company]* and *[Mr. Y]*. Nevertheless, it is sometimes the case that conflicts develop after the initiation of a joint representation, and there is a potential that a conflict of interest could develop in this case. Accordingly, *[Mr. Y]* has agreed that if a conflict of interest develops that renders continued joint representation impermissible or unreasonably difficult, *[Mr. Y]* will obtain separate counsel. *[Mr. Y]* also agrees that in such event *[he/she]* will not object to the continued representation of *[X Company]* by *[law firm]*. In no event, however, will *[law firm]* become involved in any dispute between *[X Company]* and *[Mr. Y]*, and we ask in advance that if such a dispute arises you not discuss it with us.
>
> *[Or:]*
>
> As we discussed in my office on *[date]*, the "perfect" way to proceed would be for each of you to have separate counsel. There are many issues where you may or will have conflicting or potentially conflicting interests: compensation; ownership shares; control of the enterprise—just to name a few. Notwithstanding the above, you have each said that, to keep legal costs to a minimum, you may wish our law firm to represent all of you.

[The following language included in an engagement agreement, was held the Northern District of Texas, to establish that a a very sophisticated client had given full consent to conflicts in advance. See Galderma Laboratories, LP v. Actavis Mid Atlantic LLC, supra.]

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

[The following proposed form for an advance waiver of conflicts, is part of an excellent article 'A Safe Harbor' for Future Conflicts Waivers', by Peter Jarvis, David Lewis, Allison Rhodes and Calon Russell, as part of the 2013 ABA/BNA Lawyers' Manual on Professional Conduct. This work is highly recommended. The article suggests that any advance waiver of conflicts should address the following issues]:

- The Waiving Clients should have Business AND Legal Sophistication
- Review by Independent Counsel for Waiving Client
- Observe Rules of Conspicuousness.
- Agree that Lawyers who work for Waiving Client will not work for conflicting clients in the future.
- Client Signatures and Other Formalities.
- Exclude Non-Waivable and Extreme Conflicts.
- Limits on Adverse Parties or Types of Matters to Which the Waiver May Apply
- Addressing Conflicts That Already Exist or Have Already Been Foreseen
- Risks to Confidential Client Information
- Risks to Zeal/Competence and Diligence
- Defining related and Unrelated Matters
- When and How the Waiver will End.[22]

The authors of *'Safe Harbor' for Future Conflicts Waivers',* conclude their article with words of wisdom, based upon practical experience, under the heading "Materiality 101":

In the course of helping many lawyers and law firms draft conflicts waiver language over many years, we have sometimes been told that certain subjects or risks should be left out. When we ask why, we are sometimes told that it is because their inclusion will cause the client to refuse to grant a waiver.

To us, this is as good a definition of "materiality" as one can provide. If, in fact, a client may refuse to sign a waiver letter if a specific subject or risk is discussed, it is much better to know that before the representation begins than after the disqualification motion or damage claim for breach of the duty of loyalty or fee disgorgement is brought.

The form of waiver agreement the authors suggest is set forth below:

> As you know, you have asked _____ ("the Firm") to represent _____ ("the Client") in _____ ("the Matter"). As you also know, the Firm's ability to represent any and all clients is governed by what are commonly called Rules of Professional Conduct, which include but are not limited to rules regarding conflicts of interest between multiple clients of a law firm or between a law firm and its clients (collectively, "the Conflicts Rules"). Although the Firm is not presently aware of a conflict created by the proposed work on the Matter that would trigger the Conflicts Rules at this time, the nature and scope of the Firm's work for other clients may give rise to conflicts of interest in the future.[9] The purpose of this letter is to explain how the Firm proposes to resolve future conflicts issues so that the Client can decide

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[22] See *'Safe Harbor' for Future Conflicts Waivers, Jarvis, et al,* 2013 ABA/BNA Lawyers' Manual on Professional Conduct. A great deal of judicial ink has been spilled in the course of defining when matters are and are not sufficiently or significantly related for conflict of interest purposes.[8] Although no definition will be impervious to challenges, a reasonable definition should reduce the risk of such challenges considerably. [8]*See, e.g., City of Atlantic City v. Trupos,* 201 N.J. 447, 992 A.2d 762, 26 Law. Man. Prof. Conduct 282 (2010); *Knight v. Ferguson,* 149 Cal.App.4th 1207, 57 Cal.Rptr.3d 823, 23 Law. Man. Prof. Conduct 233 (Cal. App. 2 Dist. 2007); *State v. Hunsaker,* 74 Wash.App. 38, 873 P.2d 540 (Wash. App. Div. 1 1994); *In re American Airlines, Inc.,* 972 F.2d 605 (5th Cir. 1992); *Brown v. District of Columbia Bd. of Zoning Adjustment,* 486 A.2d 37 (D.C. 1984); *Westinghouse Electric Corp. v. Gulf Oil Corp.,* 588 F.2d 221, 225 (7th Cir. 1978); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.,* 113 F. Supp. 265 (S.D.N.Y. 1953)

whether or not to be represented by the Firm. In other words, the purpose of this letter is to seek a waiver of future conflicts but to do so subject to the conditions and limitations noted herein.

The Firm only seeks a waiver for work that is entirely factually and legally unrelated to the Matter. Thus, the Firm request a waiver that would allow it:

- at any time, to attack the work that the Firm performs for the Client in the Matter;
- at any time, to disclose or use adversely to the Client, or to place itself in a position to disclose or use, any confidential client information;
- for so long as the Firm continues to represent the Client, to refrain from screening the lawyers who work for the Client from any lawyers who may work on matters adversely to the Client, and vice versa;
- [*optional: for so long as the Firm continues to represent the Client, to sue the Client/represent any clients other than _____ adversely to the Client, etc.*];
- for so long as the Firm continues to represent the Client, to allege criminal or fraudulent conduct by the Client.

Outside of these limitations, the Firm is and will remain free to represent other clients adversely to the Client. In other words, we may represent other clients in negotiations, business transactions, litigation, alternative dispute resolution, administrative proceedings, discovery disputes, or other legal matters even if those matters are adverse to Client. For example, and solely by way of illustration, the Firm could [*list at least some types of clients and/or specific clients who could be represented adversely to the Client in at least some types of matters*].

Although the terms of this waiver shall last indefinitely, the Client may revoke this waiver at any time. You agree, however, that any revocation will not affect any matters undertaken by the firm prior to receipt of notice of the revocation, and that, to the extent permitted by any applicable rules of professional conduct, you consent to our withdrawal from any of Client's matters if withdrawal is necessary for the firm to continue representing other clients. If the Firm does withdraw from a matter, however, it will assist Client in transferring the matter to other counsel of Client's choice and will not bill Client for legal fees, expenses, or other charges arising from the need to assist successor counsel in coming up to speed.

As you know, we have discussed this conflicts waiver and its potential implications with you [by phone/in person] and we strongly urge you not to sign this waiver if you have any unanswered or unaddressed reservations or concerns. [*If sent to someone other than in-house or outside counsel: We also [insist/encourage/recommend] that you discuss this waiver with independent counsel of your choice.*]
As we have already explained, there are questions that Client should address before a decision to waive future conflicts is made:

- Is there a material risk of adverse disclosure or use of confidential client information?
- Is there a material risk that the Firm will be less zealous or eager when representing the Client in the Matter because of other adverse representations?
- Is the Client ready, willing, and able to live by its commitments in the future?

As to the first two questions, we believe that any risk to the Client is minimal to nonexistent in light of the protections and limitations contained in this letter. As to the final question, that is necessarily the Client's choice and not ours. Although we are certainly willing to discuss potential amendments to this waiver that you would like us to consider, you should know that without a mutually acceptable waiver, we will be unable to represent Client.

If you find these conditions acceptable, please sign the enclosed extra copy of this letter and return it to me for my files. If not, please let me know.

Very truly yours,
Attorney