

AN ADVANCED CLASS ON ADVANCE WAIVERS FOR THE SOPHISTICATED CLIENT

Another process server. Someone else is suing your company. How tiresome. Let's see the complaint. Wait...isn't that our counsel who appears to be the plaintiff's counsel? Is that possible? Is it ethical? Here comes the head of litigation trotting in with their retainer letter—containing an advance waiver. Now you remember. The law firm did discuss this with you. But the question remains: Is it enforceable?

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rate clients to refuse them or limit their scope. We shall examine the permissible scope of these waivers under the ethical rules as well as a possible alternative that may be more palatable to consumers of legal services.

THE KEY FACTOR: CLIENT SOPHISTICATION

First, let's review the current climate. Lingering doubts about the propriety of the concept have dissipated.¹ Both the American Bar Association (ABA) and the American Law Institute, bowing to the reality of consolidation in the legal profession, have now approved the use of advance waivers.² Implementation, however, has proven a bumpy road, because the waiver must satisfy the ethical rules governing a client's consent to contemporaneous conflicts of interest. Most importantly, the waiver must be sufficiently clear as to potential future

conflicts, so that "the client's consent can reasonably be viewed as having been fully informed when it was given."³ To satisfy this standard, the court will examine the text of the waiver and the surrounding facts at the time the client gave consent. The client's sophistication proves to be an almost decisive factor in upholding waivers.

AND WHO IS THE MOST SOPHISTICATED CLIENT...?

Here is a roadmap to the analysis of the advance waiver. Model Rule 1.7 of the ABA's *Model Rules of Professional Conduct* governs conflicts of interest involving current clients.⁴ Pursuant to subsection 1.7(a), a lawyer is generally prohibited from representing a client if the representation involves a concurrent conflict of interest—that is, if the representation will be directly adverse to another client or if a significant risk

The waiver may very well be both ethical and enforceable. Advance waivers permitting counsel to be adverse to a current client—even representing an adverse party in litigation against the current client (in unrelated matters)—were once rare birds but are now commonplace. Increased reliance on such waivers by mega-law firms that represent transnational clients has raised their profile in the corporate legal community and led some corpo-

John K. Villa, "An Advanced Class on Advance Waivers for the Sophisticated Client," *ACC Docket* 23, no. 8 (September 2005): 164–167.
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exists that the lawyer's representation will be materially limited by her responsibilities to another client. Subsection 1.7(a), however, is subject to the exception in subsection 1.7(b), which permits a lawyer to represent a client despite a concurrent conflict of interest under the following circumstances:

1. the lawyer reasonably believes that she will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing.

Whether a lawyer may properly secure a waiver as to an existing or potential conflict of interest, therefore, depends upon the test in subsection (b).⁵ The decisive factor is often whether the client

has given informed consent, confirmed in writing. Informed consent to a waiver of a concurrent conflict "requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interest of that client."⁶ If the concurrent conflict is one that might arise in the future, informed consent similarly depends upon "the extent to which the client reasonably understands the material risks that the waiver entails."⁷

One way to increase the chances that a court will find informed consent is for the advance waiver agreement to identify potential conflicts as explicitly as possible. The ABA Commission on Ethics and Professional Responsibility, for example, suggested that the waiver should identify either the potential opposing party or a class of potentially conflicting clients.⁸ Recognizing, however, that the sufficiency of the disclosure depends upon the sophistication of the client, the commission opined that

even such identifying information might not be enough if the client were unable to appreciate the nature and potential effect of the representation on its interests.⁹

This emphasis on client sophistication (and access to separate counsel) in finding informed consent has obvious implications for corporations and their inside counsel. Corporations (and their counsel) are typically sophisticated and experienced; with access to their own in-house lawyers, they are the perfect example of the client who can give informed consent. For a sophisticated corporation represented by in-house counsel, a waiver might be effective even if the waiver were not very specific about the types of future conflicts that might arise. The comments to Rule 1.7 note that such a general and open-ended consent will ordinarily be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. The likelihood that the client will have the necessary understanding increases with a more comprehensive explanation of the types of representations that might arise (and their reasonably foreseeable adverse consequences). But the comments add:

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 [a general and open ended] 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.¹⁰

AN ACID TEST: THE VISA CASE

A decision that presents the acid test of the advance waiver is *VISA U.S.A.*,

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*Inc. v. First Data Corp.*¹¹ The case presented the most severe conflict: The lawyers were representing a client who was suing another current client. But balanced against the severity of this conflict were the specificity of the waiver and the sophistication of the client executing the waiver.

In *VISA*, First Data—the defendant in this trademark infringement case—sought to disqualify the plaintiff’s lawyers on the basis that they were also representing First Data in an unrelated patent infringement action. But when First Data originally hired these lawyers (well before *VISA* sued First Data), these lawyers informed First Data that they had a long-standing relationship with *VISA*. They advised First Data that although they did not foresee any conflicts, they would represent First Data only if First Data agreed they could represent *VISA* in any future litigation between the parties. First Data agreed, and its agreement was memorialized in an engagement letter that set out all of these disclosures. The letter further stated that if *VISA* engaged the lawyers on a matter adverse to First Data, the lawyers would undertake the representation only if they did not possess confidential information relating to the matter, in which case they would erect an ethical wall between the attorneys representing *VISA* and those representing First Data.

In determining whether the waiver was effective under applicable state law,¹² the court examined several factors, including the following:

- the breadth of the waiver;
- the temporal scope of the waiver;
- the quality of the conflicts discussion between the attorney and the client;
- the specificity of the waiver;
- the nature of the actual conflict (i.e., whether the attorney sought to represent both clients in the same dispute or in unrelated disputes);
- the sophistication of the client; and

- the interests of justice.

The court upheld the waiver: Not only did counsel fully disclose the nature of the conflict to the defendant, but also the defendant made a knowing and informed consent. The court stressed the explicitness of the lawyers’ disclosure of the potential conflict:

Most significantly, the waiver letter itself demonstrates that [the law firm] fully explained the nature of the conflict waiver at issue[.] . . . The letter identifies the adverse client, *VISA*, and discloses as fully as possible the nature of any potential conflict that could arise between the two parties. The letter also clearly states that the waiver contemplates [the law firm’s] representation of *VISA* against First Data in matters “including litigation.” First Data was given ample information concerning the conflict in question that it was asked to waive, reviewed this information, and then agreed to the waiver.¹³

Similarly, the court found that First Data was aware of the potential conflict with *VISA* when it signed the waiver in the engagement letter. As the court pointed out, First Data, a processor of financial transactions under contract with *VISA*, began contemplating the conduct for which *VISA* would later sue at least two years before it hired *VISA*’s lawyers. Finally, in a ruling with broader implications for current readers, the court found that a Fortune 500 company with a legal department of approximately 50 attorneys “is a knowledgeable and sophisticated user of legal services,” that “can and should be expected to understand the full extent of what it waived when it signed [counsel’s] explicit waiver letter.”¹⁴

VISA demonstrates that a truly informed consent will trump the most direct conflict. But it is important to note

that First Data was the most informed client possible: It came to the law firm fully aware that the lawyers were current and longstanding lawyers for *VISA*, it gave an explicit informed consent, and it was a very sophisticated client.

THE SOPHISTICATED CLIENT: EFFECTIVE GENERAL WAIVERS—OR ALTERNATIVES

But how relevant is the waiver in *VISA*, so precise and specific, to the broad, general hypothetical advance waivers now often requested? The *Restatement* takes a position similar to the ABA’s Model Rules: A client’s general, open-ended consent to all conflicts “normally should be ineffective *unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.*”¹⁵ Again, the implication is that for a sophisticated client like a corporation that receives independent advice (from either inside or outside counsel, presumably), an adequately drafted general waiver may be effective. But a poorly drafted waiver will not be effective even for sophisticated clients.¹⁶

The moral of our story is that advance waivers for sophisticated clients with access to separate counsel are likely to be enforced, with certain caveats.

- First, the language of the waiver will be scrutinized to determine whether the client understood that it was agreeing to the type of adverse action that has developed. For example, if the advance waiver does not state that the law firm can represent another client in litigation against the waiving client, such litigation may not be permitted.
- Second, the advance waiver cannot encompass certain conflicts that are usually deemed unwaivable—such as

representing adverse parties in the same or substantially related matters.

There are, however, other options. The truth is that most law firms would strive mightily to avoid suing a current client even if permitted ethically to do so. Thus, a corporation may be able to secure its counsel of choice by agreeing to allow the firm to seek discovery against it, take positions adverse to it, or take other similar actions but *not* agreeing to allow the firm to represent other clients in suing the corporation. This may meet the needs of law firms to litigate unrelated matters without undue restrictions yet ensure that the company is not someday attacked—by its own lawyers. ■

NOTES

1. See *Unified Sewerage Agency of Washington County v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981); *VISA U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003); *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579 (D. Del. 2001); see generally W. R. Habeeb, Annotation, *Representation of Conflicting Interests as Disqualifying Attorney from Acting in a Civil Case*, 31 A.L.R.3d 715, § 9.
2. See *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 93-372 (April 16, 1993) (hereinafter ABA Opinion); *Restatement (Third) of the Law Governing Lawyers*, § 122, cmt. d (2000).
3. ABA Opinion, at ¶ 1.
4. ABA Model Rules of Professional Conduct (hereinafter Model Rules). Available online at www.abanet.org/cpr/mrpc/mrpc_toc.html.
5. See *id.*, Rule 1.7, cmt. 22.
6. *Id.*, Rule 1.7, cmt. 18 (referencing Rule 1.0(e), which defines “informed consent”).
7. *Id.*, Rule 1.7, cmt. 22.
8. ABA Opinion, *supra* n. 2, at ¶ 15 (stating that it would be “unlikely” that a waiver omitting this information “would survive scrutiny”).
9. *Id.* at ¶ 10 and ¶ 15.
10. Model Rules, Rule 1.7, cmt. 22.
11. 241 F. Supp. 2d 1100 (N.D. Cal. 2003).
12. California’s pertinent ethical rule, Cal. Rule of Prof. Conduct 3-310(C)(3), prohibits an attorney, without the informed written consent of each client, from “represent[ing] a client in a matter and at the same time in a separate matter accept[ing] as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.” See 241 F. Supp. 2d at 1104.
13. *Id.* at 1107. See also *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 583 (D. Del. 2001).
14. 241 F. Supp. 2d at 1110.
15. *Restatement (Third) of the Law Governing Lawyers*, *supra*, n. 2.
16. See *id.* (noting the benefits of a system of advance consents to defined conflicts with which the client is familiar); see also *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356, 1359–1360 (N.D. Ga. 1998).