

## Advance Conflict Waivers In New York (Part II)

BY ROY SIMON

Last month in NYPRR, in Part I of this article, I discussed New York judicial opinions and bar association ethics opinions regarding the validity of advance conflict waivers. To summarize, the ethics opinions have approved three types of advance conflicts waivers.

First, N.Y. County Lawyers Op. 724 (1998) approved relatively specific advance waivers that disclose “(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.” Waivers supported by these disclosures are valid for all clients, sophisticated and unsophisticated alike, though the amount of disclosure is subject to a “less stringent test” if the client is sophisticated. However, the advance waiver will remain valid only if the conflict is consentable (waivable) under the “disinterested lawyer” test of DR 5-105(C) at the time the conflict arises.

Second, N.Y. County Lawyers Op. 724 also approved a “‘blanket’ waiver of future conflicts involving adverse parties,” which “may be informed and enforceable depending on the client’s sophistication, its familiarity with the law firm’s practice, and the reasonable expectations of the parties at the time consent is obtained.” Eight years later, N.Y. City 2006-1 (2006) echoed that approval for “blanket or open-ended advance waivers” for future matters that are not substantially related. The N.Y. City Bar cautioned, however, that the amount of disclosure needed to obtain a client’s consent under DR 5-105(C) increases as a client’s sophistication decreases.

Third, for sophisticated clients only, N.Y. City 2006-1 approved “blanket advance waivers and advance waivers that include substantially related matters,” provided the waivers include “adequate protection for client confidences and secrets” if a conflict with a substantially related matter actually arises in the future.

Thus, ethics opinions have approved advance conflict waivers of three types: (1) specific waivers identifying in reasonable detail the kinds of future conflicts, matters, and adversaries covered by the waiver; (2) “blanket” waivers covering all future matters that are not substantially related; and (3) blanket waivers for all future matters, including substantially related matters.

This month, I will focus on a case that I described briefly in last month’s column, *New York and Presbyterian Hospital v. New York State Catholic Health Plan*, Index No. 603640-04 (N.Y. County Supreme Ct., May 25, 2006). In that case, Justice Karla Moskowitz refused to honor a broad advance conflict waiver, and therefore disqualified McDermott, Will & Emery (“McDermott”) from defending its client N.Y. State Catholic Health Plan (d/b/a “Fidelis”) in litigation brought by its current client, The Brooklyn Hospital Center (“Brooklyn Hospital”) and various other plaintiffs.

## **Background**

In 2000, Brooklyn Hospital approached McDermott, Will & Emery seeking representation in a labor law matter. McDermott was interested in the engagement but was concerned about potential future conflicts of interest. Therefore, McDermott insisted that the following advance waiver provision be included in the firm's retainer agreement with Brooklyn Hospital:

Because McDermott, Will & Emery is a large firm with offices throughout the United States, the occasion may arise in which we are requested to represent a party with interests that may be adverse to you. We will not accept any directly adverse engagement that is substantially related to the subject matter of your retention of us, or which would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us. However, we are accepting the present engagement with your express consent that our representation of you does not preclude us from accepting in the future any other engagement from an existing or new client, even if the interests of that client are adverse to your interests, provided that the engagement is not substantially related to the subject matter of any services that we shall provide to you.

Over the next four years, McDermott represented Brooklyn Hospital in additional labor law matters, including a litigated matter arising from the cancellation of certain malpractice insurance coverage. That litigation, entitled *New York State Nurses Association v. The Brooklyn Hospital Center*, was filed before the National Labor Relations Board ("NLRB") on January 4, 2004.

On November 1, 2004, while the NLRB litigation in *New York State Nurses Association* was still pending, Brooklyn Hospital and other plaintiffs filed suit against N.Y. State Catholic Health Plan ("Fidelis"). On March 1, 2005, McDermott filed an answer on behalf of Fidelis. For some reason, Brooklyn Hospital did not move to disqualify McDermott until May 11, 2006, a few days before briefs were due on opposing motions for summary judgment. Oral argument on the Hospital's order to show cause was held the next day. McDermott argued that the motion should be denied because of laches, but the court disagreed. (I am not going to analyze the laches issue in this column because I want to focus on advance waivers and their limits.) After the oral argument on the order to show cause, the parties quickly briefed the issues regarding disqualification, and Justice Moskowitz held oral argument on the motion to disqualify on May 25, 2006. At the end of the argument, she handed down a decision from the bench granting the motion to disqualify. No written decision was issued, but the transcript of the May 25th oral argument began circulating via email.

### **Oral Argument Before Justice Moskowitz**

At the oral argument on the motion to disqualify, Brooklyn Hospital (represented by Sills Cumis Epstein & Gross), argued that McDermott Will & Emery had not made the disclosures or obtained the consent required under DR 5-105(C) to oppose the Hospital. McDermott countered that it had obtained a blanket advance waiver broad enough to cover this litigation. Because Judge Moskowitz issued her ruling orally from the bench and it is not available anywhere online (even on Lexis or Westlaw), I will quote liberally from the transcript. McDermott partner Banks Brown set the stage this way:

MR. BROWN: [I]s there a waiver here? ... [Y]es, there is a waiver here. There was an advance waiver contained in a letter signed by Brooklyn Hospital, a sophisticated client, I think, by anybody's definition, that permitted us to take on matters that would come along in the future, even if we were directly adverse, as long as there was no substantial relationship between the two matters.

Thus, the purported waiver letter was well within the bounds permitted by N.Y. City 2006-1, which would honor waivers even for matters that are substantially related. But Justice Moskowitz immediately expressed serious concerns about the purported waiver, for two reasons. First, the waiver encompassed not only conflicts that could arise after the attorney-client relationship with the consenting client had ended (i.e., when the client giving the waiver had become a *former* client), but also conflicts that could arise while the law firm was still representing the waiving client (i.e., when the client giving the waiver was still a *current* client). Second, the waiver was a "general" or "blanket" waiver. It did not specify a particular litigation, or the particular client for whose benefit the waiver was sought (here, Fidelis), or even the type of matter (whether litigation or transaction) that might create a conflict with Brooklyn Hospital.

Although these two points are discrete and independent, the oral argument treats them as intertwined. Consider this exchange between the court and McDermott's Banks Brown.

MR. BROWN: So what this comes down to is, do we have here a waiver that permits us to have represented Brooklyn Hospital in labor matters, and to now be adverse to Brooklyn Hospital when it sued another one of our clients? The waiver says we can do that. The waiver that they executed says in no uncertain terms that we can do that; that we can – that we are getting their express consent that our representation of you does not preclude us from accepting in the future any other engagement from an existing or new client even if the interests of that client are adverse to your interests, provided that the engagement is not substantially related to the subject matter of any services that we shall provide you.

It is simply not limited to a situation of we finished up with Brooklyn and then we take on another representation. If we were in that position, we would not need this waiver. We were entitled to do that under the rule.

THE COURT: I don't think that the case law supports your reading of the "waiver" that your client signed.

Judge Moskowitz then read into the record from DR 5-105(C), which governs a client's consent to a concurrent conflict (i.e., "simultaneous representation"). So that we have it before us, here is DR 5-105(C):

In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

Justice Moskowitz then continued as follows:

THE COURT: The law firm undertook to represent Brooklyn Hospital in the NLRB proceeding, correct?

MR. BROWN: That's correct.

THE COURT: And while the proceeding is still existing and that representation still exists or existed at the time of this motion, the firm undertook to represent the defendant in this case, correct? So it is simultaneous representation.

MR. BROWN: That's correct.

THE COURT: So then, the operative section is the exception section to the general rule and the exception is, "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." And I ask you if you have found any decision anywhere in the United States where the specific – where the consent is a general consent as opposed to a consent to a specific representation, where the general consent has been found by any court ....

Judge Moskowitz then cited and quoted from *Interstate Properties v. Pyramid Company of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982). Judge Moskowitz mischaracterized *Interstate Properties* as "a prior representation case," apparently because Finley, Kumble had dropped Pyramid-Utica when the conflict arose – Justice Moskowitz apparently did not realize that Finley, Kumble continued to represent other Pyramid entities that were arguably the same client even after the litigation began. Judge Moskowitz continued:

THE COURT: I could not find any decisions where there was a waiver of the kind ... that the law firm has in this case, where there is not, the information does not contain the name of the other client, what the representation would be.

MR. BROWN: That's correct, your Honor.

THE COURT: At the same time.

MR. BROWN: That's correct, your Honor.

THE COURT: And I don't believe that the prior waiver that the law firm has been using is sufficient and that what was required was when the other client came along, was a – there had to be by the law firm, the law firm had to inform at that juncture the first client, Brooklyn, to say look, this has come up; Brooklyn Hospital Center, this has come up; there is a duty to inform ... the duty is on the law firm that is conflicted and you cannot shift any of that burden or that duty on to anybody else, either the client, former client, or the attorney for the former client. The duty is squarely on the law firm, so –

MR. BROWN: Right and believe me, that is our opponent's argument and I understand the argument.

THE COURT: It is not just the opponent's argument. It is what the case law says and what the

disciplinary rules say and it is what the opinions of these bar associations say.

MR. BROWN: Your Honor, that is where we differ. As far as I know, there is only one case, there may be another one but it is unpublished and we are having a hard time getting it, but as far as we know, there is only one case that directly talks about an advanced general waiver and it is a Northern District of Georgia case that they cited in the brief and that case says you cannot have advance notice. ...

THE COURT: [H]ere we have a simultaneous representation case situation, which says you cannot do it unless you meet these two criteria and one of the criteria is a knowing waiver and I can't see that a knowing waiver can exist on simultaneous representation unless the client knows the other representation, who it is and what the situation is. ... That "waiver" provision is ineffective when there is a – when the second case comes along while you are still representing the first client.

At this point McDermott brought up N.Y. City 2006-1, which construed DR 5-105(A) to permit a single law firm to represent both sides of a corporate transaction in many instances. McDermott tried to use N.Y. City 2006-1 to its advantage:

MR. BROWN: Your Honor, if I may, the City Bar Association that is attached to our brief [N.Y. City 2006-1]... specifically addresses DR 5-105. I mean that is what they are talking about. There is no question that is what they are talking about. They say in a transaction you can represent both sides to the transaction. There is no doubt they are talking about this.

THE COURT: But the opinion and all of the other opinions say there is a difference between transactional matters and litigated matters.

MR. BROWN: That is how frankly my opponent would like people to read it, but that is not what it says. It says there are two different situations, right? There are two different situations. One is where you have concurrent representation in different places, I am on one side of one transaction over here and another transaction over there. Right? That is the first one. This says in those cases, you can have an advance waiver as long as the two things that you're representing the client on are not related and that is what our waiver says. It then says ...: "Blanket or open-ended advance waivers and advance waivers that permit the law firm to act adversely to the client on matters substantially related to the law firm's representation should be limited to sophisticated clients ...". So what this says, your Honor is that advance waivers that permit the law firm to act adversely to the client on matters substantially related require that they be transactional matters only. There are two types of matters they are talking about, two types of waivers; blanket or open-ended advance waiver, one; and two, advance waivers that permit the law firm to act adversely to the client on matters substantially related. We are not acting adversely to anybody on a matter that is substantially related. ... This opinion says under certain circumstances, even if they are substantially related, you can go forward nevertheless. Our point simply is that we have got matters here that are not substantially related. We have a waiver that permits us to do it and this opinion quite clearly, your Honor, says that those waivers, when they are signed by a sophisticated client and the matters are not substantially related, then the advance waivers are enforceable.

All right – "blanket or open-ended advance waivers" –which is what we have.

THE COURT: Yes.

MR. BROWN: "That are accompanied by relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable."

THE COURT: Talks about prospective conflicting matters, doesn't it?

MR. BROWN: But it is prospective. The time they signed the advance waiver, it was prospective.

THE COURT: But then it became simultaneous. You were still representing the client at the time that you took on the new client. It wasn't prospective in the sense of you finished representing Brooklyn Hospital Center and then –it is a simultaneous representation. It is not prospective.

At this point, Banks Brown must have been thinking of the famous line in *Cool Hand Luke*: "What we've got here is failure to communicate." He bravely and patiently carried on, trying to explain the import of N.Y. City 2006-1:

MR. BROWN: It takes a while, your Honor and I apologize. I think what we have is a difference of what this language means and I am trying to give you my interpretation. What we are talking about and what this entire opinion is talking about, it is talking about a waiver that says to the lawyer, in the future, you can take on conflicting matters as long as they are not substantially related. ... It is prospective when it is signed. Prospectively, it waives for the future conflicts that might arise in the future. That is the whole purpose of this opinion, which is to say, for waivers that are given in advance of the actual conflict, they are enforceable as long as they were sophisticated clients. And that as long as you are dealing with sophisticated clients, as long as the matters are not substantially related, that is deemed to be informed consent under Rule DR 5-105. That is informed consent. It is presumed that a sophisticated client (sic) will say to them, "You know what, before I represent you, I need a contract that will permit me, because I will do labor matters for you. I need – I need a contract that will permit me that if an opportunity comes along in a wholly unrelated matter, that I can go ahead and do that."

At this point a fascinating issue cropped up. The judge raised the fact that the "point person" for Brooklyn Hospital in the pending NLRB case – in which McDermott represents Brooklyn Hospital – was also the "point person" in the New York and the Fidelis case, as well as the person who would be testifying against McDermott's client. As Judge Moskowitz put it, "The matters aren't related but the person, right, who ... will be examined in an EBT, is the same person.... [Y]ou are going to cross examine a person who you presented on behalf of Brooklyn Hospital Center in another proceeding. Now ... they are different matters, but it is the same person." This issue was obviously put in the case just to confuse students on final exams. Are two matters substantially related simply because a witness in one case is also a witness in the other case, even if the subject matter of the two cases is totally different? If so, then the NLRB matter and the Brooklyn Hospital matter were substantially related and McDermott's waiver did not cover the situation. But the court was not interested in exploring this intriguing issue at this juncture, and went back to the question of "prospective" advance waivers.

THE COURT: And I don't see that you could say that this -- that your representation here of the defendant is in the future. It is occurring at the same time and it started to occur at the same time that you were representing ... one of the plaintiffs in this case in another proceeding and I don't

think that this Bar Association opinion changes anything about the law on simultaneous representation. You had a duty under the Code when the second client said we are being sued – for you to do the conflicts check, for you to go to the first client who you are still representing in the NLRB and say, “Look, we are just representing you in labor matters, we now have our other client who is being sued by you in this case, do you have any problem with us representing Fidelis in this other unconnected litigation?” You didn't do it and I think that that defeats the operation and the effect of the waiver that you obtained from Brooklyn Hospital Center in the beginning of your representation and that is my opinion.

The citation to the – this Bar Association opinion, it is not dispositive and I do not see that the opinion envisioned what happened in this case. It is not binding on this Court. ... I don't believe that ... the prior waiver is a waiver ... because there was never a disclosure that, “Hey, you will be a plaintiff in this lawsuit, or you now are a plaintiff in this lawsuit and we want to defend Fidelis,” and that was never disclosed, so how could there be a knowing waiver of the simultaneous representation by the client? And it is a client. So that is my decision.

### **An Imaginary Appellate Opinion**

Fidelis has not appealed Justice Moskowitz's decision, so we will not have the benefit of appellate guidance on the advance waiver issue in this case. But what if Fidelis had appealed? Should the First Department have affirmed or reversed? In an effort to answer that question, I will take the liberty of writing an imaginary appellate opinion. Since this is a close question, with strong arguments on both sides, I will also include a dissent.

CHOICE OF COUNSEL, P.J. – This interlocutory appeal requires us to balance a client's right to choice of counsel against a client's right to undivided loyalty. Brooklyn Hospital, which moves to disqualify opposing counsel, seeks counsel “free of compromising influences and loyalties” (EC 5-1). Fidelis, which is resisting the motion to disqualify, seeks to continue being represented by its longtime counsel, in whom it has great trust and confidence.

In opposing the motion, Fidelis relies on a “blanket” advance conflict waiver. Counsel for Fidelis (McDermott, Will & Emery) accepted its initial engagement with Brooklyn Hospital in 2000 based on Brooklyn Hospital's “express consent that our representation of you does not preclude us from accepting in the future any other engagement from an existing or new client, even if the interests of that client are adverse to your interests, provided that the engagement is not substantially related to the subject matter of any services that we shall provide to you.” This waiver is similar to (though less detailed than) the model blanket advance conflict waiver approved in N.Y. City 2006-1 (2006), which provides:

Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliate in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. ...

The City Bar made clear that such blanket advance waivers could be made only by “sophisticated” clients, defined in N.Y. City 2006-1 as a client that “readily appreciates the implications of conflicts and waivers,” including “clients that regularly engage outside counsel for legal services, or that have access to independent or inside counsel for advice on conflicts.” In this sense, Brooklyn Hospital is unquestionably

a “sophisticated” client.

The American Bar Association has similarly taken the position that blanket advance waivers by sophisticated clients are sometimes permissible. Comment 22 to Rule 1.7 of the ABA Model Rules of Professional Conduct provides that the effectiveness of advance conflict waivers “is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.” The Comment continues:

The 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 that the client will have the requisite understanding. ... If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, *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*, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. ... [Emphasis added.]

Brooklyn Hospital is a sophisticated client that freely agreed to a blanket advance conflict waiver for matters that are not substantially related. Because McDermott’s acceptance of the engagement was expressly conditioned on this waiver, we assume that McDermott would not have accepted the matter absent the waiver. By agreeing to the waiver, Brooklyn Hospital expanded its own options for choice of counsel but gave up its right to undivided loyalty. Brooklyn Hospital should not now be permitted to negate the waiver for purposes of denying Fidelis its right to choice of counsel.

We reject the New York County Supreme Court’s view that advance conflict waivers are ineffective with respect to current clients. Under DR 5-108(A), a law firm may generally oppose a *former* client in any matter as long as the new matter is not substantially related to the matter in which the firm represented the former client. A law firm therefore does not need an advance waiver to permit it to oppose a former client in matters that are not substantially related. DR 5-108(A) itself provides that waiver. If advance waivers are per se ineffective to cure conflicts with current clients, then they will serve little or no purpose, depriving clients and law firms alike of the benefits of advance waivers.

We believe that blanket advance waivers for matters that are not substantially related have significant benefits. Upholding a blanket advance waiver expands everyone’s choice of counsel. The client giving the waiver is able to retain a firm that would otherwise decline the engagement, and the client invoking the waiver is able to continue using the law firm it has chosen. And when (as here) the future matters covered by the waiver are not substantially related to the matters on which the law firm represents the waiving party, there is no threat to the waiving party’s confidential information.

For all of these reasons, we reverse the disqualification and direct the Supreme Court to enforce the advance conflict waiver signed by Brooklyn Hospital.

FREEDOM OF CONTRACT AND SOPHISTICATED CLIENT, JJ., CONCUR.

UNDIVIDED LOYALTY, J., DISSENTING – Six years ago, Brooklyn Hospital signed a retainer agreement with McDermott, Will & Emery for a single, well-defined engagement. The retainer agreement included a broad advance conflict waiver. Under DR 5-105(C), a lawyer seeking a conflict waiver (advance or

otherwise) “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 ....” EC 5-16. McDermott made no apparent effort to comply with this standard when it originally obtained the advance waiver. Nor did McDermott attempt to comply with the requirements of N.Y. County Lawyers Ass’n Op. 724 (1998), which advised that, at a “minimum,” a 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.”

Since the original engagement, McDermott has handled several more matters for Brooklyn Hospital. Nothing in the record suggests that McDermott brought the advance waiver to Brooklyn Hospital’s attention at the time of these new engagements (including the presently pending NLRB matter) so that Brooklyn Hospital could decide, with respect to each separate engagement, whether it wished to waive all future conflicts in unrelated matters. Nor did McDermott make any effort to make the advance waiver provision more detailed and specific, even after it learned more about Brooklyn Hospital’s operations and could presumably have described with greater specificity the types of future conflicts that it was asking Brooklyn Hospital to waive.

Today’s holding lowers the traditional standards of the profession for “sophisticated” clients but not for others. As a result, every time a law firm resists a motion to disqualify based on an advance conflict waiver, the court will need to determine whether the client purportedly granting the waiver is a “sophisticated” client. That may be clear in some cases, but it will be unclear in many others, and many hours of judicial resources will be expended dividing clients into sophisticated and unsophisticated categories. It would be more efficient to put the burden on those with the most to gain – law firms seeking advance waivers – to be more specific in their advance waiver provisions.

We do not dispute that a client’s right to choice of counsel is an important right, and that courts should not lightly separate a client from its chosen counsel. But if the value of choice of counsel is taken to its logical extreme, all conflict of interest rules will fall by the wayside, and the great professional values of undivided loyalty and independent professional judgment will ultimately wither away in the name of economic efficiency. I therefore dissent. JUDICIAL ECONOMY, J., JOINS IN THIS DISSENT. You have now read two competing views of the blanket advance waiver at issue in the Brooklyn Hospital case. Where do you come out?

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