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PERSPECTIVE

The future of advance conflict waivers in California

By Amy Bomse

This article considers where California law stands on broad advance conflict waivers in the wake of the California Supreme Court's adoption of a new set of professional conduct rules and a high-profile decision finding that a law firm's undisclosed conflict of interest rendered its engagement agreement unenforceable despite a broad advance waiver. Although the court did not have occasion to weigh in directly on the effect of a broad advance waiver given the facts presented, it hinted that California's advance waiver jurisprudence is likely to remain fairly consistent despite the new rules. Separately, a district court decision enforcing a broad advance waiver further underlines the fact-specific nature of such inquiries. Given that fact-specific nature, the article closes with a few practical suggestions for enhancing disclosures in the absence of a crystal ball.

What are advance waivers and why do they matter? It is a familiar principle of attorney ethics that absent consent a lawyer may not take on any representation adverse to an existing client no matter how unrelated. See California Rule of Professional Conduct 1.7. Therefore, without informed written consent from the client, an attorney advising a client on environmental law in Albany may not represent that client's landlord in negotiating a lease of property adverse to that client in Zamora. Add to that broad rule the rule that the conflict of any lawyer in a law firm is imputed to all lawyers within the firm. With the increasing size of law firms and some businesses — and families of business, which could be considered a single client for conflict purposes — law firms may perceive a need to rein in certain conflicts by seeking client consent in advance — that is, *before* a conflict has arisen. Advance waivers have become common feature in many California law firm engagement agreements.

Advance waivers seemed to get off to a good start. In *Visa v. First Data*, a district court in California enforced a client's advance waiver of a future conflict where the law firm identified the specific client whom it might represent adversely. 241 F. Supp. 2d 1100 (2003). In that case, the law firm was approached to represent client X. Because the law firm had an existing relationship with X's competitor, Y, the law firm conditioned its agreement to represent X on X's consent that the firm could represent Y adverse to it on unrelated matters in the future. At the time, there was no adversity between X and Y, so the waiver addressed a hypothetical situation rather than an actual conflict. Y subsequently sued X in a major, bet-the-company lawsuit making the potential conflict an actual conflict. The firm sought to represent Y, and X moved to disqualify the firm from doing so. The district court denied X's motion, finding that the waiver provided X with the information needed to provide informed consent. The court rejected the notion that a second waiver is always required when a potential conflict becomes actual.

Advance waivers in California courts hit the skids, however, in the first test of a broader waiver in *Concat P.C. v. Unilever, PLC*, 350 F. Supp. 2d 796 (2004). The law firm represented a client in estate planning and sought to be adverse to a company owned by that client in a patent dispute. The firm sought to rely on a waiver that allowed it to be adverse to the client in any unrelated matter (whether litigation or a transactional matter). Although the court found the client was sophisticated, it found the "boilerplate" waiver insufficient to form the basis of an informed consent.

Nearly a decade later, a non-California court reached the opposite result when presented with a similarly broadly worded advance conflict waiver. *Galderma Labs v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 (2013). In that case, the Texas district court held that where a sophisticated multi-national company represented by in-house counsel agreed to a broad waiver, that waiver was sufficient to inform the client of the risks and the waiver was enforceable. The court relied heavily on the evolution of the ABA Model Rules of Professional Conduct and in particular the addition of a comment to the current client conflict rule that permitted a lawyer to obtain effective consent to a wider range of future conflicts. In an analysis that echoed the court in *First Data*, but with respect to a general waiver rather than a specific one, the *Galderma* court concluded that the firm's waiver, made to a sophisticated client and reviewed by in-house counsel, had warned the client of the very risks of which it claimed it was not made aware.

In the wake of *Galderma*, however, California district courts remained skeptical, declining to find informed consent in a series of advance waiver cases also involving large corporate clients. In one instance, a court specifically distinguished *Galderma* on the grounds that California had not adopted the Model Rules which played such an important role in the court's analysis in *Galderma*.

In 2018, California adopted a new set of professional rules designed to hew more closely (although not exactly) to the Model Rules, including Rule 1.7, the current client conflict rule. Like the Model Rule, a comment to California's Rule 1.7 explains that the rule does not "preclude an informed written consent to a future conflict in compliance with existing

case law." Even before the new rules were officially adopted, however, a decision by the California Supreme Court offered a gloss on that new comment that indicated California is likely to continue to chart its own path on broad advance waivers. *Sheppard Mullin Richter & Hampton LLP v. J-M Manufacturing Co. Inc.*, 6 Cal. 5th 59 (2018). That case involved a law firm that was aware of an existing conflict at the time the client signed an engagement agreement that contained a broad advance waiver, yet failed to disclose it. In those circumstances, the court had no trouble reaching the conclusion that "without full disclosure of existing conflicts known to the attorney, the client's consent is not informed for purposes of our ethics rules." *Sheppard Mullin*, 6 Cal. 5th at 86.

Given that the court's analysis focused on the failure to disclose an actual conflict, rather than the language or terms of the advance waiver itself, the court was not obliged to offer any further comment on advance waivers or advance waiver jurisprudence. But it did. In a footnote, the court took pains to note that even though it had recently adopted new rules of professional conduct including Rule 1.7 and comment 9, which contemplates consent to future conflicts, "we did not adopt the comment to rule 1.7(a) of the Model Rules upon which the *Galderma* court relied." And that is true. The Model Rule comment on advance waivers provides that an advance waiver signed by a sophisticated client is "more likely to be effective." By contrast, comment 9 to California's Rule 1.7 says only that client sophistication is "relevant" to whether the client understands the risks. In calling out this difference, the court may have been suggesting that it might decide a case like *Galderma* differently. But that is unclear and the future of advance conflict waivers under the new California rules remains to be further shaped through future cases that squarely require courts to confront their efficacy in informing clients.

Finally, another recent California district court decision involving a broad advance waiver, *Simpson Strong-Tie Co. v. Oz-Post International*, 18-1188 (N.D. Cal. Aug. 17, 2018), underlines the fact-specific nature of such decisions. The language of the waiver and the level of client sophistication were roughly similar to the terms of waivers and clients in two prior district court decisions in which the courts found that the waivers were not informed and granted motions to disqualify. Here, however, the court found that the interests of justice favored enforcing the waiver and denying the client's motion to disqualify. Interestingly, the difference on which the outcome largely turned was the manner in which the conflicted representation came about. In that case, the conflict arose as the result of a merger rather than as a result of a law firm deciding to take on a new representation adverse to a current client.

In sum, while California may or may not be in the vanguard of embracing broad advance waivers, there are practical steps that a lawyer or law firm can take to improve the likelihood that a broad advance waiver accomplishes the goal of adequately informing the client of the risks of such a waiver. If you are asking the client to consent to your law firm being adverse to it in litigation, *say* those words. If there are specific areas or other firm clients for which adversity is most likely to crop up, *identify* those specifically. Several decisions declining to enforce broad advance waivers involved waivers signed years earlier at the outset of a long attorney-client relationship. It is, therefore, a good practice to update any broad advance waiver every few years, particularly if the representation has expanded or changed in some substantial way. ■

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