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Advance Conflict Waivers: Use Them or Lose Them?

Many lawyers use advance or future conflicts waivers to streamline the conflict waiver process for future matters involving current clients, including those who may subsequently become former clients. An effective advance conflict waiver will permit lawyers to take on matters adverse to a client without the need for a subsequent waiver from that client.

The American Bar Association Model Rules of Professional Conduct RPC 1.7 and RPC 1.9 authorizes waiving conflicts in advance, as discussed below. But even with express authority authorizing advance conflict waivers, lawyers should scrupulously consider this protocol before adopting the practice – because what should work in theory does not always work in practice. The difficulty with advance conflict waivers is that obtaining informed consent for a conflict that has not yet occurred may be challenging. As a result, sufficiently advising a client about the material risks of consenting to future conflicts presents complex issues inasmuch as lawyers cannot predict the future. Moreover, a client that signed such a waiver may later assert a lack of understanding about what it was being asked to sign.¹ An advance or future conflicts waiver can thus fail under circumstances in which a present conflicts waiver would be upheld.

This article offers two suggestions for the possible use of advance waivers. First, advance waivers may permit lawyers to seek more streamlined consents to conflicts that come up repeatedly with the same client or clients. Second, recent case law suggests that conflicts waivers may be an effective tool for maintaining representation of one client when adversity arises during a joint representation. Courts appear to be more likely to enforce advance waivers in the context of jointly represented clients because the lawyer is at least arguably able to be more specific as to both 1) the clients whose interests may become adverse in the future, and 2) the types of matters covered by the waiver. Although not the focus of this article, two other points bear noting. First, a lawyer seeking a conflict waiver, whether for a current conflict or a future one, would be well-advised to discuss the waiver with the client before signing. Such discussions are especially important in the context of an advance waiver. Second, all waivers should, at a minimum, discuss loyalty/zealousness and confidentiality/privilege, as noted in greater detail below.

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¹ Informed consent can also be revoked or withdrawn, and the risk of such a circumstance becomes elevated in direct proportion to the amount of time that has elapsed since the waiver was signed. Whether and under what circumstances revocation or withdrawal of consent can defeat a conflicts waiver, whether obtained in advance or not, is beyond the scope of this article.

Black Letter Authority for Advance Conflict Waivers

The authority for advance conflict waivers is rooted in Comment [22] to Model Rule 1.7, which provides “[w]hether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b).” Model Rule 1.7(b), in turn, provides for a client to consent to a conflict if (1) the lawyer can provide competent and diligent representation to each affected client, (2) the representation is not prohibited by law, (3) the clients are not adverse in litigation or other proceedings before a tribunal, and (4) each affected client gives informed consent, confirmed in writing.² Advance waivers are not limited to current client conflicts. Comment [9] to Model Rule 1.9 makes clear that lawyers may also seek advance consent for former client conflicts when such consent is consistent with Model Rule 1.7(b). Focusing on informed consent, it is defined as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Model Rule 1.0(e). What type of explanation must be provided in order to obtain informed consent for a future conflict?

Advance Consent for Recurrent, Unrelated Conflicts

As Comment [22] explains, the key to obtaining informed consent is in the detail and specificity of the explanation to the client because “[t]he effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.” In other words, the effectiveness of an advanced waiver is limited by the lawyer’s ability to predict the type of waiver that may arise in the future, as well as the client’s ability to understand the material risk of consenting to such a waiver.

Thus, if relying on an advance waiver, practitioners should be cognizant of the specificity of such waivers, and would be prudent to re-evaluate their scope as conflicts arise.

² This article focuses on what is necessary to obtain informed consent for a future conflict, but lawyers relying on an advance conflict waiver should not overlook their obligation to satisfy the other elements of Model Rule 1.7(b) in taking on representation that would otherwise be adverse to a current or former client. If, for example, a reasonably prudent lawyer would not conclude that it is possible to competently and diligently represent all clients in a given circumstance, then an advance waiver will be no more effective than a contemporaneous one.

Certain conflicts are, in fact, predictable. For example, after obtaining informed consent on several occasions, a lawyer may ask a client on whose behalf she negotiates commercial leases for all tenants in building A to consent in advance to the firm representing any of the tenants in building A in non-litigation matters that are unrelated to either building A or their respective leases. Comment [22] suggests that such an advance waiver should be enforceable because the client is “agreeing to a particular type of conflict with which the client is already familiar.” The client is also presumably “an experienced user of the legal services,” which should make the advanced consent more likely to be effective. Moreover, the unrelated nature of the concurrent representation means the lawyer’s obligations of loyalty and zealousness on behalf of both clients are less likely to raise issues. Independent representation of the client from whom advance consent is sought also may result in a more effective consent. By contrast, “[i]f 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.” Model Rule 1.7 Comment [22]. Clients from whom a lawyer obtains a conflict waiver with some regularity may be good candidates for an advance waiver.

Advance Consent in Joint Representation

Recent case law suggests that advance consent when taking on joint representation will often, if not always, permit a lawyer to continue the representation of one client when it is not otherwise prohibited by the rules. Three recent cases are illustrative.

In *SinglePoint Direct Solar LLC v. Curiel*, 2022 U.S. Dist LEXIS 218633 (D. Ct. Az. 2022), an Arizona district court concluded that a broad advance waiver was enforceable where “the agreement clearly anticipated circumstances in which the jointly represented parties would be adverse.” In that case, a law firm jointly represented two defendants. Before taking on the representation, the law firm had all joint clients sign a “Joint Representation Letter and Waiver of Potential Conflict” (the “Letter”), which stated, “[b]y signing below, you agree that you will not seek to disqualify [the law firm] from representing Current Clients and Defendants, or any related individual or entity at any time, for any reason, whether now or in the future.” The Letter also acknowledged that this was a valid conflict waiver under applicable ethics rules, and stated that in the event of a conflict, the lawyer could withdraw from representing only one client. When a conflict arose, the law firm continued to represent one of the defendants in the matter while the other obtained substituted counsel. The party who obtained substituted counsel then contended that the law firm was disqualified from this case, as it was now acting materially adverse to his interests. Importantly, the court determined that “[t]he Letter

notes both that there is a risk that information communicated by Defendant to the attorney *may* [sic] be used adversely to him, and that the jointly represented parties, and their interests, could come into conflict. Understanding this, [the client] affirmatively waived his right to move to disqualify counsel.” *Id.* at 8. While the waiver was broad, the district court found it enforceable because the client (1) expressly waived the right to seek disqualification, and (2) was sufficiently apprised both of the possibility of a dispute arising between the jointly represented clients and that the law firm could withdraw only from his representation.

Similar to the district court of Arizona, a California superior court recently upheld an advance conflict waiver in *Nickelsen v. GWP Holdings LLC*, 2021 Cal. Super. LEXIS 33403 (Cal. Super. 2021). In that case, a law firm asked clients to execute a joint representation and conflicts waiver in order to defend an employer and manager in a 2012 wrongful termination case. The conflict waiver stated as follows:

If changing facts or circumstances cause a conflict of interest to develop between GWP and Mr. Nickelsen, whether relating to this litigation or any other matter, GWP and Mr. Nickelsen agree [the law firm] may withdraw as counsel for Mr. Nickelsen, and that [the law firm] may continue to represent GWP, even if such representation is adverse to Mr. Nickelsen It should also be understood that [the law firm] may use information it received from either party during the joint representation in any subsequent post-conflict representation of the party we can represent.

Id. at 7-8. In 2019, Mr. Nickelsen then filed his own wrongful termination claim, among others, against GWP and objected to its representation by that same firm based upon the prior representation. *Id.* In finding the conflict waiver valid, the California superior court noted that the waiver specifically stated that [law firm] would continue to represent GWP Holdings, LLC, rather than [Nickelsen], in the event that a conflict ever arose.” *Nickelsen v. GWP Holdings LLC*, 2021 Cal. Super. LEXIS 33403, *8.3

Another recent case illustrates the limits of advance waivers. In *24-7 Bright Star Healthcare, LLC v. Res-Care, Inc.*, 2022 U.S. Dist. LEXIS 96694 (D. Ct. N. Dist. of Ill.), the defendants were part of a larger pharmaceutical company “family.” The law firm representing plaintiff in the matter had represented the defendants’ “sibling” company on numerous matters, and on that basis, they moved to

disqualify the plaintiff’s law firm. The law firm contended that the sibling company had signed a broad advance waiver as part of its engagement letter and therefore, had waived the conflict. The Northern District of Illinois was unwilling to enforce the waiver because it was signed before the pharmaceutical company “family” was formed, and it failed to reference the defendant to whom the law firm was now adverse. The court also took a dim view of what it concluded was a blanket waiver. Instead, the court concluded that the waiver did not bind the sibling entity seeking disqualification, and granted the motion to disqualify.

The above cases emphasize that practitioners must try and specifically tailor advance conflict waivers to the clients against whom they will ultimately be enforced. Conversely, blanket waivers lacking specificity are too easily rejected.

Crafting an Advance Waiver

When drafting an advance waiver, aim for as much specificity as possible. See Geoffrey C. Hazard, Jr., Peter R. Jarvis, Trisha Thompson & W. William Hodes, *The Law of Lawyering* §12.36 (Fourth Edition, 2022-2 Supp. 2014) (“[C]onflicts waiver documentation is more likely to be upheld if it includes an explanation why the client should or might care about the conflict, rather than a simple recitation that objection to certain categories of representation is being waived.”). This goal is easier to achieve when the advance waiver is signed in the course of a joint representation. For example, identify the clients that may pose a potential conflict in the future and the types of matters to which the waiver applies.

Such waivers also should consider the client and its level of legal sophistication. For a sophisticated corporate client with an in-house legal department, courts may be more inclined to enforce a broad advance waiver. See *id.* at §11.09 (“A waiver of a conflict by an individual client not experienced in engaging lawyers should be regarded with great skepticism, even if the explanation required for informed consent is adequate[.]”). The advance waiver also should discuss the general lack of confidentiality and of privilege for jointly represented clients. It should further explain that information or communications that would otherwise be confidential and/or privileged would not be protected if a dispute arises between the joint clients. As a result, the lawyer seeking the advanced consent would be at liberty to use said information/communications in the dispute. Concerns about a loss of loyalty and/or zealotry to one client or the other also may require clarification.

³ The court also found that the successive matters were not substantially related (and thus no conflict was present), before concluding that the conflict waiver was valid and enforceable.

Additionally, it is a good practice for attorneys to reevaluate advance waivers throughout the course of representation. See *id.* (“Thus, even with a signed waiver in hand, the lawyer must reevaluate the situation if a deeper conflict subsequently develops, to determine whether it is *still* reasonable to proceed. This reevaluation must include consideration of whether it is reasonable to suppose that the emerging conflict was within the contemplation of the clients signing the original waiver[.]”). In other words, an advance waiver should not be relied on simply because it exists (or, even, simply because the lawyer believes that it is enforceable). Instead, the specific situation should be evaluated in relation to: 1) the client that poses the conflict, and 2) the specific matter that has arisen. If there is any doubt that the specific matter is covered by the advance waiver, then the attorney should consider whether to devote time and resources to attempting to enforce an advance conflict waiver when he may be unsuccessful. Confirming the applicability of the advance waiver to a particular situation with the affected clients may also save lawyers and law firms the time and expense of defending an advance conflict waiver. Such a process may be helpful in managing the risks associated with advance waivers.

Conclusion

Although advance conflict waivers are permitted under Model Rules 1.7 and 1.9, courts have traditionally been skeptical of them because of the inherent difficulty in obtaining informed consent for a conflict that has not yet occurred. Recent cases, however, demonstrate that courts are more comfortable enforcing advance waivers where they are specific as to both 1) the clients whose interests could become adverse and pose a future conflict, and 2) the types of matters the waiver covers. As illustrated by the above outlined cases, the specificity that tends to pass muster is easier to achieve in the context of joint representation. On the other hand, courts probably will not enforce blanket, broad waivers. Thus, if relying on an advance waiver, practitioners should be cognizant of the specificity of such waivers, and would be prudent to re-evaluate their scope as conflicts arise.

This article summarizes aspects of the law and does not constitute legal advice. For legal advice for your situation, you should contact an attorney.

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