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Advance Waivers: Effective Tool If Used Wisely

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Advance waivers can be an effective practice management tool with benefits for both lawyers and their clients—if used wisely. As the name implies, an “advance waiver” is an agreement by a client waiving a particular set of conflicts before the specific circumstances giving rise to a conflict occur. They can be tailored narrowly or can be relatively broad. They offer firms the ability to take on clients who might otherwise present conflicts. They offer clients access to firms that might not be available without the assurance of an advance agreement on conflicts. For example, a firm with highly specialized expertise that represents primarily high tech start-ups that often negotiate with an industry leader might not otherwise be willing to take on a discrete project for that industry leader without an advance waiver in place.

In this column, we’ll look first at the mechanics of advance waivers and then the limitations.

Mechanics

As noted earlier, advance waivers address future conflicts. They are generally permitted under Comment 22 to ABA Model Rule 1.7 (on which Oregon’s current client conflict rule is patterned). Although Oregon’s RPCs do

not include accompanying comments, the Oregon State Bar has recognized the viability of advance waivers in Formal Ethics Opinion 2005-122.

Because a client is being asked to waive a conflict that has not yet occurred, the key to an effective advance waiver is the client's "informed consent." Comment 22 to ABA Model Rule 1.7 puts it this way: "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." OSB Formal Ethics Opinion 2005-122 echoes the ABA Model Rule comment (at 324): "Nothing in Oregon RPC 1.7 prohibits a blanket or advance waiver from . . . a . . . client as long as Lawyer adequately explains the material risks and available alternatives."

Limitations

There are five principal limitations on the use of advance waivers.

First, both the ABA Model Rule comment and the OSB ethics opinion stress that an advance agreement cannot waive a nonwaivable conflict. In other words, a firm couldn't use an advance waiver to represent both sides of the same case or transaction.

Second, both the ABA Model Rule comment and the OSB ethics opinion highlight that the waiver must meet the other requirements specified in the rules. In Oregon, that means that the client's informed consent must be confirmed in writing (under Oregon RPC 1.7(b)) and the process leading to the waiver must include a recommendation that the client seek review by independent counsel (under Oregon RPC 1.0(g)). When using an advance waiver, firms also need to remember that they still need to obtain a waiver (under Oregon RPC 1.7(b)) from the client whom the firm will be representing adverse to the client that granted the advance waiver.

Third, an accompanying ABA ethics opinion on which the Oregon opinion relies (ABA Formal Opinion 05-436) notes (at 5) that an advance waiver, "without more, does not constitute the client's informed consent to the disclosure or use of the client's confidential information against the client." To lessen client concern on this score, firms may wish to consider voluntary internal screening of the respective teams handling the matters on each side of an advance waiver.

Fourth, the waiver will be limited to its terms. Therefore, if a conflict arises that is beyond the scope of the written agreement, that conflict must be analyzed separately and addressed by its own waiver (if the conflict is waivable and the clients involved consent).

Finally, and in many respects most fundamentally, an advance waiver will only be as good as the disclosure and informed consent on which it is based. This can effectively turn on the relative sophistication of the client involved. In short, what may work for a Fortune 500 corporation represented by in-house counsel may not be appropriate for “mom and pop.” Comment 22 to ABA Model Rule 1.7 succinctly summarizes these respective poles:

“The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. 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. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. 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.”

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its

predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.