NYPRR | May 2006

ABCNY Opinion Defines Conditions For Advance Waivers

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Two fairly recent but accelerating developments in the practice of law have prompted the ethics committee of the City Bar to review the conditions under which a law firm may "ethically request that a client prospectively waive objection to the law firm's subsequent representation of another client adversely to the first client" (ABCNY Committee on Professional and Judicial Ethics, Formal Opinion 2006-1, 2/17/06). These developments are:

1. The complexities inherent in the growing practice of large corporate clients to retain several different law firms in different areas of law. "In today's legal world, the paradigm of a lawyer serving all the legal needs of the client and being a friend 'for all purposes' no longer applies to the relationships between many lawyers and their clients;" and

2. The resulting increase in tactical disqualification motions triggered by the increase in potential lawyer/client conflicts.

Advance conflict waivers respond to the fundamental notion that every client is entitled to be represented by the lawyer of his or her choice. For that reason, the Court of Appeals in Levine v. Levine, 56 N.Y. 2d 42 (1982) permitted the same lawyer to represent the potentially adverse parties in a marital separation agreement. The Court held that potentially adverse parties had the absolute right to retain the same lawyer, so long as " 'there has been full disclosure between the parties, not only of the relevant facts, but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity.' "

Because advance conflict waivers are being used more and more to establish the "rules of the road" at the beginning of a new client relationship, the Committee felt the need to define "when advance waivers are ethically permissible."

Definition of "sophisticated" client

One factor influencing the Committee was the increased sophistication of companies with multiple divisions and subsidiaries to choose among law firms, to insist on engaging more than one law firm, and to demand complex services. This led the Committee to distinguish in some of its comments between the "sophisticated" client and the ordinary client. The Committee defined the sophisticated client as follows:

> As used in this opinion, a sophisticated client is one that readily appreciates the implications of conflicts and waivers. This would include, but not be limited to, clients that regularly engage outside counsel for legal services, or that have access to independent or inside counsel for advice on conflicts.

In all cases, the law firm requesting advance waivers must satisfy two basic conditions in DR 5-105(C):

1) it must disclose to all conflicted or potentially conflicted clients "the implications of the simultaneous representation and the advantages and risks involved," to enable the clients to make an informed decision whether to consent; and

2) it must conclude that a disinterested lawyer would believe that the lawyer "can competently represent the interest of each…."

In the case of a "sophisticated" client, blanket advance waivers that include substantially related natters are also ethically permitted, provided there is "adequate protection for client confidences and secrets."

The Committee relied on several of its earlier opinions (2004-2 and 2001-2), as well as on opinions of the ABA (05-436) and the New York County Lawyers Association (724). It also cited COSAC's recommendations on the adoption of the ABA Model Rules (specifically, as to Rule 1.7, Comment 22A, 9/30/05), and, §122, Comment d of the Restatement 3d of the Law Governing Lawyers.

When Matters Are Substantially Related

Most bar association opinions and most law review articles which have discussed conflicts waivers have limited themselves to circumstances in which a law firm's representation of Client A and its prospective representation of Client B are not substantially related. When the matters are substantially related, however, a new ingredient goes into the mix of concerns – the need to protect the confidences and secrets of each of the clients and to see that they are not used to the disadvantage of either client. (See, DR 4-101.)

Venturing beyond these earlier opinions and articles, the Committee concluded that under certain circumstances, an advanced waiver may ethically be applied to substantially related matters. It referred to Formal Opinion 2001-2, in which it discussed a law firm's representation of multiple clients with differing interests in unrelated matters or in the same matter. In Opinion 2001-2, the Committee described three situations in which a law firm cannot ethically represent conflicting interests: 1) a litigation between two clients; 2) a transactional setting in which the parties' interests are inherently antagonistic, as between a hostile bidder and the unwilling target in a corporate takeover; and 3) when lawyers in the firm would be required to negotiate substantive business terms "head-to-head."

On the other hand, "in transactional settings in which the adversity between clients is less stark, the application of DR 5-105 is more relaxed and nuanced." Also, in many cases, a client will insist that the same law firm represent multiple clients with differing interests in a single negotiated transaction.

ABCNY Opinion 2001-2 set forth a number of factors that a law firm should consider in determining whether the lawyer can represent multiple clients with differing interests in unrelated matters "or in the same matter". These are: the nature of the conflict; the possibility of an adverse effect on the firm's independent professional judgment; the likelihood that the confidences and secrets of one party will be relevant to the interests of the other party; the ability of the firm to preserve the confidential information of the clients through screening and other protective devices; the sophistication of the clients and their ability to understand the reasonably foreseeable risks of the conflict; and, the risk that the firm will favor one client over another.

The Committee concluded that these same factors will help a law firm to decide whether or not advance waivers will "pass muster" when the waiver includes "substantially related matters in a transactional setting." But the Committee added the following conditions that must also be met before a firm may ethically request a waiver in situations involving "substantially related matters": (a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation; (c) the law firm is able to ensure that the confidences and secrets of one client are not shared with, or used to the advantage of, another client; (d) the waiver is consentable under the tests imposed by DR 5-105(C); and (e) special consideration is given to the factors described in Formal Opinion 2001-2.

Waiver Need Not Be In Writing

The Committee advised that an advance waiver need not be in writing "if informed consent can be found under the circumstances." It cautioned, however: "…under most circumstances a written confirmation of the waiver is salutary because it may avoid disputes over the nature and extent of the waiver."

The Committee attached to its Opinion three examples of blanket advance waivers. Two of the Examples (A and B) exclude substantially related matters. One (Exhibit C) covers substantially related matters and refers to DR 5-105(C) and to ABCNY Formal Opinion 2001-2. The text of these sample waivers may be found by going to www.nyprr.com. Click on the ABCNY logo and then on the second opinion listed, "Advance Waivers of Future Conflicts, etc."

In discussing its Examples, the Committee said:

> …we believe it useful to provide guidance regarding the drafting of an advance waiver.
>
> These [the Examples] are merely examples of the many forms that a workable advance waiver might take. But it bears emphasis, as this opinion concludes, that an advanced waiver must be tailored to the specific situation on hand.
>
> In this vein, because a waiver is more likely to be enforced the more specifically it refers to a conflict that eventually arises, it is advisable to supplement the general language of these examples with non-exclusive reference to particular clients or circumstances which may then present foreseeable conflicts. This is particularly true of an advance waiver with respect to substantially related matters.

In reaching its conclusion, the ABCNY Committee discussed at some length the two requirements of DR 5-105(C), supra, concerning the representation of multiple clients. DR 5-105(C) contains an exception to the general prohibition in DR 5-105(A) and (B) against a lawyer's accepting or continuing multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be affected by the multiple employment, or if it is likely to involve the lawyer in representing different interests.

The Disinterested Lawyer

The first test of DR 5-105(C) – that a disinterested lawyer would believe that the lawyer can competently represent the interest of each client in the representation of multiple clients
– requires a definition of the term "disinterested lawyer." The Committee adopted the definition in Simon's New York Code of Professional Responsibility Annotated:

> ….a disinterested lawyer is an imaginary hypothetical independent lawyer who has no personal or financial interest in continuing the representation of the client – a lawyer whose only aim is to give the client the best advice possible about whether the client should or should not consent to a conflict.

If the disinterested lawyer would advise that the client should not consent to the waiver, the lawyer involved should not ask for the waiver "or provide representation on the basis of the client's consent." EC 5-16. The disinterested lawyer test should be applied both when the advance waiver is given and again when the subsequent adverse matter arises. The Committee cited ABCNY Formal Opinion 2004-2, for an "analysis of the considerations involved in the 'Disinterested Lawyer ' test."

[**Author's note:** Although the "disinterested lawyer" test is "objective" in theory, it loses its objectivity in practice. Few lawyers and few clients will seek the opinion of an independent lawyer when a conflict arises or is anticipated. In the final analysis, the lawyer involved has to make the determination whether an advance waiver is ethical or proper. ABA Model Rule 1.7 eliminates the intervention of a disinterested lawyer and substitutes instead the reasonable belief of the lawyer involved that he can "provide competent and diligent representation to each affected client," notwithstanding the existence of a concurrent conflict, provided "each affected client gives informed consent, confirmed in writing." In larger law firms with independent ethics counsel, the judgment whether a waiver should be requested and whether a conflict is consentable should be made by ethics counsel and not by the lawyer(s) involved.]

The "Informed Consent" Test

The second test of DR 5-105(C) requires each client to " 'consent[] to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." This test will be more difficult for the lawyer to meet in advance waivers than in waivers of concurrent conflicts. ABCNY Formal Opinion 2004-2. Many of the factors creating future conflicts may not be known when the advance waiver is executed.

The adequacy of disclosure and the integrity of the consent will depend on the circumstances of each case. Wolfram, Modern Legal Ethics § 7.2.4 at 343 (1986).

The Committee agreed with NYCLA Ethics Opinion 724 that, in general, "the client or prospective client should be advised of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients or matters that may present such conflicts." In measuring the adequacy of the disclosure, the sophistication of the client is a critical factor. Sophisticated clients are better able to understand the "implications," "advantages," and "risks" implicit in advance waivers. Especially, they are able to understand the "risks" involved and to rely less on the lawyer's disclosures.

…if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective. (ABA Model Rule 1.7, Comment 22.)

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