



Advance Waivers to Potential Conflicts

We occasionally ask current or former clients to waive any objections they might have to our representing another party who presently may be or once might have been in a position adverse to them, either as a competitor or an opponent in unrelated litigation. We do this to enhance client relations and keep ourselves out of the ethical problems that conflicts of interest can generate.

Most of us are generally familiar with the requirements we have to meet when we need a present or former client to waive a perceived conflict of interest that otherwise would violate ERs 1.7, 1.8 and/or 1.9 of Arizona's ethical rules concerning conflicts of interest.¹ But what about those occasions when we are concerned about potential conflicts of interest that may occur in the future?

A recent New Jersey case points up the risks in attempting, at the beginning of the representation, to anticipate what kind of conflicts may be encountered in the future.² In that case, a broadly worded conflict waiver for matters "substantially related to the subject matter of our representations" of the client, considered and signed by the client's corporate counsel, was held insufficient to allow the lawyers to represent another party in another lawsuit adverse to the objecting client. The court, in granting a motion to disqualify the lawyers, found that the fact that the person signing the waiver for the client was sophisticated corporate counsel did not excuse the lawyers from obtaining "informed consent," which in turn required more information and explanation of the risks and alternative courses of action than was given in the case. The lawyers were accordingly prohibited from representing a defendant in an intellectual property matter against a plaintiff they represented in unrelated securities litigation.

In the typical conflict of interest situation, we do not have to guess at the risks involved. In the "advance waiver" situation, however, sometimes the parties and the issues involved will not have been completely identified.

So what are the rules when we believe an advance waiver is necessary?³

We start with Comment 21 (Consent to Future Conflict) to ER 1.7.

The effectiveness of the advance waiver is always a function of how well the consenting client understood the material risks involved at the time of giving the consent (noting that some conflicts may be "nonconsentable"⁴). This will generally mean that a more detailed explanation will have to be given to the unsophisticated client than to an experienced user of legal services or someone who has had the opportunity to be represented by independent counsel in relation to such consent.⁵ In any event, the concept of "informed consent" is a defined term denoting 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 available alternatives to the proposed course of conduct.⁶

Because the reported cases on this issue are so factually diverse, it's difficult to come up with any bright-line rule, other than to state that the closer the conflict is to what the parties contemplated at the time of the advance consent, the more like-

ly it is that the consent will be held to be effective.⁷

If you need to get an advance waiver, remember:

- All types of conflict waivers must be in writing.⁸
- Be as specific as you can about what the concern is and what the risks involved are to the affected clients.
- Make the consent as narrow as possible.
- If possible, restrict the length of time the consent is to be effective.⁹

Advance consents are one of the "hot topics" in ethics circles and are the subject of a developing body of case law and commentary. If nothing else, they force lawyers and clients to think ahead about potential problems in joint representations and protect a lawyer's ability to more efficiently serve a larger number of clients. **AY**

endnotes

1. ER 4.4(b), Rule 42, ARIZ.R.S.CT. See also ABA Formal Ethics Op. 08-450 (Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters) (April 9, 2008).
2. *Celgene Corp. v. KV Pharm. Co.*, 2008 WL 2937415 (D.N.J. 2008)
3. For a discussion of other instances where advance waivers are appropriate, see Diane Karpman, *Advice and Consents*, LOS ANGELES LAW. (June 2007).
4. ER 1.7(b) provides three instances that will make a conflict nonconsentable: (1) where the lawyer believes she can't provide competent and diligent representation to each affected client; (2) where the representation is prohibited by law; and (3) where the affected clients end up on opposite sides in the same litigation.
5. See ABA Formal Ethics Op. 05-436 (Informed Consent to Future Conflicts of Interest) (May 11, 2005).
6. See ER 1.0(c).
7. For a collection of cases on this issue and examples of consents held to be effective and not effective, see freivogelonconflicts.com, at Waiver/Consents, then at Advance Waivers; see also the excellent treatment given the subject in Angela Elbert & Sarah Malia, *Playing Both Sides? Navigating the Murky Waters of Adverse Client Waivers*, 19 PROF. LAW. 14 (2008).
8. For examples of advance consents, see Association of the Bar of the City of New York, Formal Op. 2006-1 (Feb. 17, 2006).
9. See Karpman, *supra* note 3, at 6.

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