

Editor's Inbox

A Comment on Advance Conflict Waivers

By Peter Katz

The Summer 2010 issue of the *Boston Bar Journal* contained an [article](#) (the "Article") arguing that advance conflict waivers, already common, "will become even more essential and standard practice" and that such waivers provide benefits to firms and clients. The benefit to lawyers is clear. The benefit to clients is not.

This comment assumes that Rule 1.7 of the ABA Model Rules of Professional Conduct and its Massachusetts counterpart allow advance conflict waivers, although that assumption may deserve further discussion.

The Article quotes a fairly typical example of advance waiver language: It is possible that some of our present or future clients will have matters adverse to you while we are representing you. We understand that you have no objection to our representations of parties with interests adverse to you, and that you waive any actual or potential conflict of interest as long as those engagements are not substantially related to our representation of you. We agree that your consent shall not apply in any instance where, as a result of our representation of you, we have obtained confidential information that, if known to such other client, could be used to your material disadvantage.

It may be self evident, but is worth emphasizing, that the premise of this language is that there is in fact a conflict which, absent the client's consent, would prevent the lawyer from representing one or both of the adverse parties. In plain English, this waiver is intended to permit the lawyer to undertake work that could otherwise be prohibited. So the lawyer is asking the client for permission to do something which under the ethical standards of the profession is traditionally thought of as exceptional, not ordinary. Nevertheless, asking for a conflict waiver in the form of a broad consent to the lawyer's exercise of discretion seems to have become a regular feature of engagement letters.

Under Rule 1.7, for the client's consent to be effective the waiver request must be both comprehensible and reasonable. The quoted waiver states that it will apply if the other



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engagement is not “substantially related” to the lawyer’s work for the client. (This assumes that any restriction relating to confidentiality is satisfied; often, advance waiver language pledges merely that the firm will not improperly disclose the client’s information.) But does “substantially related” put any serious limitation on the lawyer? It certainly appears to allow a firm to undertake litigation against the client, for example, if the litigation involves a real estate transaction and the firm’s engagement for the client is for patent work. This language also would not necessarily bar the firm from representing an adverse party in transactions, such as working on a purchase of all the client’s assets while the firm is counseling the client on ERISA matters. Does “substantially related” therefore mean only that the firm cannot be adverse to the client in the very matter on which the firm is advising the client?

The advantage for the lawyer — and the difficulty for the client — in this ambiguous state of affairs is that the waiver puts decisions on the many situations in which a matter might or might not be considered “substantially related” into the hands of the lawyer, even though it is the client’s interest that is at stake. The Article implicitly recognizes this problem by remarking that it would be better to avoid blanket waiver language in favor of a waiver request that identifies the subject, the potential opposing party, and the nature of the anticipated adverse matter. This starts to sound like a conventional request for a specific waiver of a known conflict. In other words, the more careful a lawyer is to meet the letter and spirit of the rules by evaluating a potential conflict in light of the particular circumstances, the less defensible it is to ask the client to agree to a waiver in advance.

The Article maintains that advance waivers, by allowing the lawyer to undertake future “unrelated work” and thus removing a barrier to engagements, ensure that the client can engage or keep its counsel of choice. But if there is no true conflict, there should be no barrier, and if there is a potential conflict, the client would expect notice of it and the opportunity to reconsider its choice of counsel in that light. From the client’s viewpoint, under the advance waiver the lawyer seems to be refusing to represent the client unless the client grants a consent that effectively diminishes the lawyer’s duty of loyalty. Lawyers should not be surprised if clients do not find this attractive.

In light of these concerns, why are lawyers asking for advance waivers? They seem to serve two major purposes. One is that, as firms grow, potential for conflicts increases and it becomes more difficult to identify and track them. Blanket waivers help protect firms from the consequences of missing or not recognizing conflicts. The other purpose, of course, is that advance waivers reduce an important obstacle to taking on new business. These are powerful motivations, and neither benefits the client. Clients may be excused for fearing that their lawyers, even with the best of intentions, will tend to exercise in their own favor the discretion they enjoy under advance conflict waivers. ■

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