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VIEWPOINT

Law firms put themselves before their clients with advance waivers

Two weeks ago, the new California State Bar-appointed rules commission held its first meeting. The commission is starting from scratch with a new charge from the state Supreme Court, as many interested parties look on with curiosity to see what will happen next.

But the behavior of many lawyers is not always governed by the ethics rules. Take the case of so-called "advance waivers."

MORAL COMPASS

Despite the rules, which clearly prohibit almost all such waivers, clients—particularly big, institutional clients—are routinely being asked by law firms, principally larger firms, to agree to broad, open-ended advance waivers.

What is an advance waiver? At its simplest, it's the client's agreement to waive in advance a conflict of interest that may occur in the future.

Some limited waivers have been accepted for years. In *Zador Corp. v. Kwan*, 31 Cal.App.4th 1285 (1995), the Heller Ehrman firm jointly represented the Zador company and Kwan, an individual, in litigation. Heller had advised Kwan in writing that while there were no current conflicts, it intended to continue to represent Zador "if the interests of [Zador] become inconsistent with your interests." Heller asked Kwan to sign a consent "to our continued and future representation of [Zador] and agree not to ... seek to disqualify us ... notwithstanding any adversity that may develop."

Kwan signed the consent, and adversity did develop, to the point where Heller, having withdrawn from representing Kwan, filed a cross-complaint for Zador against Kwan. Kwan then moved to disqualify Heller, and the trial court agreed.

In reversing the disqualification, the appellate court held that Kwan's waiver had met the test for any waiver of a conflict of interest: "informed written consent," even

Richard Zitrin

Richard Zitrin is a professor at UC-Hastings and principal in San Francisco's Zitrin Law Office. He is the lead author of three books on legal ethics, including "The Moral Compass of the American Lawyer," and the 4th edition of "Legal Ethics in the Practice of Law."

though the consent was by a joint client to a future occurrence. After all, the advance waiver in *Zador* was quite narrow, involving a known circumstance and a known second party on a known subject—the ongoing litigation Heller had been retained for.

LAW FIRMS LOBBY FOR A BROADER CONCEPT

By the new millennium, large law firms were pushing for a liberalization of the advance waiver concept. They reasoned that given the wide-ranging list of clients and possible future clients in their books of business, it was more than reasonable to ask their clients to consent to an open advance waiver, even though neither the firm's future client, nor the future case, would be discernible to the current client.

In 2002, the American Bar Association modified its own conflicts rule, Model Rule 1.7, to require "informed consent, confirmed in writing." But it also gave substantial recognition to the concept of a broad advance waiver by adding Comment 22, which, edited, says in part: "If the consent is general and open-ended, [and] 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." The ABA followed this broad comment with Formal Opinion 05-436, which liberalized prospective waivers substantially, particularly where the client is a "sophisticated" user of legal services.

In California, the standard of disclosure and consent has long been high: "Disclosure means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances ... ."

"Informed written consent" is consent after this disclosure. The first rules commission drafted a proposed comment to California's conflicts rule that would have allowed consent "even where the lawyer cannot provide all the information and explanation [disclosure and consent] ordinarily requires." While the comment then reiterates the disclosure standard, it modifies it somewhat, requiring "a disclosure *to the extent known* [emphasis added] of facts and reasonably foreseeable consequences ... ."

This would leave unresolved what "future facts and circumstances" need not be known in order for the consent to still be "informed." This is the same problem presented by the ABA's comment. After all, how can consent be truly "informed" if a client does not know who the firm's new client will be and on what issue the firm will be adverse to the current client? Ordinarily, when a disclosure doesn't provide sufficient information to fully advise the client, the conflict is considered unwaivable.

WAIVING THE FUTURE

To date, no California advance waiver rule or comment beyond *Zador* has ever been approved. Yet, over the past five to seven years, I have seen what seems like innumerable advance waivers presented routinely to so-called "sophisticated" clients by California law firms. These waivers take the "substantial relationship test," long used to determine whether a firm could be adverse to a *former* client, whether the former representation is "substantially related" to the new representation, and use it to define law firm adversity against a *current* client.

These law firms have conflated a never-accepted proposal for a comment to a

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rule—not even in the rule itself—into a broad conflicts waiver they see as an enforceable document. But the problem of informed consent does not go away merely by signing a consent that does not inform. The waivers I have seen generally ask clients to consent to the firm representing *any* new client in *any* matter against the current client, so long as the representations are not substantially related.

But the future client of the firm may be an entity that is not even in existence yet. And that future client may sue the current client on a matter that goes to the very core of the original client's existence—interference with its business or its principal trade secrets—so long as that potential death-blow litigation is not related to what the firm is representing the original client on.

Those who argue in favor of such waivers note that they would only apply to "sophisticated" users of legal services. But several commentators, including a powerful group of large-firm general counsel, have defined "sophisticated" as any "repetitive user" of legal services. This, says Lawrence Fox, himself a member and former managing partner of a large firm and a lecturer in ethics at Yale Law School, is pure folly: "If you are a 'repetitive user of legal services,' whatever that means, you are a sophisticated client. Name any business and that criterion will be met. A little incorporation, one liability lawsuit, family succession and estate planning, and (before you know it) you are a repetitive user. ..."

The advance-waiver movement may just be the tip of the iceberg. In March 2011, 33 large-firm general counsel co-signed a series of proposals, entitled "Proposals of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients," addressed to ABA Commission on Ethics 20/20. These proposed changes, if adopted, would be tantamount to doing away with the ethical concept of law firm "loyalty." Among other proposals: unfettered, open-ended advance waivers would be allowed even if they resulted in "direct adversity" in a current engagement; new representation could be undertaken adverse to a law firm's current client *without that client's consent* so long as the firm concluded that the matter had no "substantial relationship" to the current client's matter; and a basic switch that "presumptions under the conflict rules and certain other rules would be reversed, unless the parties specified otherwise."

Why all this push to limit "informed consent" and adequate disclosure? Large-firm general counsel undoubtedly see the opportunity to retain their existing clients while expanding their client list, including by bringing in new partners from other firms. They increasingly argue that no longer should *any* loyalty be imputed to an entire firm, even if the equity partners all share in the profits. They'd like to see loyalty limited as closely as possible to the relationship between one lawyer and one client.

At this point, matters have not gone nearly that far. And, at least from a de jure perspective, advance waivers have still not been widely approved, with only a few jurisdictions formally accepting a broad formulation. But it is clear that in day-to-day practice, many law firms with "sophisticated clients" have jumped the gun on the rules. That may mean the best interests of clients, big and small, sophisticated or not, are taking a back seat to the best interests of law firms.

The Recorder welcomes submissions to Viewpoint. Contact James Cronin at jcronin@alm.com.