

## Advance Waivers and Common Sense

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**E**ven those skeptics who regard tinkering with ethics rules as irrelevant at best should recognize the recent achievement of the ethics community in accepting the use, with certain important limitations, of advance waivers.

Advance waivers are consents that clients provide to outside lawyers in connection with possible future conflicts of interest that the outside lawyers may encounter. Allowing such consents, with the appropriate limitations of course, expands the freedom of clients and lawyers to address conflicts that may arise down the road. It is a most refreshing triumph of common sense.

BY ARTHUR D. BURGER

### Ethics

The ethics community has been able to address client loyalty, one of the core principles of the practice of law while, at the same time, preserving the flexibility to

allow for the realities of modern practice.

The District of Columbia has recently joined the growing consensus in favor of this procedure with its endorsement of advance waivers under specified caveats in D.C. Bar Ethics Opinion 309. This development was foreshadowed by my partner James P. Schaller in his *Legal Times* article of March 12, 2001 (“*Waving a Yellow Flag at Prospective Waivers*,” Page 25), which supported the concept of advance waivers but expressed concern about whether such consents would ultimately be found eligible to be treated as knowing and intelligent waivers under Rule 1.7.

While blanket waivers by unsophisticated clients for any and all conflicts that may come to pass are still flatly unenforceable,

corporate clients assisted by in-house counsel can now enter into binding commitments in circumstances that might otherwise discourage the entering of an attorney-client relationship.

The contemporary realities that have been taken into consideration include both the practice of large companies of hiring a variety of law firms to handle specialized matters, and the proliferation of large law firms with offices around the country and around the world.

The point is quite simple: Without the ability to enter into binding advance waivers, a law firm may worry that if it takes on a large corporate client for a relatively discrete project, it may be barred from taking on much larger cases for a competitor of that client. These larger cases could be totally unrelated to the representation of the first client and might even involve a distant office of the firm.

Without a waiver, a law firm might well decline to take on that discrete piece of legal business in the first place. From the corporation’s perspective, the law firm’s reluctance could well result in its inability to retain counsel of its choice.

With advance waivers, however, the parties are free to negotiate and explore how they wish to respond to various types of conflicts that may arise later. They can resolve the issues from the outset.

Such frank and open negotiation, when the client has equivalent knowledge and bargaining power to the lawyer, is the hallmark of a healthy attorney-client relationship. Everything is put on the table; it is either successfully resolved, or, at worst, the parties learn that there is an incompatibility and avoid entering into an attorney-client relationship that would have been headed for trouble.

D.C. Opinion 309 is in general conformity with the new Comment No. 22 to the newly accepted American Bar Association Model Rule 1.7 as recommended by the Ethics 2000

Commission, and with the Restatement of Law Governing Lawyers.

Specifically, under the D.C. opinion, the enforceability of an advance waiver depends on the existence of one of two factors: a client represented by independent counsel on behalf of the lawyer, such as in-house counsel, or reasonable limits on the breadth of the waiver. Thus, if a client is not independently represented, an advance waiver must be limited to specified situations in order to be enforceable. If a client is separately represented, however, it is not essential that certain types of future conflicts be identified.

Of course, any matters that would be nonwaivable under Rule 1.7(a) relating to representing adverse interests in the same matter, continue to be nonwaivable in the context of future conflicts. Also, just as with waivers of current conflicts, the lawyer continues to have the burden of showing that she fully advised the client regarding the possible disadvantages of a conflict, so that the waiver is an intelligent one.

Moreover, the opinion states that in order to avoid even inadvertent breaches of confidentiality, advance waivers are ineffective as to representations that are substantially related to the initial representation. Finally, the opinion strongly recommends, “for the protection of lawyers as well as clients,” that advance waivers be put in writing.

These are fair and prudent restrictions. The important thing is that clients and lawyers can put their heads together now and agree in advance how they wish to treat future conflicts that may arise in matters that are not substantially related to their current representation. A good place to put such understandings is right in the retainer agreement.

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