**The Ethics Corner**

*Can I create a special conflict waiver to represent borrowers in negotiating and closing credit facilities from big lender clients? The lender would approve all conflicts so that I can represent borrowers in negotiating and closing credit facilities from the lender when the lender is represented by outside counsel on an approved list. The waiver would sunset, unless renewed every 12 months, and would not apply to any litigation matter. Does this fit anywhere in the Model Rules? With this in hand, when I need to open my new file, all I need to clear is the conflict with my prospective, borrower client.*

Yes and no! Advance waivers of conflicts are neither expressly prohibited nor permitted by the ABA Model Rules of Professional Conduct. Each conflict waiver must be evaluated on its own merits. Your suggestion can withstand judicial scrutiny if your lender client has sufficient information and understanding of the conflict before giving its consent and the waiver is limited to defined parameters. Your including an annual review for renewal and excluding litigation will work in the waiver’s favor.

Check the exact wording of the version of the Model Rules adopted by the applicable jurisdiction. They may differ from the ABA Model Rules.

Many authorities have wrestled with advance waivers, including the ABA Committee on Ethics and Professional Responsibility, the Restatement (Third) of the Law Governing Lawyers, the ABA Ethics 2000 Commission, and various courts and bar associations. The consensus is that advance waivers are not disallowed but will withstand scrutiny only if the client gave sufficient informed consent. What is sufficient will likely vary from jurisdiction to jurisdiction and from case to case.

The Restatement advises that advance waivers are “subject to special scrutiny, particularly if the consent is general. A client’s open-ended agreement to 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.” Restatement (Third) of the Law Governing Lawyers § 122 (2000). It also adds:

> On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement letter for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client’s interest while insuring the lawyer did not undertake a potentially disqualifying representation.

**Id.**

The ABA Ethics 2000 Commission recommended certain changes to the Model Rules and included the following note about advance waivers, most likely because of their increased popularity:

> 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, for example, 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.

Further, the Commission added:

> In determining whether the information and explanation provided [the client] are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally such persons need less information and explanation than others, and generally a client or other person represented by other counsel in giving the consent should be presumed to have given informed consent.

Courts upholding advance waivers follow the above theme: upholding the waiver’s enforceability when the adverse party or class of party was known and identified, the client giving the waiver was sophisticated, and the waiver had been reviewed by the client’s in-house counsel. See *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981); *Fisons Corp. v. Atotech North Amer., Inc.*, No. 90 Civ. 1080 (JMC), 1990 WL 180551 (S.D.N.Y. Nov. 14, 1990); *Interstate Properties v. Pyramid Co. of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982). And, as you would expect, many cases strike down general waivers that were not limited in scope at all and were given by unsophisticated, unrepresented clients.

So, as with many ethics dilemmas, the answer is maybe! Whether your proposed waiver will withstand scrutiny depends on the facts. Remember that a waiver of conflict does not equate to a waiver of confidentiality. If you are aware of certain edits that the lender is willing to make to its loan documents from a prior representation of the lender, then that information is confidential unless waived. This may be a sticky issue to deal with.

Good luck! To be part of The Ethics Corner, or to discuss this issue or a host of other tricky ethics issues that lawyers are faced with every day, join one of the Divisions’ Ethics Committees by e-mailing Michael H. Rubin at mrubin@mcglinchey.com (for the RP side) or Patricia H. Char at pat.char@klgates.com (for the TE side).