

## **Ethics Corner: Conflicts of Interest - a Primer - Part III, Waivers/Consents**

From the Committee on Professional Responsibility, William Freivogel, Chair

Part I of this series dealt with conflicts of interest with current clients. Part II dealt with conflicts with former clients. This Part III is concerned with the extent to which a client can waive a conflict.

“Waiver” vs. “Consent.” We are not aware of any distinction between these two terms in the legal ethics literature. We prefer “waiver,” and that is what we will use.

Are some conflicts un-waivable? Yes. Model Rule 1.7(b)(3) specifically prohibits a waiver for a lawyer to be on both sides of “the same litigation or other proceeding before a tribunal.” We are not aware of a state with a contrary rule. As to all other situations, Model Rule 1.7(b)(1) provides that a waiver will work if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . .

What does that mean? It is mostly a common-sense test because there is not much guidance in the literature. Certainly, some clients lack the sophistication to understand how a conflict might affect them. Even as to sophisticated clients, good transactional lawyers know that some deals require resolution of so many complex and contentious issues that the same lawyer would be foolish to attempt to represent more than one party.

Need for written waiver. Some states have always required that conflict waivers be in writing. Some have not. The ABA added a requirement for writings at Model Rule 1.7(b)(4) in 2002. All it requires is that the waiver be “confirmed in writing.” The Comment explains that the writing need not be signed by the party waiving and that the writing need not occur prior to the representation but “within a reasonable time” after the client waives orally.

Joint representations and confidences. When a lawyer attempts to represent more than one client in litigation or in a transaction, there is always a tension between the lawyer’s duty to keep all clients informed and the duty to protect each client’s confidences. Suppose two individuals ask a lawyer to represent them in the formation of partnership and the purchase of a business. One day one of the clients calls the lawyer and reveals that he has been prosecuted for fraud in two earlier matters, but does not want his partner to know about it. The lawyer’s dilemma is clear. That is why ethics experts recommend that any waiver or joint representation agreement contain a clause that the lawyer will not keep a secret of one client from the other(s), where the secret is related to the representation.

Advance waivers. Law Firm has been adverse to HugeBank in loan transactions and litigation on many occasions and will be in the future. HugeBank wants to retain Law Firm on one highly specialized advertising matter. Almost certainly, Law Firm can obtain effective waivers from HugeBank for existing, identifiable, matters. But, Law Firm is reluctant to take on the advertising matter, because it will prevent Law Firm from taking on future, unknown, matters adverse to HugeBank. Can law firm obtain from HugeBank a waiver for future matters, including matters that come in while the

advertising representation continues? Probably yes. Comment [22] to Model Rule 1.7 generally favors such waivers, particularly if the party waiving is “an experienced user” of “legal services.” The Comment’s suggestion, and the suggestion of most courts addressing the issue is that the less sophisticated the client, the more specific the advance waiver has to be regarding the nature of the future matters. All agree that if the law firm wants to take on *litigation* against the waiving party, the waiver must specifically mention litigation. Caution: a small minority of courts may never approve an advance waiver. *See, e.g., Worldspan L.P. v. The Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

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