THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2024-1: ETHICAL ISSUES ARISING FROM THE REPRESENTATION OF TWO OR MORE BIDDERS COMPETING FOR THE SAME ASSET

TOPIC: Representing Bidders Competing for the Same Asset

DIGEST: This opinion analyzes a lawyer's and a law firm's ethical obligations when they consider representing two or more bidders competing for the same asset. The applicable New York Rules of Professional Conduct include Rules 1.4, 1.6, 1.7, 1.9, and 1.10(a). Under these rules, in most situations, the lawyer and/or law firm would have a conflict of interest; however, again in most situations, the conflict is likely to be waivable in the law firm setting.

RULES: **1.0(f), 1.2(c), 1.4, 1.6, 1.7, 1.9, 1.10(a)**

QUESTION: Can a lawyer and/or a law firm ethically represent two or more bidders for the same asset?

OPINION:

Introduction

When an asset is marketed for sale, one or more potential purchasers may compete for the opportunity to acquire it. If a lawyer (or a law firm) takes on the representation of one of these potential purchasers, does a conflict of interest arise that would prevent the lawyer from representing another bidder for the same asset? There is a dearth of ethical guidance for lawyers and law firms in this scenario. This Committee believes that more guidance would be useful in New York about how lawyers and law firms ethically should handle such engagements.

In Part I of this opinion, we conclude that a conflict of interest arises where a lawyer or law firm represents two or more bidders competing for the same asset. In Part II, we consider a permutation of this situation in which the lawyer or law firm represents one bidder for the asset, but becomes aware that another client (which the lawyer is representing in an unrelated matter) is also bidding for the asset. In our view, this permutation is unlikely to result in a conflict of interest unless the lawyer is asked to analyze or critique the other client's bid. In Part III, we conclude that a multiple-bidder conflict is often waivable with consent from the affected competing bidder clients. In Part IV, we address other related ethics issues arising from this situation, including the lawyer's duty to maintain the confidentiality of the work the lawyer (or the lawyer's associates) performs for each of the competing bidder clients, and the possibility of using advance waivers to manage possible competing bidder conflicts ahead of time.

I. Conflicts of Interest Arising from Representing Multiple Bidders Competing for the Same Asset

When a finite asset is marketed for sale, multiple bidders may seek to acquire it. Examples of a finite asset include an exclusive license, a contract to provide services, a piece of real estate as well as a corporate entity that has put itself up for sale. A lawyer considering whether to take

on the representation of multiple bidders for the same asset must first consider whether a conflict of interest exists under Rule 1.7. Rule 1.7(a) provides that a lawyer "shall not represent a client if a reasonable lawyer would conclude that . . . (1) the representation will involve the lawyer in representing differing interests." "Differing interests," in turn, is defined by Rule 1.0(f), which provides that such interests include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." As explained in Comment [1] to Rule 1.7, "loyalty and independent judgment" are essential to the lawyer's relationship with the client, and a conflict becomes disabling when it "impair[s] the lawyer's ability to exercise professional judgment on behalf of each client."

Therefore, "differing interests" arise under Rule 1.0(f) that are sufficient to impair the lawyer's loyalty and independent professional judgment when the two clients are adversely interested in the very matters for which they are retaining the same lawyer. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 c(iii) (2000) (emphasis added) (noting that, while "general antagonism" is not sufficient to create a conflict, a conflict of the interests of the clients "in the matters being handled by the lawyer" is sufficient to create a conflict).

The situation at issue here – in which multiple clients seek to retain the lawyer to represent them in purchasing the same, finite, asset – does involve representing "differing interests" under Rule 1.0(f), and thus is a conflict under Rule 1.7(a). The two clients are adversely interested in the very matter in which they are seeking the lawyer's loyalty and counsel, and one client's success in that matter will necessarily result in failure for the other client in the same matter. Each client, therefore, at least implicitly, is hoping for the other client's failure in the very same matter. For this reason in N.Y. City Op. 2001-3, we opined that "conflicts are by no means limited to the litigation realm. . . ['']If, for example, two businesses were competing for the same Government contract, and each engaged the same lawyer to prepare bids, Rule 1.7(a) would surely be applicable.'"

As a practical matter, a conflict arises in this scenario because the lawyer cannot help one client without harming the other in the very same matter. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 c(i) (2000) (hypothesizing that a lawyer has been simultaneously representing two clients competing for a single broadcast license, and noting that "Lawyer's representation will have an adverse effect on both A and B . . . [e]ven though either A or B might obtain the license . . . Lawyer will have duties to A that restrict Lawyer's ability to urge B's application and vice versa."). A lawyer in such a situation is thus materially limited in advising the clients, a fact that may be further compounded because the lawyer may be aware of material confidential information of each client that the lawyer cannot use on behalf of the other bidder client.

While we have considered the possibility of a conflict from the point of view of a single lawyer, a conflict still arises even when the lawyer who represents one bidder is practicing as part of a firm and other lawyers in the firm will handle the representation of the other bidder. This is because Rule 1.10(a) imputes conflicts of interest to the entire firm: "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 . . . ."

II. Conflicts of Interest Arising from Representing Only One Bidder Competing for an Asset that Another Client is Also Bidding On

By contrast, where a lawyer or law firm is only representing one client bidding for an asset ("Client A"), a conflict is unlikely to arise where another client is also bidding for the same target but is not represented by the law firm in the bid ("Client B"). In fact, in many cases the law firm may not know at all or may only find out after doing substantial work that another client is also bidding. This situation is less likely to result in a conflict than the situation we considered in Part I because, where a conflict of interest is merely commercial or economic between two potential clients, it will not ordinarily rise to the level of a "differing interest" under Rule 1.0(f) and Rule 1.7(a). Indeed, were this usually to present a conflict, the uncertainty for both clients and lawyers of whether a lawyer may be disqualified would create an unworkable situation.[1]

Comment 6 to Rule 1.7 specifically notes that "simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest." Thus, even in situations where one client may be impacted economically by the lawyer's representation of another client, there may not be a conflict. For example, in 2016, the New York State Bar recognized that mere economic competition would not preclude a lawyer from representing two clients simultaneously in unrelated matters, concluding that there would not be a conflict under Rule 1.7 for a lawyer to represent a client in a litigation, even though it would be in the economic interest of the lawyer's other client for the first client to lose that litigation. N.Y. State Op. 1103 (2016) ("Even if Corporations A and B were both current clients of the inquirer, their economic competition would not prohibit the inquirer from representing both of them").

Here, the lawyer knows that a successful bid for Client A could adversely affect the economic interests of Client B, but because the lawyer does not represent Client B in the bid, the lawyer will not necessarily be forced to make difficult choices in the matter as to which client's bid to favor. Therefore, a lawyer will not ordinarily be representing differing interests under Rule 1.7(a) where a lawyer representing only one bidder happens to be aware that a different client of the lawyer is also bidding for the same asset and has retained other counsel. On those facts alone,

[1] Were such a development to create a conflict of interest, it might be argued that this would be a "thrust upon" conflict as the conflict would not be reasonably foreseeable with respect to a particular client at the outset of the representation. *See* N.Y. City Op. 2005-5 (defining "thrust upon conflicts"). This is true even if the lawyer knows from experience that it is likely that one or more of the lawyer's clients may bid for the same asset. *See* D.C. Ethics Op. 356 (Nov. 2010) (suggesting that a conflict was "thrust upon" even though "[t]he lawyer recognized that it was possible—and even likely—that one or more of her other industry clients might also bid to acquire" the same target based on her "industry experience"). Even were this to be considered a thrust upon conflict, if the clients did not waive the conflict, the lawyer would have to resign from representing one of the clients. Where the conflict is "thrust upon," a lawyer should consider a number of factors, including relative prejudice to the clients, in determining which client the lawyer should withdraw from representing if consent to the conflict cannot be obtained. *See* N.Y. City Op. 2005-5 (discussing factors to consider).

the interests between the two clients are merely economic and do not create the type of ethical conflict prohibited by the Rules.[2]

However, in this situation a conflict of interest may arise if other factors are present. For example, it may be that the lawyer's representation of Client A entails the lawyer critiquing a potential bid by Client B, analyzing Client B's actual bid, or otherwise interacting with Client B. In these instances, we believe there would be a conflict of interest under Rule 1.7(a). *See* D.C. Ethics Op. 356 (Nov. 2010) (finding a conflict of interest under DC Rule 1.7 where an attorney representing a bidder learns that a different client she represents in unrelated matters is also bidding for the same target, and the representation may entail "interven[ing] with the regulator to prevent one another from obtaining regulatory approval for their respective bids"); ABA Formal Op. 05-435 (finding the a lawyer may have a conflict with a liability insurer client who is not a party to a litigation but is providing the defense under a policy of insurance if the lawyer would have to cross-examine or take discovery from the liability insurer client). However, in such a situation, a lawyer may be able to avoid the conflict by agreeing with the client to limit the scope of the representation, consistent with Rule 1.2(c), so as to not put the lawyer in a position of being adverse to the lawyer's other client.[3] Specifically, the lawyer could agree that the lawyer would not analyze or critique any of the competing bids.

III. Conflicts of Interest in a Multiple-Bidder Situation Are Often Waivable

As detailed below, whether a multiple-bidder conflict discussed in Point I is waivable depends on many factors. The most important factor is whether the lawyer considering the multiple-bidder representations is practicing alone, or in a law firm where the other bidders can be represented by other lawyers in the firm. We will first analyze the situation in which the lawyer is practicing in a firm, and different lawyers in the firm will represent the different bidders (Part A); we then consider the situation in which the lawyer intends to represent both of the bidders (Part B).

A. Different lawyers within a firm representing different competing bidder clients

[2] Ethics committees and courts outside of New York have come to similar conclusions in analogous situations. For example, ABA Formal Op. 05-435 (Dec. 4, 2004) found that a lawyer representing a plaintiff in litigation does not necessarily have a concurrent conflict of interest if the defense is being provided under a policy of insurance issued by a liability insurer that the lawyer represents in other unrelated matters. *See also In re: Imerys Talc America, Inc.*, 2020 WL 6888278, at *5 (D. Del. Nov. 24, 2020) ("when a lawyer represents an insurance company in one matter and also represents a plaintiff suing an insured of the insurance company in another matter, 'economic adversity alone between the insurer and the plaintiff [] is not ... the sort of direct adversity that constitutes a concurrent conflict of interest.'") (quoting ABA Formal Op. 05-435).

[3] As noted, it may often be the case that a lawyer only learns that Client B is a bidder for the same asset after the lawyer has already undertaken the representation of Client A as a bidder. Where such knowledge creates a conflict of interest (*e.g.*, because the representation of Client A would require the lawyer to criticize Client B's bid), we believe in most situations it will be a "thrust upon" conflict as the conflict would not be reasonably foreseeable with respect to a particular client at the outset of the representation. *See* Note 1, *supra*.

While the circumstances of competing bidder representations may differ substantially, in many cases a law firm may be able to represent multiple competing bidders notwithstanding the existence of a conflict of interest under Rule 1.7(a), imputed to the lawyers associated with the firm through 1.10(a) as discussed above.

Rule 1.10(d) permits a firm to take on an otherwise conflicted representation if the conflict is waived "under the conditions stated in Rule 1.7." Specifically, Rule 1.7(b) permits a lawyer to represent a client notwithstanding a conflict of interest so long as:

> (1) the lawyer reasonably believes that the lawyer will be able to provide
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> competent and diligent representation to each affected client; [and]
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> (4) each affected client gives informed consent, confirmed in writing.[4]

With respect to Rule 1.7(b)(1), in a law firm setting where separate lawyers or separate teams of lawyers plan to represent the respective competing bidders, it may be reasonable for a lawyer to conclude that each lawyer (or team) will be able to provide competent and diligent representation to each bidder client, because the lawyers representing one client would not be required to advocate against the interests of another client in the same matter. *See, e.g.* Rule 1.7, comment [28] ("a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another"). Furthermore, and as the opinion discusses in Section IV below, in most circumstances law firms may be able to provide sufficient information such that the affected clients can give informed consent to the conflict as required by Rule 1.7(b)(4). Indeed, in N.Y. City Op. 2006-1 (2006), this committee provided sample conflict waiver language that contemplated a client agreeing that the law firm could represent "other bidders for the same asset."

However, even with separate lawyers or teams of lawyers representing the different clients, a law firm may have a non-waivable conflict in certain circumstances. As discussed above, a non-waivable conflict may arise where Client A asks the lawyer to analyze, critique or argue against the bid of Client B, a competing bidder represented by a different lawyer or team of lawyers at the lawyer's firm. That situation is much like different lawyers at the same law firm representing opposite sides in the same litigation. The lawyers in both situations could not effectively advocate that the positions taken by others at the same law firm were wrong. Further, the lawyers may have a conflict of interest in not wanting to act in the best interests of a good firm client if such action could hurt their standing within the firm (for example, in getting a promotion, getting certain financial incentives, and maintaining relationships with colleagues) or it could hurt the firm itself, for example, by creating an impression that the firm is disloyal to its own clients, or that other lawyers in the same firm are ineffective or incompetent. *See* N.Y. State Op. 973 (lawyer may have a non-waivable conflict when required to critique the conduct of another lawyer in the same

[4] Rules 1.7(b)(2) or Rule 1.7(b)(3) would appear to be rarely, if ever, relevant to these considerations as they prohibit representations where there is a concurrent conflict of interest if "the representation is [] prohibited by law" or if "the representation [] involves 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," respectively.

organization, noting that the lawyer's potential interest in "the reputation of the [] organization that employs both the inquirer and the inquirer's allegedly ineffective colleague" and in the "collegiality within the office, and [the lawyer] may not wish to alienate a colleague by attacking his work."). However, if such a situation arises in the matter, it does not mean that the law firm cannot represent the clients. For example, in seeking the conflict waiver from the clients, the law firm could also seek to limit the scope of the representation for each client under Rule 1.2(c), carving out analyzing or critiquing other bids and thus avoiding direct adversity between its own teams.

In seeking consent for a waiver, the firm should consider whether it can disclose the identities of the respective clients and, if not, whether informed consent can be obtained without disclosing the clients' identities to one another.[5] In most cases, we believe informed consent can be obtained without disclosing these identities because the conflict inherent in the representation lies in the fact that the firm is assisting other bidders – the client should be able to understand the significance of this conflict and whether it is concerned about it from learning that fact alone.

B. Individual lawyers representing different competing bidder clients

By contrast, where a single individual lawyer plans to represent different competing bidders seeking the same asset, unless the lawyer's representations are in a limited capacity (as discussed below), it is much more likely that there could be a non-waivable conflict.

For example, if the lawyer for one bidder, Client A, learns through his or her law firm of highly material confidential information of the other bidder Client B (and not in the context of the lawyer's representation of Client A),[6] such as the deal terms that Client B is offering to buy the asset, that lawyer very likely will be unable to use or disclose that information on behalf of Client A. *See* Rule 1.6(a). The deal terms that Client B is willing to offer for the asset are material because, knowing that information, Client A could structure its own bidding behavior to take advantage of this information, and disadvantage Client B. Although a client cannot reasonably expect its lawyer to disclose confidential information of its lawyer's other clients, it would not be possible for a lawyer to not take into account Client B's deal information when advising Client A. Because of this, absent consent from Client B to use that information on behalf of Client A, the lawyer likely will have a conflict of interest that will prevent the lawyer from providing competent representation to Client A, a conflict that cannot be waived by Client A. *See* N.Y. City Op. 2005-2 (2005) (finding conflict where lawyer acquired confidential information of one client that "is so material to [the representation of lawyer's other client] that the lawyer cannot avoid using the information."); N.Y. State Op. 525 (lawyer cannot represent client where "he cannot possibly discharge his duty to that client without revealing the secret of [a prospective client] or using it to the [prospective client's] disadvantage. In the circumstances, he has no choice but to withdraw from the representation of the [] client with respect to the matter in question.").

[5] The client's status as a bidder for a particular asset might in itself be confidential information protected by Rule 1.6; for the firm to disclose to a competitor of that client that the client is a bidder might in itself prejudice the client.

[6] Therefore, as many firms do in practice, it is advisable to establish information barriers between the lawyers representing the different competing bidders, which this opinion discusses in more detail in section IV.A below.

But a non-waivable conflict is much less likely where the attorney's role is limited to providing advice on discrete aspects of the bid and the lawyer does not have material information about the clients' bids.[7] A lawyer representing competing bidders does not need to represent the clients as to all legal issues arising from the matter, and Rule 1.2(c) permits a lawyer "to limit the scope of the representations if the limitation is reasonable under the circumstances [and] the client gives informed consent."

Thus, assuming compliance with Rule 1.2(c), a team of lawyers could handle due diligence of the asset being sold and share this information with all the competing bidders.[8] For example, an environmental lawyer could advise two competing bidders with respect to the potential liability arising from a contaminated site the bidders were seeking to acquire; again, it is presumed the analysis would be the same. Likewise, a tax lawyer could ethically advise two (or more) competing bidder clients only with respect to the tax liability of the proposed target as the answer to the question raised presumably would be the same. In these types of situations, the lawyer performing the work for all bidder clients would not be advocating on behalf of one client against another client and the lawyer is not in a position to use (and may not even be aware of) material confidential information of one bidder client on behalf of the other. Thus, it would be reasonable to believe that the lawyer could provide competent and diligent representation to each bidder client, making the conflict waivable under Rule 1.7(b).

IV. Specific Protective Measures Firms Might Consider in a Multiple-Bidder Situation

While a multiple-bidder situation may present a waivable conflict for a law firm (or even a single lawyer), the law firm should consider taking steps to protect each client's confidential information (Part A), and may consider obtaining advance conflict waivers to simplify the intake process (Part B).

A. Protecting Each Client's Confidential Information

In order to protect each client's confidential information under Rule 1.6, the law firm might find it prudent to erect screens to ensure that the teams working for each client do not inadvertently disclose one client's confidential information to the other team. Law firms should strongly consider establishing the screens at the outset of the representations to help ensure compliance with their obligations under Rule 1.6 and to prevent the creation of a non-waivable conflict as described above.[9]

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[7] A lawyer advising competing bidders may received some confidential client information, such as the identity of the client, that is not being shared with the clients so long as the lawyer does not need to take this confidential information into account to be able to provide the requested advice to the client with whom the confidential information is not being shared.

[8] Doing so may be advisable for liability-avoidance reasons. A law firm would not want lawyers for one of the bidders to have identified a potential risk associated with the asset when other firm lawyers working for another bidder have failed to spot the issue.

[9] A law firm that expects that it may be asked to represent multiple bidders may want to establish at the time it takes on the first client a screen preventing lawyers and staff not representing the client in connection with the bid from

In seeking and obtaining informed consent, the law firm should consider any reasonably foreseeable pressure that this screening process will impose on its ability to diligently and competently represent each client. Rule 1.1(a). For instance, if the firm has only a single attorney with experience addressing a particular issue that will be important to analyze during diligence into the asset (such as environmental regulatory issues, tax issues, or the like), the law firm might consider screening that attorney off from confidential information of the bidders so that he or she will not be conflicted from providing legal advice to both clients.

B. Advance Conflict Waivers

Modern law firms frequently focus on specific legal practice areas, that can place them in demand from multiple clients with similar needs. It is therefore reasonable for the law firm to assume that there could be risk of future adversity between these clients given their positions in the marketplace. Law firms are not prohibited from negotiating agreements with sophisticated clients (that is, clients who are experienced purchasers of legal services, have in-house counsel, and/or possess bargaining power equal to the law firm) whereby the law firm could seek advance protection from imputed conflicts of interest that might arise on future matters.

As has been previously stated by this Committee, a law firm may ethically request a client to waive future conflicts if (a) the law firm makes appropriate disclosure of, and the client is in a position to understand, the relevant implications, advantages, and risks, so that the client may make an informed decision whether to consent, and (b) a disinterested lawyer would believe that the law firm can competently represent the interests of all affected clients *See* N.Y. City Op. 2006-1.[10]

The ABA Model Rules include comments regarding "Consent to Future Conflict[s]." Comment 22 to ABA Model Rule 1.7 makes the point that the effectiveness of waivers of conflicts that may arise sometime in the future may well hinge on the extent to which a client reasonably understands the potential consequences of the waiver. Consequently, the waiver's effectiveness turns on such factors as the sophistication, prior experience and understanding of the client itself, and whether it is represented by other counsel (including, most obviously, in-house counsel) in giving the consent, as well as the adequacy of any explanation of the reasonably foreseeable types of future representations that could arise and the attendant risks.

In other words, an agreement in which a client provides a consent to a specific conflict type with which the client is previously familiar will routinely be considered effective, at least according to the Comment—which is not binding on any tribunal. On the other hand, the Comment states that an open-ended consent agreement that fails to adequately identify the types of conflict that later come into issue may not necessarily be effective, depending on the facts and circumstances. *See also* NYSBA Committee on Standards of Attorney Conduct, Proposed New

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access to the client's confidential bidding information. If this is not done, the law firm may find it difficult to staff the representations of bidders that subsequently seek to retain it with lawyers who are not privy to the first bidder's confidential information about the bid.

[10] While this opinion further stated that an advance waiver need not be in writing, the Rules of Professional Conduct (adopted after the publication of the opinion) now require that informed consent be confirmed in writing. *See* Rule 1.7(b)(4); Rule 1.0(e).

York Rules of Professional Conduct Rule 1.7, Comment 22A (Sept. 30, 2005) ("A client may agree in advance to waive potential conflicts that have not yet ripened into actual conflicts. The nature of the disclosure necessary to ensure that the client's advance consent is 'informed' will depend on various factors."); Restatement 3d of Law Governing Lawyers § 122, Comment d ("[T]he gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client.").

The template advance waiver provided at the conclusion of N.Y. City Op. 2006-1 (and copied below) remains, in our opinion, viable as an example of a workable advance waiver in this context in connection with the representation of the first of the bidder clients where the law firm has not yet been asked to represent other bidders. A specific waiver describing the conflict and waiving it should be used if and when the law firm is asked to represent other bidders. Even when using this template, it is strongly urged that an advance waiver be tailored to the specific situation at hand.

> You also agree that this firm may now or in the future represent another client or clients with actual or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without waiving the generality of the previous sentence, you agree that we may represent [*to the extent practicable, describe the particular adverse representations that are envisioned, such as "other bidders for the same asset" or "the lenders or parties providing financing to the eventual buyer of the asset"*].
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> This waiver is effective only if this firm concludes in our professional judgment that [we can competently and diligently represent you in this matter]. In performing our analysis, we will also consider (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information-control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.

CONCLUSION

Representing two or more bidders competing for the same asset will generally create a conflict of interest. For law firms, these conflicts may be waivable, particularly where separate teams of lawyers represent the different bidders and appropriate information walls prevent the sharing of the respective bidders' confidential information. Furthermore, individual lawyers, such as those who practice in narrow practice areas, may also be able to represent multiple competing bidders on discrete legal issues if they do not receive confidential information about one or more of the clients' bids that would be material to the advice that the lawyer is giving to other bidders. Finally, law firms may be able to obtain advance consent from clients to certain defined conflicts arising from the representation of multiple bidders competing for the same asset.