

Making Sense of Informed Consent

Is an Advance Conflicts Waiver Valid?

If you are considering handling a matter for a client against a former client, you review Pennsylvania Rule of Professional Conduct 1.9 and decide whether the matters are substantially related and the interests are materially adverse. Even if so, you can do it if the former client gives informed consent.

If you are considering handling a matter for a client against a current client, you review Rule 1.7 and make a somewhat similar determination as to whether the representation is materially adverse. Even if so, you may be able to do it if both affected clients give you informed consent and it's not in the same litigation.

Remember that "informed consent" is defined in Rule 1.0(e) as requiring agreement after you have communicated to the client or clients adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Also, Rule 1.8(a) seems to require such consent to be in writing signed by the client.

Suppose, however, that you have a clause in your signed retainer agreement saying that the client agrees that you can take on any matter adverse to the client as long as the matter is unrelated to the work being done for that client. These days, large companies tend to spread their legal work around to various firms, based in part on the perceived expertise of lawyers in different fields of practice. Hence, firms are utilizing that clause.

So, for example, you may represent Company A in labor and employment matters, and get an opportunity to represent Company B in a real estate matter with Company A, or in a piece of commercial litigation adverse to Company A. When the appropriate person at Company A learns of this, you can bet they'll be calling you and raising the roof. You then remind them of the clause in the fee letter.

Putting aside the business considerations (Do you want Company A mad at you? Might you get no further business from them?), the issue is whether this advance conflicts waiver is ethical and valid.

Some commentators have opined that you must have undivided loyalty to all of your clients, and should not accept representation in any matter adverse to a current client even if you are not representing both parties in that particular matter. The argument is made that it is not only injurious to the legal profession and maintenance of the integrity of the legal professional, but that you cannot effectively counsel the client as to informed consent after the fact, and, therefore, there can be no enforceable waiver in advance.

In short, they say there can be no "truly informed consent" given in a prospective waiver. You cannot provide meaningful consultation to a client about potential future conflicts.

Other commentators have argued freedom to contract, and possibly attempts by the client to pre-empt the handling of any matters adverse to the client by giving some legal work to many firms.

The issue has come up in cases where disqualification petitions are filed. Keep in mind that the standard for disqualification is probably lower in the minds of judges than the burden of proving an ethical violation. Most cases addressing this question have granted disqualification, despite the waiver clause in the fee agreement, finding that the lawyer could not possibly have given the client sufficient information in advance to obtain informed consent.

The burden is shifted to the lawyer to prove that, and a general and open-ended advance consent is found to be ineffective where the client is not separately represented in negotiating the fee agreement, no matter how sophisticated the client is. Consent must

be "knowing, intelligent and voluntary." Hence, the ethics rules trump the contracts interpretation theory.

Sometimes a "hot potato" conflict arises, meaning a conflict discovered after the start of a case. A firm then may decide to choose between clients, in effect, "firing" one, and pointing to the waiver clause. This is another delicate issue.

What do you think? ■

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