

Advance Conflict Waivers In New York (Part I)

BY ROY SIMON

Suppose your law firm represents a number of health insurers and has earned a strong reputation in the health law field. Because of this strong reputation, you get a call from a major hospital corporation, a sophisticated and frequent user of legal services, asking your firm to represent it in some labor law matters pending before the National Labor Relations Board (the “NLRB”). Your firm would like to accept the representation, but there’s a hitch – if the hospital gets into litigation with any of your firm’s current or future health law clients (which could well happen), your firm wants to be free to represent the health law clients in the litigation. (Your firm would not represent the hospital in litigation against your firm’s other clients, of course, but you don’t want to be conflicted out of representing a health law client just because the adversary, the hospital, has become a current or former client.) No conflict exists now, and no specific conflict is on the horizon, but a conflict is certainly possible. What can your firm do to protect itself against disqualification if a conflict arises? Specifically, if you obtain a blanket advance waiver from the hospital, will that waiver protect your firm against a motion to disqualify if you someday undertake to represent a different client in litigation against the hospital?

The answer depends on whom you ask. In April of this year, in N.Y. City Bar 2006-1, the New York City Bar’s Committee on Professional and Judicial Ethics issued an opinion generally approving broad advance conflict waivers under the right conditions. But a month later, in a case called *New York and Presbyterian Hospital v. New York State Catholic Health Plan*, Index No. 60364004 (N.Y. County Supreme Ct., May 25, 2006), Justice Karla Moskowitz expressly disagreed with N.Y. City Bar 2006-1 and ruled from the bench that blanket advance conflict waivers could, at most, cure conflicts only with former clients, not with current clients. Indeed, perhaps blanket advance waivers were not valid for any purpose.

This month, in Part I of this column, I trace New York judicial decisions and ethics opinions leading up to and including N.Y. City 2006-1. (I am deliberately omitting ABA rules and ethics opinions so that I can keep my focus on New York sources.) Next month, in Part II of this column, I will describe and analyze Justice Moskowitz’s unpublished ruling from the bench in *New York and Presbyterian Hospital*.

Background: Judicial Opinions on Conflict Waivers

The New York Code of Professional Responsibility’s coverage of advance waivers of conflicts can be described in a four letter word: zero. Not a single Disciplinary Rule or Ethical Consideration expressly addresses advance waivers of conflicts of interest. (For purposes of this article, I use the term “advance waiver” to describe a client’s consent to waive a conflict of interest that does not yet exist but could arise in the future.)

Lacking any specific guidance from the Code, we need to invoke basic principles and weigh competing policies. On one hand, we want to promote the widest possible choice of counsel. In the context of advance waivers, this means two things. First, we want to encourage law firms to take on new clients who seek their representation, rather than turning away new clients for fear of future conflicts. If

advance conflict waivers are valid, that will encourage law firms to accept new clients, which will give those new clients a greater chance of retaining the firms they want to retain. Second, we want to avoid disqualifying law firms unnecessarily, because every time a court grants a motion to disqualify, the losing party is deprived of its chosen counsel.

On the other hand, we do not want to ask clients to waive non consentable conflicts, or to waive conflicts without full disclosure. Under DR 5105(C), for example, a client's waiver of a conflict between two current clients is valid only "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each [client] and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." EC 516 elaborates on the idea of full disclosure in the context of simultaneous representation of multiple clients in the same matter (e.g., codefendants in litigation) as follows:

[B]efore a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and otherwise provide to each client information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict, and should accept or continue employment only if each client consents, preferably in writing. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, the lawyer should also advise all of the clients of those circumstances.

The principle of full disclosure raises a question about advance conflict waivers: Can a lawyer ever make "full disclosure" about a conflict that has not even arisen yet? How can a lawyer make "full" disclosure about a conflict whose shape and dimensions are not yet known because it does not yet exist?

One of the first New York judicial opinions to evaluate an advance waiver was *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, (S.D.N.Y. April 10, 1978) (MacMahon, J.) (Memorandum and Order), an unpublished opinion. It is not available even on Westlaw or Lexis, but fortunately it is described in Professor Richard Painter's excellent article, *Advance Waiver of Conflicts*, 13 *Geo. J. of Legal Ethics* 289 (2000).

In 1973, Curtiss-Wright Corporation asked Skadden, Arps to represent it in making a tender offer for Airco Inc. Skadden agreed, but only on the condition that Skadden would be free to represent other target corporations against Curtiss-Wright if Curtiss-Wright sought to acquire those targets. Specifically, the retainer agreement provided: "Should your corporation ... seek to acquire or invest in any company which is a client of our office, we will be free to represent that client"

Early in 1977, Kennecott Copper retained Skadden to advise it regarding a divestiture. Later in 1977, Curtiss-Wright began buying shares of Kennecott stock and announced that it planned a proxy contest to gain control of Kennecott. Kennecott responded by retaining Skadden to file suit against Curtiss-Wright for securities and antitrust violations, whereupon Curtiss Wright moved to disqualify Skadden on grounds that Skadden still represented Curtiss-Wright in litigation over the Airco tender offer.

Judge MacMahon denied the motion to disqualify. Curtiss-Wright knew in 1973, when it first retained Skadden, that "Curtiss-Wright's aggressiveness and Skadden, Arps's specialized practice might some day lead to a collision." Curtiss-Wright also knew that it "was not a regular client on a general retainer but a new, minor and 'one shot' client on a particular retainer for the Airco matter only." The 1973 retainer

agreement entitled Skadden to “represent any client, past or future, in any takeover attempt, with no risk of disqualification, even though Curtiss-Wright happened to be the unfriendly corporate suitor or otherwise in an adversarial position.” Curtiss-Wright had agreed to that condition and thus had “waived any objection it might otherwise have to Skadden, Arps’ dual and simultaneous representation of Curtiss-Wright and a Curtiss-Wright target company.” We thus learn that an advance waiver need not identify the specific client that may later create a conflict of interest.

The next New York case to address advance waivers is the little known case of *Interstate Properties v. Pyramid Company of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982). Interstate Properties and Pyramid Company of Utica (“Pyramid-Utica”) were competitors. They owned adjoining parcels of land in Utica, where each company hoped to develop a shopping mall. Interstate hired Finley, Kumble to raise environmental objections to Pyramid-Utica’s plans, and Pyramid-Utica was denied a permit. At that point, Pyramid-Utica and Interstate formed a joint venture to develop a single shopping center on their combined properties. Pyramid-Utica was responsible for obtaining the necessary permits and financing. Impressed with Finley, Kumble’s success in blocking its earlier permit application, Pyramid-Utica retained Finley, Kumble to represent the company in its renewed permit application. Given the obvious potential for conflicts in any joint venture, Finley, Kumble must have asked Pyramid to waive any conflicts that might arise with Interstate regarding the joint venture. Pyramid apparently gave an oral advance waiver and Finley, Kumble went to work, this time succeeding in getting the permit issued. (The court’s opinion is unclear on the chronology.)

While Finley, Kumble was still working on other aspects of the Utica project, Pyramid’s close affiliates (i.e., real estate partnerships with common lead partners, common offices, and other close ties) retained Finley, Kumble regarding other real estate projects, eventually naming Finley, Kumble Pyramid’s General Counsel. (The court found it unnecessary to decide whether Pyramid-Utica and its affiliates were a “unified” entity or “discrete” enterprises, but for this article I will assume that all members of the Pyramid family were a single, unified client.)

Finley, Kumble was still doing work for Pyramid-Utica and its affiliates on various projects, when sharp differences arose between Interstate and Pyramid-Utica over their joint shopping mall venture. At that point, presumably to confirm Pyramid’s earlier oral conflict waiver, Finley, Kumble asked Pyramid to countersign a detailed advance waiver letter drafted by Finley, Kumble, and Pyramid did so. The letter acknowledged that Pyramid was aware of Finley, Kumble’s “longstanding” representation of Interstate, and Pyramid granted “express permission” for Finley, Kumble to “continue to act as general counsel for Interstate in any and all pending and future matters including any adversary proceedings that might arise between Interstate and Pyramid.” The letter also acknowledged that there had been “no confidential or privileged communications” between Finley, Kumble and Pyramid that would “inhibit” Finley, Kumble’s representation of Interstate in the litigation concerning the joint venture agreement. Finally, the letter cautioned Pyramid that the waiver letter should be “carefully examined by separate counsel of their own choosing,” and Pyramid agreed that in signing the waiver letter it had “acted solely in reliance upon the advice of independent counsel,” not on advice from Finley, Kumble.

A month or two later, with the differences over the Utica mall still unresolved, Finley, Kumble filed suit against Pyramid on behalf of Interstate alleging that Pyramid had breached its obligations regarding financing. Finley, Kumble also informed Pyramid that Finley, Kumble could no longer represent Pyramid-Utica in connection with the Utica mall. (In other words, Finley, Kumble was dropping

Pyramid-Utica like a hot potato with respect to the Utica project, though Finley, Kumble continued serving various Pyramid affiliates.) Pyramid-Utica responded by moving to disqualify Finley, Kumble in the litigation with Interstate, but Finley, Kumble invoked the waiver letter, asserting that Pyramid had waived the conflict in advance both orally and in writing.

Although Judge Carter said that Finley, Kumble had “tread perilously close to the border of the professionally irresponsible,” he honored the waiver letter and denied the motion to disqualify. “Of course,” the court said, such advance waiver letters “cannot immunize conduct otherwise inappropriate under the canons,” but here, Finley, Kumble’s continued representation of Interstate could not be labeled impermissible because Finley, Kumble could “obviously” fulfill its duties to each client. Thus, Finley, Kumble’s multiple obligations did not require “divided loyalties.”

Judge Carter had thus satisfied his concerns under Canon 5 (conflicts of interest), but he then embarked on a final step in the analysis, testing the advance waiver against Canon 4 (confidentiality). Judge Carter’s guiding principle was clear:

... Canon 4 concerns only arise when a prior representation was such that counsel subject to the disqualification motion could possibly have received confidences or secrets. Of course, once this threshold is surmounted, disqualification is automatic as long as the attorney’s employment in question is adverse to the interests of a former client on a matter substantially related to a prior representation of that client. [Citations omitted.]

Here, while doing environmental work for Pyramid-Utica in the joint venture with Interstate, Finley, Kumble would not have received information that was intended to be withheld from Interstate. Moreover, the advance waiver letter explicitly acknowledged that during Finley, Kumble’s simultaneous representation of both Interstate and Pyramid-Utica, Finley, Kumble had not received any confidential information that would inhibit the firm’s representation of Interstate in litigation with Pyramid-Utica over the proposed shopping mall. “It is incredible that Pyramid-Utica would execute such a statement under advice of counsel if confidences or secrets had passed between the company and Finley, Kumble,” Judge Carter said. “The waiver, thus, can be read to eliminate any possibility, however slight, that confidential information might have been acquired from Pyramid-Utica during its relationship with Finley, Kumble that will now be used to Pyramid-Utica’s disadvantage.”

In short, the advance waiver was valid because the conflict that had actually arisen was a waivable conflict under DR 5105 and did not jeopardize Pyramid-Utica’s confidences and secrets under DR 4101. The advance waiver passed muster under both the conflicts rules and the confidentiality rules of the Code of Professional Responsibility.

N.Y. County Lawyers’724

The next major New York landmark in analyzing advance waivers was N.Y. County Lawyers’ 724 (1998), the first New York ethics opinion to address advance waivers. The inquiry faced by the committee was whether a lawyer could ethically ask an existing or prospective client to waive conflicts of interest that may arise in the future. The committee said yes, provided the lawyer complied with DR 5105(C). At that time (as in the *Interstate Properties* opinion), a conflict was waivable only if it was “obvious” that the lawyer could “adequately represent the interest of each client” and each client consented to the conflict after full disclosure. At a minimum, therefore, the lawyer seeking an advance conflict waiver should advise the client of (a) the types of possible future adverse representations that the lawyer envisioned, (b)

the types of clients and matters that may present such conflicts, and (c) the measures the lawyer would take to protect the client or prospective client (e.g., an ethics screen or “firewall”) if a conflict actually arose. “This could include a disclosure of the procedures (for example, an information screen) that would be put into place to protect client confidences” if a conflict arose.

The precise degree of disclosure necessary to ensure that the client’s consent is “informed” also depended on various factors. For example, when the lawyer was seeking an advance waiver from a “sophisticated client, such as a large corporation with in-house counsel,” the disclosure would 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.” And the lawyer was not required to predict the precise facts of each future conflict, because. “[i]f such were the rule, no advance waiver would ever be enforceable ...”

However – and this is crucial – even if a lawyer made adequate disclosures at the time the lawyer obtained the client’s consent to future conflicts, the lawyer “must reassess the propriety of the adverse concurrent representation under [DR 5105(C)] when the conflict actually arises,” and “if the actual conflict that materializes is materially different than the conflict that has been waived, the lawyer may not rely on the consent previously obtained.”

Thus, under N.Y. County 724, an advance conflict waiver must be tested at two different times – first when a law firm obtains the waiver from the client, and again when the law firm invokes the waiver to permit a conflict that would otherwise be improper.

N.Y. City 2006-1

Despite the substantial guidance given by N.Y. County 724, lawyers continue to have many questions about advance waivers. In N.Y. City 2006-1 (2006), therefore, the New York City Bar’s Committee on Professional and Judicial Ethics addressed a broad question: Under what circumstances may a law firm ethically ask a client to waive prospectively an objection to the law firm’s later representation of another client against the first client? The answer was a ringing endorsement of advance waivers, in litigation as well as in transactions. The opinion began as follows:

When a law firm agrees to represent a client in a particular matter, it may ethically request that the client waive future conflicts of interest, including that the client consent to allow the law firm to bring adverse litigation on behalf of another current client, if (a) the law firm appropriately discloses the implications, advantages, and risks involved and if the client can make an informed decision whether to consent; and (b) a disinterested lawyer would believe that the lawyer can competently represent the interests of all affected clients. See DR 5105(C).

That sounds a lot like the first branch of N.Y. County 724. Later in the opinion, the opinion echoed the second branch of N.Y. County 724 by requiring that the validity of an advance waiver be evaluated both at inception and invocation:

The disinterested lawyer test should be applied both when the advance waiver is given and again when the subsequent adverse matter arises. In the first instance, the lawyer examines the type of representation and prospective client that is anticipated and the potential adversity of interests. In the second instance, the lawyer examines the actual client and matter and the actual adversity that has developed. If the actual conflict is materially different from the conflict envisioned by the

waiver, the waiver will be ineffective. If the actual conflict is not materially different, the waiver will also be ineffective if the actual conflict is nonconsentable.

Next, N.Y. City 2006-1 addressed the amount of disclosure necessary to obtain the informed consent (i.e., the consent after “full disclosure”) required by DR 5105(C). Focusing on advance waivers by the kinds of large, legally experienced clients typically represented by large Wall Street law firms, the City Bar scaled down the amount and detail required to attain full disclosure:

... Sophisticated clients need less disclosure of the “implications,” “advantages,” and “risks” of advance waivers before being able to provide informed consent. ... [T]he effectiveness of advance waivers is determined “by the extent to which the client reasonably understands the material risk that the waiver entails,” placing the emphasis, for the sophisticated client, on the client’s understanding of risks rather than detailed disclosure by the lawyer. For the sophisticated clients described above, blanket or open-ended advance waivers that are accompanied by relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable.

Up to this point, N.Y. City 2006-1 generally tracked N.Y. County 724. But then the City Bar went further, stating: “At least for a sophisticated client, blanket advance waivers and advance waivers that include substantially related matters (with adequate protection for client confidences and secrets) also are ethically permitted.” This went beyond prior ethics opinions and beyond Judge Carter’s decision in *Interstate Properties v. Pyramid*, in which the court stated that disqualification was “automatic,” despite an advance waiver that satisfied DR 5105(C), if “counsel subject to the disqualification motion could possibly have received confidences or secrets” from the opposing party in a substantially related matter. The City Bar (which did not cite *Pyramid*) recognized the concerns but rejected such automatic disqualification. “To be sure,” the City Bar said, “when the waiver applies to two engagements that are substantially related, another consideration must be added to the analysis – the need to safeguard each client’s confidences and secrets and to ensure that those confidences and secrets are not used to the respective client’s disadvantage.” But in certain circumstances, an advance waiver “ethically may apply to substantially related matters.”

Specifically, the committee concluded in N.Y. City 2006-1 that a law firm may ethically request an advance waiver that includes substantially related matters if the following conditions are met:

(a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation and opposite sides in a starkly disputed transactional matter; (c) the law firm is able to ensure that the confidences and secrets of one client are not shared with, or used for the advantage of, another client; (d) the conflict is consentable under the tests of DR 5105(C); and (e) special consideration is given to the other factors described in Formal Opinion 2001-2.

The “other factors” described in N.Y. City 2001-2 included:

(a) the nature of the conflict and the possibility of an adverse effect on the exercise of the lawyer’s independent professional judgment; (b) the likelihood that client confidences or secrets in one matter will be relevant to the other representation; (c) the ability of the lawyer or law firm to ensure that confidential information of the affected clients will be preserved, including through screening and other information control devices; (d) the sophistication of the client and the client’s ability to understand the reasonably foreseeable risks of the conflict; and (e) if the firm is

still representing the waiving client when the conflict arises, whether the lawyer's relationship with the clients is such that the lawyer is likely to favor one client over another.

The City Bar then suggested that law firms use the following model "blanket waiver" for future conflicts not involving substantially related matters:

This firm is a general service law firm that [insert client name here] recognizes has represented, now represents, and will continue to represent numerous clients (including without limitation [the client's] or its affiliates' debtors, creditors, and direct competitors), nationally and internationally, over a wide range of industries and businesses and in a wide variety of matters. Given this, without a binding conflicts waiver, conflicts of interest might arise that could deprive [the client] or other clients of the right to select this firm as their counsel.

Thus, as an integral part of the engagement, [the client] agrees that this firm may, now or in the future, represent other entities or persons, including in litigation, adversely to [the client] or any affiliate on matters that are not substantially related[Emphasis added.]

The committee then suggested an alternative model letter for waivers that do not encompass substantially related matter. Neither model waiver letter identified either the specific clients whose interests might conflict with the waiving client or the specific type of conflict that might arise, but rather sought waivers for conflicts with all "other entities or persons" in "business transactions, counseling, litigation or other matters."

In sum, under N.Y. City 2006-1, advance waivers based on informed consent by sophisticated clients will cure nearly all conflicts, including conflicts in substantially related matters, as long as adequate safeguards are in place to protect the waiving client's confidences and secrets. N.Y. City 2006-1 thus represents a new high water mark regarding the utility of advance waivers. (For a comprehensive summary of N.Y. City 2006-1, see Lazar Emanuel, Page 1, NYPRR May 2006.).

Of course, bar association ethics opinions are merely advisory and are not binding on courts. That point was powerfully brought home in *New York and Presbyterian Hospital v. New York State Catholic Health Plan*, *supra*. On May 25, 2006, Justice Moskowitz held oral argument on a motion by New York and Presbyterian Hospital (the "Hospital") to disqualify McDermott Will & Emery as counsel for N.Y. State Catholic Health Plan (the "Health Plan").

The situation was simple. McDermott Will & Emery represented the Hospital in various matters, including some labor matters before the NLRB. The firm also represented the Health Plan in many matters. When the Hospital brought suit against the Health Plan, McDermott Will & Emery appeared in the litigation on behalf of the Health Plan. For purposes of argument, everybody assumed that this presented a conflict. The only question was whether the conflict had been waived.

McDermott Will & Emery argued that it had obtained a blanket advance waiver from the Hospital agreeing not to object to any adverse representation, whether in litigation or in a transaction, as long as the matter was not substantially related to the work McDermott Will & Emery was doing for the Hospital when the conflict arose. Here, it was undisputed that McDermott Will & Emery's current work for the Hospital was not substantially related to the lawsuit, so McDermott Will & Emery's representation of the Health Plan fell within the scope of the waiver. The only question was whether the blanket advance

waiver was valid. That is the question I will address next month when I describe and analyze the New York and Presbyterian Hospital decision in detail.

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