

Ask the Ethics Experts

Editor's Note: *Conflicts of interest are a fact of life in today's legal practice. With the growth in the size of law firms, the opportunity for client conflicts also increases. Add in the fact that antitrust lawyers increasingly find themselves engaged in "one-time" representations in litigation or merger matters of companies that are not otherwise clients, and it is the rare antitrust practitioner that has not had to deal with conflict issues. Because the only resolution of many conflict situations is obtaining client waivers, every antitrust lawyer should be familiar with how conflict waivers can be obtained and enforced to avoid disqualifying conflicts.*

This issue's "Ask the Ethics Experts" poses ethical questions that may occur in the context of antitrust practice and then answers them based on the rules of individual jurisdictions and the ABA's Model Rules of Professional Responsibility. Our guest expert for this issue is Kathryn Fenton, a partner at Jones Day in Washington, DC, and Secretary of the ABA Section of Antitrust Law.

If you have questions or topics to suggest for discussion in future issues of The Antitrust Source, send email to: antitrust@att.net.

Note: *The responses to hypothetical situations in this feature are presented for informational and discussion purposes only and should not be considered or construed as legal advice applicable to any specific facts or circumstances. They discuss general ethics principles that may not apply universally or in a particular jurisdiction, and readers should take care to determine and consult the legal and ethical standards applicable to any specific issue they confront.*

Waivers of Conflicts of Interest

Q: My law firm, like many others, recently has implemented a policy of seeking waivers of conflicts of interest from all new clients in order to minimize future potential disqualification concerns. In seeking such advance waivers, what factors should we be considering in order to maximize the likelihood that the waivers will be enforced?

A: As law firms grow in size and increase their operations around the globe, the potential for encountering current or future client conflicts of interest correspondingly increases. In response, law firms increasingly are turning to advance client waivers of conflicts of interest as a means of avoiding the potential disqualification risks and other concerns associated with such conflicts.

As the term is commonly used, an "advance waiver" generally means a waiver that is granted by a client or a prospective client before an identifiable conflict arises and before the precise parameters of the conflict (e.g., the adverse party or the specific matter involved) are known. (Advance waiver also are sometimes referred to as "prospective waivers" or "generic waivers.") The most common form of advance waiver, generally sought at the time the attorney-client relationship is first established, seeks to ensure that the representation to be undertaken will not be asserted as a conflict of interest or the basis for a motion to disqualify the law firm if direct adversity with another firm client in a particular matter should arise in the future.

A variety of bar ethics opinions, the Restatement of the Law Governing Lawyers, and the ABA's Ethics 2000 Commission all have acknowledged that advance waivers are permissible in concept, but emphasize that individual waivers will be enforced only where the client providing the waiver can be said to have given informed consent. For example, ABA Formal Ethics Opinion 93-372 (1993) cautions that "[u]nlike the client issuing a specific waiver, the client issuing a prospective waiver cannot know what confidences he will in the future disclose or in what adverse representations the attorney may engage." Thus, the opinion concludes that an advance waiver will not be enforced unless it identifies the likely adverse party, or at least a class of potential opponents, as well as sufficient information for the client to appreciate "the nature of the likely matter and its potential effect on the client." The ABA opinion also emphasizes that client waivers of future conflicts do not necessarily encompass waivers of confidentiality, which should be separately addressed, and strongly urges that any advance waiver be in writing. See also Restatement of the Law Governing Lawyers, § 122, Comment d (2000) ("A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.").

The current version of ABA Model Rule 1.7, the product of the ABA Ethics 2000 Commission review of the Model Rules, includes a comment on advance waivers. Comment [22] to Rule 1.7, "Consent to Future Conflict," states that the general test of enforceability of forward-looking waivers will be "the extent to which the client reasonably understands the material risks that the waiver entails." *Id.* Thus, "[t]he more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations," the greater the likelihood of requisite client understanding. The Comment goes on to note that in the case of conflict waivers that are "general and open ended, . . . the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved." *Id.*

The application of these concerns in an actual dispute regarding the effectiveness of an advance waiver was demonstrated by a recent judicial decision holding that a general advance waiver was insufficient to cover adversity in litigation because the waiver did not expressly refer to this possibility. *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356, 1360 (N.D. Ga. 1998) ("[A]ny document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information.").

A number of state and local bar associations have issued legal ethics opinions holding that advance waivers are permissible and providing guidance on the measures to be adopted to increase the likelihood that the waivers will be enforced. See, e.g., Los Angeles County Bar Ass'n Formal Opin. 471 (1994) (opining that advance waivers are permissible). The New York County Lawyers' Association adopted the approach of ABA Formal Opinion 93-372 regarding the need to disclose potential adverse clients and types of adverse representations. N.Y. County Lawyers' Ass'n Ethics Opin. 724 (1998). It went on to suggest that the lawyer also should disclose the steps to be taken to protect the client (e.g., implementation of screening procedures or adoption of an ethical wall) if a conflict should ultimately arise. *Id.* Recognizing the subjective nature of informed consent, the opinion also stated that for "a sophisticated client, such as a large corporation with in-house counsel, the adequacy of disclosure will be put to a less stringent test than if the client

were a small business, an individual unsophisticated with respect to legal matters, a child or an incapacitated person.”

The District of Columbia Bar Association expanded on this point and suggested that an advance waiver given by a client with access to independent counsel (either in-house or outside) to review the waiver would be presumptively valid, even if general in character. D.C. Bar Legal Ethics Comm. Opin. 309 (Dec. 2001). In the absence of such independent review, the client consent must be specific as to the “types of potentially adverse representations and types of adverse clients (e.g., a bank client for whom the lawyer performs corporate work waives the lawyer’s representation of borrowers in mortgage loan transactions with that bank).” *Id.* The D.C. Bar also recommended that “for the protection of lawyers as well as clients” that advance waivers be in writing. *Id.*

The message lawyers should take from these opinions is clear. Because the burden of establishing the enforceability of advance or prospective waivers will rest with the lawyer, all possible steps should be taken to establish that the waiver was the product of knowing and informed client consent. If possible, the consenting client should be advised by an independent attorney. In cases where such independent advice is not available, the advance waiver should spell out in as much detail as possible the specific types of conflicts that may arise, the potential consequences to the waiving client of these conflicts, and the measures the lawyer will undertake to prevent possible harm to the waiving client. If the waiver is intended to apply to litigation or other forms of dispute resolution, that fact and the resulting implications (e.g., the possibility that hostile discovery or cross-examination will occur) should be fully discussed.

Q: What happens when a client granting waiver of an actual or potential conflict of interest changes his mind and attempts to withdraw the waiver? Can clients engage in such revocation? Does it make a difference at what point in time the waiver is withdrawn? Does this possibility represent a continuing threat that an ongoing representation will be disrupted and withdrawal will be required? Are there means by which lawyers can protect themselves and their other clients against such changes of heart?

A: In many conflict of interest situations, obtaining the consent of both affected clients in the form of a waiver of conflict is the only way to permit the representation to proceed. While the grant of such waivers normally represents the end of the problem in most cases, more than one lawyer has secretly worried about the possibility that the client will undergo a change of heart and attempt to withdraw a previously granted conflict of interest waiver.

The recently adopted ABA Model Rules address this issue for the first time by adding a comment to Rule 1.7 on “Revoking Consent.” Comment [21] states that “[a] client who has given consent to a conflict may revoke the consent and, . . . may terminate the lawyer’s representation at any time.” According to the comment, whether this revocation affects the lawyer’s continued representation of other clients “depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of material changes in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.”

The practical consequences of attempted repudiation of a previously granted conflict waiver recently were considered in a recent opinion of the Legal Ethics Committee of the District of Columbia Bar. In Opinion 317, issued in November 2002, the D.C. Bar Committee concluded that once a client’s waiver of his lawyer’s conflict of interest has been relied upon by another client or

by the lawyer, the revoking client's subsequent change of heart will not restore the status quo ante and require the lawyer's disqualification.

In considering the implications of a change of heart by a client who had previously waived a conflict of interest, D.C. Bar Opinion 317 focused on the detrimental reliance on the waiver by the lawyer and the other client involved. Concluding that "while nothing can prevent a waiving client from later changing its mind, such an action might not compel the lawyer to withdraw from representing the other affected client."

While noting that a conflicts waiver could be viewed as a contract between lawyer and client, the D.C. opinion decided that the special fiduciary nature of the attorney-client relationship counsels against treating the question of withdrawal or disqualification merely as one of contract law. It noted that a client can discharge its lawyer at any time, but cannot, by the mere fact of discharge, escape existing obligations to the lawyer, such as payment for previously rendered services. The opinion also noted several judicial decisions that had found revocation of consent insufficient to preclude continued representation of the other client where the law firm and the other client had relied upon a previously granted waiver. *See, e.g., Unified Sewage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1346 n.6 (9th Cir. 1981); *Fisons Corp. v. Atochem N. Am. Inc., Inc.*, 1990 WL 180551 *6 n.6 (S.D.N.Y. 1995).

The opinion concluded that detrimental reliance should constitute a similar standard here, and if there has been detrimental reliance by the other client or the lawyer, the lawyer should ordinarily continue representing the other client. The possible arguments in support of this result include the fact that the repudiation of the waiver has effectively discharged the lawyer or that the repudiation constitutes a failure by the client "to fulfill an obligation to the lawyer regarding the lawyer's services," Model Rule 1.16(b)(3) or "obdurate or vexatious conduct on the part of the client [that] has rendered the representation unreasonably difficult." *Id.* Rule 1.16(b)(5). D.C. Rule 1.7(d) dealing with "thrust upon" conflicts also might permit the lawyer to continue the representation if the withdrawal of the waiver (and hence reemergence of the conflict) was not reasonably foreseeable. *See* D.C. Ethics Opin. 292 (1999).

In focusing on possible detrimental reliance by the other client, the opinion cited the Restatement of the Law Governing Lawyers and its examples, including whether substantial time, money, and effort have been invested in the representation, confidential information has been disclosed to the lawyer by the nonrevoking client, and the lawyer or the nonrevoking client has elected to forgo other opportunities in reliance upon the consent. Restatement § 122, comment f (2000). Thus, unlike a revocation of consent announced as soon as the ink was dry on the waiver letter, a revocation that occurred many months after the original consent was given and after significant investment by the lawyer and other client in an ongoing representation likely would not require disqualification from the representation.

Finally, the D.C. Bar Opinion suggested that even the potential for a client's change of heart could be addressed in advance through the initial engagement letter, the communication by which the waiver was initially granted, or some other communication between the lawyer and client. Recommending that such communication always be in writing, the opinion noted that such a document can address whether a client that changes its mind will have a right to continue representation by the lawyer and, if the lawyer is permitted to withdraw from representation of that client, whether the lawyer may continue to represent the other clients involved. ●