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Advance Waivers as a Practice Management Tool

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Effective September 1, a new comment—Comment 22—was added to RPC 1.7 that specifically addresses advance waivers of future conflicts. The new comment is based on its ABA Model Rule counterpart and followed a somewhat unusual history. The comment clarifies an ambiguity that had crept into Washington practice concerning the use of advance waivers. The new comment generally permits them—subject to several limitations. In this column, for context we'll first touch on the rather circuitous path advance waivers took in Washington. We'll then turn to their practical application. Finally, we'll survey the limitations on their use.

A Brief History

The basic notion of advance waivers is not new. In fact, ABA Formal Opinion 93-372 discussed them at length 25 years ago. In a typical scenario, the client involved is prospectively waiving conflicts that may arise during a firm's representation of the client. They offer firms the ability to take on clients who might otherwise present conflicts with existing clients. They offer clients access to firms that might not be available without the assurance of an advance agreement on conflicts. A ready example is a law firm with special expertise that primarily represents high tech start-ups that routinely negotiate against an

industry leader. If the industry leader approached the law firm about an unrelated project, the law firm would be understandably reluctant to take on the work without an advance waiver in place that would allow it to continue to represent its primary clientele in negotiations with the industry leader while the firm also handled the unrelated project for the industry leader.

When the ABA comprehensively updated its influential Model Rules of Professional Conduct in the early 2000s, it added a comment to Model Rule 1.7—which governs current client conflicts—that generally authorized advance waivers. Notwithstanding the 1993 ethics opinion, the ABA commission that developed the amendments concluded that the additional clarity offered by a comment would be useful to lawyers and clients alike. The ABA followed with a new opinion in 2005—Formal Opinion 05-436—that replaced the 1993 opinion and specifically relied on new Comment 22 to ABA Model Rule 1.7.

In the wake of the ABA amendments, Washington appointed a special committee to make recommendations to the WSBA Board of Governors and the Washington Supreme Court. In 2004, the special committee proposed a number of amendments to the Washington RPCs based largely on the then-recent ABA Model Rule amendments. One of the proposed Washington amendments was a new Comment 22 to RPC 1.7 that mirrored the change to the corresponding ABA

Model Rule. The BOG approved the proposal and it went to the Supreme Court as a part of a broad package of potential amendments. In 2006, the Supreme Court adopted many of the amendments—but not Comment 22 to RPC 1.7. Instead, the Supreme Court struck the text and simply listed that comment as “Reserved.”

The Supreme Court’s action cloaked advance waivers in Washington with a degree of ambiguity. On one hand, trial courts continued note their use in practice, with *Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000, 1006-07 (W.D. Wash. 2007), an example. On the other hand, some questioned whether “reserved” effectively meant “prohibited” in light of the Supreme Court’s deletion of the text of the proposed comment.

To eliminate this ambiguity, the WSBA Committee on Professional Ethics last year recommended to the BOG that the ABA Model Rule comment be presented to the Supreme Court again. The BOG agreed and, after publication and a public comment period, the Supreme Court approved the new comment. It became effective as Comment 22 to RPC 1.7 on September 1.

Practical Application

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 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.” This is also consistent with the general definition of “informed consent” in RPC 1.0A(e): “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

Although Comment 22 does not contain a “sophisticated user” requirement, the effectiveness of an advance waiver will often turn on the relative knowledge of the client involved due to the focus on the client’s informed consent. Therefore, what may work for a Fortune 500 corporation represented by an in-house legal department seeking assistance with a sophisticated intellectual property project like our opening example may not be appropriate for an elderly person with a recent diagnosis of the early stages of dementia who is looking for help with asset-planning. Comment 22 addresses these poles within the context of informed consent:

“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.”

Given their nature, advance waivers are most often discussed with clients when work is being initially considered as in our opening illustration. They are sometimes incorporated into engagement letters for the matters concerned and in other instances are separate supplements to engagement agreements. Although conflicts waivers under RPC 1.7(b)(4) are simply required to be “confirmed in writing,” the accent on informed consent in Comment 22 suggests that the particular circumstances and scope should be incorporated into a contemporaneous writing for the benefit of both the client and the lawyer in the event either has questions later. Similarly, although RPC 1.7(b)(4) does not require a countersignature by a client, prudent risk management practice for as important a document as an advance waiver suggests that the law firm obtain either a client signature or an equivalent electronic acknowledgment.

Many malpractice carriers have advance waiver templates available for their insureds that are based on the ABA version of Comment 22. In using those

forms, however, lawyers need to be attentive to the crux of Comment 22: effective informed consent often turns on the particular facts discussed—and documented—with the client involved that only the firm handling an individual situation can incorporate into even the soundest template.

Limitations

Comment 22 suggests four principal limitations.

First, Comment 22 stresses that an advance agreement cannot waive a nonwaivable conflict. For example, a law firm could not use an advance waiver to represent both sides in the same litigation.

Second, Comment 22 notes that an advance agreement must also meet the general requirements for waivers under RPC 1.7(b). In particular, firms using an advance waiver also need to obtain matter-specific waivers from any other clients for whom the law firm is representing on the other side of the client that granted the advance waiver. To return to our opening example, the law firm would need to obtain waivers from its other high tech clients negotiating against the industry leader to complete the waiver process.

Third, the ABA ethics opinion on advance waivers—05-436 (2005)—that interprets the identical comment under the corresponding ABA Model Rule 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.” Because all multiple client conflict waivers under RPC 1.7(b) must involve unrelated matters, the risk of confidential information being used inappropriately is likely low. In some circumstances, however, a law firm may wish to consider voluntary internal screening of the respective teams handling the matters on each side of an advance waiver to further lessen this risk.

Fourth, an advance waiver is limited to its terms. Therefore, if a conflict surfaces later that is beyond the scope of the advance waiver, that new conflict must be analyzed and addressed with its own waivers—assuming the conflict is waivable and the clients involved consent.

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