

Advance Consent to Withdrawal for Nonpayment

BY ROY SIMON

May your firm's retainer agreement include a provision securing a client's advance consent to a conflict of interest that may develop during the representation? Usually "yes," according to most authorities.

May your firm's retainer agreement include a provision securing a client's advance consent to your withdrawal from employment if the client for any reason does not pay your fees in a timely manner? Usually "no," according to N.Y. State 805 (2007).

Why is the answer to these two questions different? Why should a client's advance consent to your withdrawal if the client fails to pay your legal fees be treated any differently from a client's advance consent to a conflict of interest?

Advance Consent to Conflicts of Interest

Advance consent to conflicts of interest has been authorized by several bar association ethics committees in New York. According to N.Y. County Lawyers' Ass'n. 724 (1998), for example, a lawyer may ethically ask a client to waive conflicts of interest that may arise in the future, provided the lawyer complies with DR 5-105(C) by obtaining the client's "informed" consent. The precise degree of disclosure necessary to ensure that the client's consent is "informed" will depend on various factors. For example, "when the lawyer is seeking an advance waiver from 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 lawyer need not predict the precise facts of each future conflict, but the lawyer "must reassess the propriety of the adverse concurrent representation under [DR 5-105(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."

In N.Y. State 761 (2003), the Committee echoed N.Y. County Lawyers 724 by saying:

The clients' advance consent must be to a conflict that is consentable and the consent must be informed. The future conflict must be described "with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when it was given." A prospective waiver of a future conflict is more likely to be effective where the attorney has identified the potentially adverse party and the nature of the conflict.

More recently, N.Y. City Bar 2006-1 (2006) said that a law firm may enforce an advance conflict waiver only if it passes both tests set out in Dr 5-105(C) - the "disinterested lawyer" test and the "informed consent" test. An "important consideration" in judging the degree of required disclosure is whether a client is "sophisticated," meaning a client that "readily appreciates the implications of conflicts and waivers," such as clients that "regularly engage outside counsel for legal services, or that have access to

independent or inside counsel for advice on conflicts." Sophisticated clients "need less disclosure of the 'implications,' 'advantages,' and 'risks' of advance waivers before being able to provide informed consent."

Against that background regarding advance conflict waivers, let us consider the second of our questions - a client's advance consent to a lawyer's withdrawal if the client fails to pay legal fees.

Advance Consent to Withdrawal for Nonpayment of Fees

Under Dr 2-110(C)(1)(f), a lawyer may withdraw if a client "*deliberately* disregards an agreement or obligation to the lawyer as to expenses or fees." (Emphasis added.) In N.Y. State 805 (2007), a lawyer asked: "may a lawyer include a provision in a retainer agreement that would secure a client's advance assent to a lawyer's withdrawal from employment if the client fails to pay agreed legal fees and expenses in a timely manner?" The Committee said:

A retainer agreement must not mislead the client with regard to the attorney's obligations, "including the obligation to continue as counsel in the absence of a permissible ground for withdrawing from the representation."... A retainer agreement that purported to permit a lawyer to withdraw upon a failure to pay agreed legal fees or expenses in a timely manner, *without more*, would not accurately state the applicable rules, and therefore would be impermissible. [Emphasis added.]

Whether a client "deliberately" disregards an obligation to pay fees, the Committee said, turns on more than the client's mere failure to pay. Rather, deliberate disregard depends on a "highly fact sensitive" inquiry. Conflicting considerations include (1) "potential prejudice to the client," (2) the "professional obligation to render services to the needy," (3) "an attorney's own financial interests," (4) "the need of the tribunal for orderly proceedings," (5) the "amount of work performed and paid for in comparison to the work remaining," (6) "the amount of the fees paid to date," and (7) "the likely effect on the client" if the lawyer withdraws.

These considerations, the Committee said, are not reflected in a clause by which a client "purports to agree that a lawyer may withdraw if the client fails to pay legal fees and expenses in a timely manner." It is "impossible" to know or weigh in advance the many factors relating to a client's "deliberate disregard," so a lawyer "may not seek advance assent to the lawyer's withdrawal from employment based on a client's failure to pay legal fees and expenses, and a lawyer may not ethically include such a provision in a retainer agreement."

Can the Opinions Be Reconciled?

Can N.Y. State 805 be reconciled with the opinions approving advance client consent to conflicts of interest? I think so. I think there are principled distinctions between a client's advance consent to withdrawal for nonpayment of fees and a client's advance consent to waive conflicts.

One distinction is the use of the word "deliberately" in DR 2-110(C)(1)(f). The purpose of the "deliberately" requirement is to protect clients who negligently fail to pay fees (e.g., misplace the bill or send a check in the wrong amount), who are unable to pay for a short time due to financial difficulties (see N.Y. State 598 (1989)), or who do not pay because they legitimately dispute the bill. A client's naked

advance consent that the lawyer may withdraw whenever the client fails to pay fees would totally negate the protection clients gain from the word "deliberately," including the client's right to challenge excessive fees without first paying the bill.

Conflict waivers are different because they have nothing to do with client behavior. By obtaining a broad advance waiver to conflicts, a lawyer is not depriving a client of any additional protection.

A second distinction is that a client's nonpayment of fees pits the interests of a client against the interests of the law firm, whereas conflicts pit the interests of two (or more) clients against each other. Suppose Client A wants to retain me but I am worried that Client A cannot or will not pay my fees. If I begin representing Client A but he later fails to pay my fees, I can still ethically continue representing Client A without further payment. It may not be profitable, but it isn't unethical. Therefore, obtaining Client A's advance consent to my withdrawal if Client A does not pay my fees protects only my interests, not the interests of Client A or any other client.

Advance conflict waivers, in contrast, protect the interests of multiple clients. Suppose Client A wants to retain me but a conflict of interest may later arise with existing Client B, and that conflict (absent client consent) would prohibit me from continuing to represent Client A and Client B simultaneously. It might even prohibit me from continuing to represent either client.

But an advance conflict waiver from Client A will serve the interests of two clients - Client B's interests are served because I will be allowed to continue representing Client B even if a conflict with Client A arises, and Client A's interests are served because Client A gets my services now just by agreeing in advance to waive a consentable conflict that may never even materialize. If I also obtain a valid advance waiver from Client B, then I can also ethically continue representing Client A. Both clients win - and Client A wins twice (once when I agree to take on the matter initially, which I would not do without an advance waiver, and once when I continue representing Client A after the conflict with Client B arises, which I could not do without Client B's advance waiver). As a bonus, the courts will spend less time deciding motions to disqualify.

Another type of advance conflict waiver - essentially a waiver of the "hot potato" doctrine - also serves the interests of multiple clients. Suppose Smallfish & Sons wants to retain me, but I think Bigfish Corp. may want to retain me in the future, and Bigfish's interests may conflict with Smallfish's interests. If Smallfish won't give me a broad advance conflict waiver, then I must either tell Smallfish to find a different lawyer now, or take on Smallfish and tell Bigfish Corp. to find a different lawyer later. Obtaining an advance conflict waiver from Smallfish again serves the interests of both Smallfish and Bigfish, giving both of them their choice of counsel even if a conflict later arises.

Alternatives to Advance Assent to Withdrawal for Nonpayment

Another distinction is that while advance conflict waivers are necessary to protect law firms against disqualification when future conflicts arise, advance withdrawal-for-nonpayment clauses are not necessary to protect law firms against clients who do not pay their bills. They are unnecessary because law firms have many other ways of achieving the same objective. For example, a law firm can reduce the risk of future nonpayment of legal fees by (a) demanding a big advance retainer; (b) limiting the scope of representation (and thus reducing the possibility of running up a bill the client cannot pay); (c)

demanding security for fee payments; (d) raising hourly rates for clients with shaky credit; (e) raising rates across the board to make up for deadbeats; or (f) charging interest on late payments (or some combination of these methods). In contrast, there are typically no adequate substitutes for advance conflict waivers, especially from the perspective of clients. If a law firm is disqualified due to a conflict, the client cannot replace the intangible benefits of being represented by its trusted counsel, and cannot easily make up for the delays and disruptions that nearly always accompany disqualification. In short, advance conflict waivers are necessary to facilitate representations that might not otherwise occur, whereas advance waivers of a law firm's right to withdraw for nonpayment just substitute for other measures that protect the interests of lawyers and clients equally well.

Dangers for Small Clients?

Another difference between advance conflict waivers and advance waivers of withdrawal for nonpayment is their relative impact on large and small clients. Advance waivers permitting withdrawal for nonpayment of fees pose much greater dangers to small clients than to big clients. Small clients are probably more likely than large clients to default on their fee payments, and have less leverage to negotiate for more time to pay. Small clients also typically have fewer financial resources, lack in-house counsel to protect their interests, and have more difficulty than large clients finding new counsel if a lawyer withdraws in mid-matter. (Large clients can usually find substitute lawyers among the lawyers working on other parts of the corporation's business, and can dangle other legal matters to entice a substitute lawyer to take on the unfinished matter, especially if the failure to pay fees stems from dissatisfaction with the original lawyer rather than financial hardship.)

In my view, N.Y. State 805 reflects an unstated concern that some lawyers who serve small clients would (if permitted) routinely insert clauses into their retainer agreements permitting withdrawal upon nonpayment for any reason, and would use those advance waivers to exit weak cases. Small clients with weak cases will be unable to find substitute counsel, and will effectively forfeit their rights for their nonpayment of fees.

Advance conflict waivers are different. Small clients are less likely than large clients to run up against an actual conflict because small clients typically have fewer transactions, fewer litigation matters, and fewer conflict-creating tentacles reaching out into the business world. If a future conflict never materializes, a small client will suffer no harm. Thus, advance conflict waivers will not usually harm small clients.

Large clients take bigger risks by signing advance conflict waivers, but large clients can assess those risks more accurately and weigh those risks against the benefits of hiring a firm that insists on advance waivers. Large clients often have substantial experience with lawyers, employ full-time in-house counsel, and have the financial resources and legal budgets to make their business attractive to law firms. If they don't want to sign an advance conflict waiver, they can choose another firm.

Limiting N.Y. State 805

Now for a completely different point. Despite broad language in some parts of N.Y. State 805, I do not think it actually imposes a blanket ban on advance consent to withdrawal if the client does not pay the agreed legal fees. To me, the most important sentence in the opinion is: "A retainer agreement that purported to permit a lawyer to withdraw upon a failure to pay agreed legal fees or expenses in a timely

manner, without more, would not accurately state the applicable rules, and therefore would be impermissible." (Emphasis added.)

If a retainer agreement includes "more" - *i.e.*, contains meaningful details about the circumstances in which failure to pay fees will justify withdrawal - it should be acceptable. As with advance conflicts waivers, if the nonpayment-of-fees clause adequately explains that the law firm will withdraw (or in litigation ask court permission to withdraw) whenever the client's failure to pay "is conscious rather than inadvertent, and is not de minimus in either amount or duration," *see* N.Y. State 598 (1989), then the lawyer should be permitted to withdraw even if the client now attempts to object. On the other hand, if the reasons for nonpayment that actually materialize are "materially different" from the reasons described in the retainer agreement (cf. N.Y. County 724), then the advance consent will be null and void, and a court should hear a client's objections to the lawyer's withdrawal. Perhaps I am not describing a true advance "waiver," but rather a retainer agreement that accurately sets forth a liberal definition of "deliberately disregards." my main point is that we should not read N.Y. State 805 to prohibit or condemn retainer clauses that consent to a lawyer's withdrawal if the client fails to pay fees for reasons other than negligence, short-term inability to pay, or a colorable challenge to the bill.

Conclusion: Disclosure Is the Key

The trick in nonpayment waivers is advance disclosure about the reasons that will justify the lawyer's withdrawal. As with advance conflict waivers, sophisticated clients need less disclosure than unsophisticated ones. With unsophisticated clients (typically individuals and small businesses), N.Y. State 805 predicts that it will usually be impossible to specify in advance whether a client has "deliberately disregarded" an obligation to pay fees so that a lawyer's withdrawal is justified by DR 2 110(C)(1)(f). But with sophisticated clients, it will often be possible to articulate the factors. if the retainer agreement generally anticipates the circumstances that ultimately trigger nonpayment, then despite N.Y. State 805 a sophisticated client's advance consent to withdrawal should be valid and ethical, just as an advance conflict waiver by the same client would be valid and ethical. At least that's my view.

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