



Advance Conflict Waivers

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Let me try to explain the rules governing Advance Conflict Waivers by asking, and then answering, five questions:

What Is an Advance Conflict Waiver?

Here's a working definition: An advance conflict waiver is an agreement, given by your client, to a potential future representation by your law firm that would otherwise be precluded because of a conflict of interest. Law firms increasingly include such waivers in their standard form engagement letters. A typical advance waiver paragraph might read something like this:

"The Client agrees that, notwithstanding our representation of the Client in general corporate matters we may, now or in the future, without seeking or obtaining your further consent, represent other persons, whether or not they are now clients of our law firm, in other matters, including litigation, where those other persons are adverse to the Client. The Client further agrees not to seek disqualification of our law firm should the firm sue the Client in the future."

When/How Is the Validity of An Advance Conflict Waiver Tested?

The rubber usually hits the road when your law firm seeks to take on a transactional matter adverse to the client and the client objects, or the law firm actually sues the client and the client seek the firm's disqualification.

Will The Advance Waiver Be Upheld?

That's the billion dollar question. The answer is a definite "maybe." Courts address the issue on a case-by-case basis, taking into account a host of factors, some of which I will discuss in a moment. I can tell you that, where "sophisticated" clients (whatever that means) are involved, the trend has been moving in the direction of enforcing advance waivers.

What Authorities Do You Need to Know to Analyze an Advance Waiver Problem?

There are a handful of leading reported decisions, all of which are very fact-specific and difficult to reconcile. But the three things you should definitely read at some point are:

- Comment 22 to Rule 1.7 of the Model Rules of Professional Conduct. Rule 1.7 is the basic rule governing conflicts of interest. The rule was amended in 2002 and, for the first time, Comment 22 — specifically addressing advance conflict waivers — was added. If you have time to read only one thing, this is the thing you should read. But, note that not all jurisdictions have adopted the Model Rules and/or Comment 22, so you need to be aware of the rules in your jurisdiction.
- ABA Formal Opinion 05-436. In 2005, the ABA Standing Committee on Ethics took the position that amended Rule 1.7 permits effective informed consent "to a wider range of future conflicts than would have been possible under the prior rules." It withdrew another Formal Opinion — 93-372 — which had been on the books for 12 years.
- New York City Bar Ethics Opinion 2006-1. This opinion goes further than any other concluding that, in certain circumstances, an advance waiver would be enforceable even with respect to substantially related non-litigation matter where the client who agreed to the waiver is sophisticated.

What Factors Will Courts Consider in Deciding Whether to Enforce an Advance Conflict Waiver?

As a general matter, there is no bright line rule here. As I mentioned above, the cases are very fact specific and somewhat results oriented. Having said that, there is a fairly specific list of factors courts will look at in assessing advance waivers.

- First and foremost, is the conflict one that is waivable at all? Remember, not all conflicts can be waived. In general, the test is whether a reasonable person would conclude that the law firm's representation of each client is not likely to be materially affected by its representation of another client. For example, if your law firm represented a client in prosecuting a patent, there is no way the firm could possibly represent an alleged infringer and argue that the patent is invalid — advance waiver or no advance waiver.
- Whether, at the time the advance waiver was sought and obtained, the client was aware of the ways in which the future conflict might affect the client's interests. In other words, did the client really give its "informed consent" to the future representation?
- As previously mentioned, the degree of the client's sophistication makes a big difference in whether or not an advance waiver will be enforced.
- Whether the client was represented by independent counsel (including in-house counsel) in agreeing to the advance waiver.
- The degree of specificity in the advance waiver itself, as to the types of representation and conflicts sought to be waived. Open ended or blanket waivers, like the above-mentioned sample, are less likely to be enforced than more specific and limited waivers.
- How much time has passed between the giving of the waiver and the time it is sought to be enforced and, in particular, whether material changes (such as a change in the client's business or management) have occurred in the interim. For example, if at the time the client signed an advance waiver it was in the business of selling widgets and it later expands into the automobile manufacturing business, a court will more closely scrutinize a waiver that would permit your law firm to represent another auto manufacturer adversely to the client.
- Whether the waiver is sought to be enforced in a litigation as opposed to a transactional matter. In general, courts tend to be more hesitant in allowing law firms to sue their own clients against the client's wishes.
- Whether the new matter implicating the advance waiver is substantially related to the law firm's prior representation of the client, such that there is a risk that client confidential information would be compromised.

Conclusion

Both the courts and the ethics rulemakers have become more accepting of advance conflict waivers in recent years. Nevertheless, If you are inclined to ask for such a waiver, you would be well advised to limit it to specific, identifiable circumstances so you can credibly argue later when the waiver is challenged that the client gave its informed consent to the adverse representation.

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