ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2006-1

ADVANCE WAIVERS OF FUTURE CONFLICTS

TOPIC: Multiple Representations; Informed Consent; Waiver of Conflicts

DIGEST: A law firm may ethically request a client to waive future conflicts if (a) the law firm makes appropriate disclosure of, and the client is in a position to understand, the relevant implications, advantages, and risks, so that the client may make an informed decision whether to consent, and (b) a disinterested lawyer would believe that the law firm can competently represent the interests of all affected clients. *See* DR 5-105(C). "Blanket" or "open-ended" advance waivers, and advance waivers that permit the law firm to act adversely to the client on matters substantially related to the law firm's representation of the client should be limited to sophisticated clients, and the latter advance waiver also conditioned on meeting the tests articulated in ABCNY Formal Opinion 2001-2, including that (a) the waiver be limited to transactional matters that are not starkly disputed and (b) client confidences and secrets be safeguarded.

CODE: DR 4-101; EC 4-1; EC 4-2; EC 4-4; EC 4-5; EC 4-6;
DR 5-105; DR 5-108; EC 5-1; EC 5-14; EC 5-15; EC 5-16

QUESTION

Under what circumstances may a law firm ethically request that a client prospectively waive objection to the law firm's subsequent representation of another client adversely to the first client?

OPINION

When a law firm agrees to represent a client in a particular matter, it may ethically request that the client waive future conflicts of interest, including that the client consent to allow the law firm to bring adverse litigation on behalf of another current client, if (a) the law firm appropriately discloses the implications, advantages, and risks involved and if the client can make an informed decision whether to consent; and (b) a disinterested lawyer would believe that the lawyer can competently represent the interests of all affected clients. *See* DR 5-105(C).

At least for a sophisticated client,[1] blanket advance waivers and advance waivers that include substantially related matters (with adequate protection for client confidences and secrets) also are ethically permitted.

These conclusions are consistent with the opinions of other bar associations and with prior opinions of this Committee. For example, both the New York County Lawyers' Association Committee on Professional Ethics and the American Bar Association have recognized the permissibility of advance waivers. *See* NYCLA Ethics Opinion No. 724 (approving advance waiver if future representation gives rise to consentable conflict and if

[1] As used in this opinion, a sophisticated client is one that readily appreciates the implications of conflicts and waivers. This would include, but not be limited to, clients that regularly engage outside counsel for legal services, or that have access to independent or inside counsel for advice on conflicts.

attorney makes adequate disclosure to client or prospective client); ABA Formal Opinion 05-436 (noting that comment to Model Rules supports "likely validity of an 'open-ended' informed consent if the client is an experienced user of legal services"); *see also* NYSBA Committee on Standards of Attorney Conduct, Proposed New York Rules of Professional Conduct Rule 1.7, Comment 22A (Sept. 30, 2005) ("A client may agree in advance to waive potential conflicts that have not yet ripened into actual conflicts. The nature of the disclosure necessary to ensure that the client's advance consent is 'informed' will depend on various factors."); Restatement 3d of Law Governing Lawyers § 122, Comment d ("[T]he 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."); ABCNY Formal Opinion 2004-02 (approving the use of advance waiver for potential conflicts of interest in multiple representation of a corporation and its constituents in governmental investigation).

Furthermore, this Committee has approved, under certain circumstances, the representation of multiple clients with differing interests in the same transaction, *see* ABCNY Formal Opinion 2001-2, and a similar analysis applies in assessing advance waivers of conflicts of interest that involve substantially related matters.

The Need for Advance Conflict Waivers

In *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976), the Court of Appeals for the Second Circuit held that the "substantial relationship" test does not apply to conflicts between current clients. Rather, the Court of Appeals held that, "[w]here the relationship is a continuing one, adverse representation is prime facie improper, and the attorney

must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation." *Id.* at 1387 (citation omitted). Although the Court explicitly held open the possibility that this presumption of diminished zealous representation may be rebutted, as one leading commentator has observed, after *Cinema 5 Ltd.*, "it has become axiomatic that a law firm's representation of a client in a matter adverse to another current client of the firm is almost always improper, even though the two matters are entirely unrelated." Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship – A Response to Mr. Fox,* 29 Hofstra Law Review 971, 973 (2001) ("*Lerner*").

In the 30 years since *Cinema 5, Ltd.* was decided, the market for legal services has changed drastically, with many clients, especially large corporations, increasingly abandoning their previous practice of retaining a single law firm for all their legal needs and instead now engaging different lawyers for different matters. *See* Leah Epstein, Comment, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. Chi. L. Rev. 667, 673-74 (2005) (citations omitted). These clients, many of which have multiple businesses, myriad affiliates, and substantial in-house legal staffs, have become more sophisticated and more demanding in retaining counsel. As a result, today these same clients often hire different law firms in different jurisdictions and in different areas of law. *See, e.g.,* Neil Rosenbaum, *Cast a Wide—and Optimistic—Net*, Nat'l L. J., Feb. 17, 2003, at C4 (noting survey of 131 Fortune 250 companies retaining multiple law firms of varying sizes for intellectual-property work). In today's legal world, the paradigm of a lawyer serving all the legal needs of the client and being a friend "for all purposes" no longer applies to the relationships between many lawyers and clients.

Unfortunately, the resulting increase in the number of potential lawyer-client conflicts has been accompanied by an increase in tactical disqualification motions. *See Armstrong v. McAlpin*, 625 F.2d 433, 437 (2d Cir. 1980) (*en banc*) (recognizing "proliferation of disqualification motions and the use of such motions for purely tactical reasons"), *vacated on other grounds,* 449 U.S. 1106 (1981); *Cerqueira v. Clivilles*, 623 N.Y.S.2d 580, 580 (App. Div. 1995) ("[W]e are not unmindful that disqualification motions are frequently used as a litigation tactic."); *see also Sports Med. Serv. of Gramercy Park v. Perez*, 657 N.Y.S.2d 314, 315-16 (Civ. Ct. 1997) ("Disqualification motions have become a cottage industry. All too frequently attorneys bring such motions as a litigation tactic. Even where the situation presented seems to implicate a disciplinary rule if read literally, the court must be wary to prevent its misuse, particularly when it is unnecessarily detrimental to the adverse party's rights.").

Given these realities, an overly broad interpretation of the duty of loyalty can strip even a long-standing client of the right to counsel of its choice, thereby perversely depriving the client of the very benefit which that ethical duty is designed to secure – the law firm's loyalty: "[T]his extremely rigid prohibition on all adverse concurrent representation can preclude a client that has relied on a law firm for many years from continuing to utilize its services if the law firm happens to represent the client's adversary in another matter, even though the other engagement is entirely unrelated to the controversy and there is no conceivable risk that any diminution of loyalty to, or zealousness in representing, the other client would occur." *Lerner* at 974.

A client's choice of counsel is a fundamental right that the New York Court of Appeals recognized in *Levine v. Levine*, 56 N.Y.2d 42 (1982), in which the Court approved a single lawyer representing potentially adverse parties to a marital separation agreement. In

Levine, the Court of Appeals held that the potentially adverse parties had the absolute right to retain the same lawyer as long as "there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity." *Id.* at 48; *see also Cerqueira*, 623 N.Y.S.2d at 580 ("A civil litigant has a fundamental right to the legal counsel of choice . . . ."); *Drury v. Tucker*, 621 N.Y.S.2d 822, 823 (App. Div. 1994) ("[A] disqualification motion must be 'carefully scrutinized' because it 'denies a party's right to representation by the attorney of [his] choice.'") (citations omitted).

An overly broad interpretation of the duty of loyalty also visits significant injury on law firms of all sizes. Thus, for example, a small firm whose core practice is representing insureds in insurance litigation may be constrained to reject an engagement for an insurer because that engagement could preclude the firm from representing any insured adversely to the insurer.[2] Likewise, a "mega" firm, which maintains offices in several cities, may be precluded from defending a long-standing client in "bet-the-company" litigation because another of the firm's offices, thousand of miles away and staffed by different lawyers, is representing the plaintiff in an unrelated and minor transaction.

In response, law firms and their clients have increasingly turned to advance waivers, by which they and their clients seek to create their own ethical "default," so that both the law firm and the client establish clear rules of the road at the inception of the relationship – a

[2] See, e.g., *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, No. 78 Civ. 1295, slip op. at 6-7 (S.D.N.Y. Apr. 11, 1978) ("Quite clearly, Skadden, Arps, a burgeoning law firm, was unwilling to close its doors to future clients by risking disqualification in its field of specialty merely because Curtiss-Wright [a "one shot client"] might set its sights on some company which happened then to be a client of Skadden, Arps.") (upholding advance waiver).

time when both sides can determine whether to proceed with the representation. This, in turn, raises the question when advance waivers are ethically permissible.

DR 5-105

The validity of an advance waiver must be measured against DR 5-105, which expressly allows clients to consent to conflicts under certain circumstances. DR 5-105 prohibits a lawyer from undertaking or continuing multiple representations "if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected" or "if it would be likely to involve the lawyer in representing differing interests." DR 5-105(A)-(B). The Code broadly defines "differing interests" to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." 22 N.Y.C.R.R. § 1200.1(a).

Significantly, the prohibitions in DR 5-105(A)-(B) are qualified by DR 5-105(C), which provides:

> [A] lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages or risks involved.

DR 5-105(C). For a law firm to enforce an advance waiver, that waiver must thus pass two tests: (a) the "disinterested lawyer" test and (b) the "informed consent" test, *i.e.*, consent after full disclosure of the relevant implications, advantages, and risks.

A. The Disinterested Lawyer Test

A disinterested lawyer is a lawyer "whose only aim would be to give the client the best advice possible about whether the client should consent to a conflict" or potential conflict. *See* Simon's New York Code of Prof'l Responsibility Ann. 554-55 (2003), *quoted in* ABCNY Formal Op. 2004-02. If a disinterested lawyer "would conclude that any of the affected clients should not agree to the [multiple] representation under the circumstances, the lawyer involved should not ask" for the advance waiver. EC 5-16. For example, a disinterested lawyer would disapprove seeking a waiver to simultaneously represent two significantly adverse parties in the same matter:

> Lawyer has been asked by Buyer and Seller to represent both of them in negotiating and documenting a complex real-estate transaction. The parties are in sharp disagreement on several important terms of the transaction. Given such differences, Lawyer would be unable to provide adequate representation to both clients.

Restatement 3d of Law Governing Lawyers § 122, Illustration 10.

The disinterested lawyer test should be applied both when the advance waiver is given and again when the subsequent adverse matter arises. In the first instance, the lawyer examines the type of representation and prospective client that is anticipated and the potential adversity of interests. In the second instance, the lawyer examines the actual client and matter and the actual adversity that has developed. If the actual conflict is materially different from the conflict envisioned by the waiver, the waiver will be ineffective. If the actual conflict is not materially different, the waiver will also be ineffective if the actual conflict is nonconsentable. For an analysis of the considerations involved in the "disinterested lawyer" test, see ABCNY Formal Opinion 2004-02.

B. The Informed Consent Test

DR 5-105(C) also requires each client to "consent[ ] to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." But "it frequently will be more difficult for an attorney to make 'full disclosure' to the same extent as in connection with a concurrent waiver." ABCNY Formal Opinion 2004-02. Although disclosure of the nature of the matter that would likely cause the conflict and the name of the potential adverse party, if known, may readily meet the disclosure requirement, s*ee St. Barnabas Hosp. v. New York City Health and Hosps. Corp.*, 775 N.Y.S.2d 9 (App. Div. 2004) (enforcing advance conflict waiver when the waiver named the potential future adverse party), this information is typically not known at the time the advance waiver is sought.

The "adequacy of disclosure and consent" will depend upon the circumstances of each case. *See* Wolfram, Modern Legal Ethics § 7.2.4 at 343 (1986); NYCLA Ethics Opinion No. 724. We agree with NYCLA Ethics Opinion No. 724 that, in general, "the client or prospective client should be advised of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients or matters that may present such conflicts."

Some opinions have emphasized the sophistication of the client in judging the degree of required disclosure, *see* NYCLA Ethics Opinion No. 724; ABA Model Rule 1.7, Comment 22, and this too is an important consideration. Sophisticated clients need less disclosure of the "implications," "advantages," and "risks" of advance waivers before being able to provide informed consent. Similarly, Comment 22 to ABA Model Rule 1.7, with which we also agree, observes that the effectiveness of advance waivers is determined "by the extent to which the client reasonably understands the material risk that the waiver entails," placing the

emphasis, for the sophisticated client, on the client's understanding of risks rather than detailed disclosure by the lawyer. For the sophisticated clients described above, blanket or open-ended advance waivers that are accompanied by relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable.[3]

Advance Waivers That Include Substantially Related Matters

The discussion of advance conflict waivers in bar association opinions and in law review articles has largely focused on when the law firm's present engagement for Client A and future engagement for Client B adverse to Client A are not substantially related. To be sure, when the waiver applies to two engagements that are substantially related, another consideration must be added to the analysis – the need to safeguard each client's confidences and secrets and to ensure that those confidences and secrets are not used to the respective client's disadvantage. *See* DR 4-101. Still, we believe that under the circumstances described below, an advance waiver ethically may apply to substantially related matters.

In ABCNY Formal Opinion 2001-2, we discussed at length a law firm representing multiple clients with actually or potentially differing interests in unrelated matters or in the same matter. In a single litigation, a lawyer cannot ethically represent both sides. Similarly, in a transactional setting in which the parties' interests are inherently antagonistic,

[3] The sophistication of the client also bears in other ways on the scope of the permissible waiver. For example, there are a few cases suggesting that a client cannot consent to have his or her own lawyer bring claims against the client charging fraud. *See, e.g., Rosen v. Rosen*, N.Y.L.J. Jan. 31, 2003 (Sup. Ct. Suffolk Cty. 2003) ("this Court simply cannot conceive of a knowing waiver by a client of such significant interests," when one client accused the other of submitting a false court filing). These cases are best understood as reflecting skepticism about whether the client understood and consented to the waiver. They have little relevance to waivers by sophisticated clients, particularly when the client is a large institution and the claims of misconduct involve personnel not involved in the representation of that client.

such as when one party is a hostile bidder and the other an unwilling target in a corporate takeover, or when lawyers in the same law firm would be required to negotiate substantive business terms head-to-head, simultaneous representation generally will be ethically prohibited. But in transactional settings in which the adversity between clients is less stark, the application of DR 5-105 is more relaxed and nuanced. We also observed in Formal Opinion 2001-2 that many law firms service clients that insist the firm simultaneously represent multiple clients with differing interests in a single negotiated transaction – an observation that has even more force today.

In Formal Opinion 2001-2, we articulated a number of factors that a lawyer should consider in determining whether the lawyer can represent multiple clients with differing interests in unrelated matters or in the same matter: (a) the nature of the conflict and the possibility of an adverse effect on the exercise of the lawyer's independent professional judgment; (b) the likelihood that client confidences or secrets in one matter will be relevant to the other representation; (c) the ability of the lawyer or law firm to ensure that confidential information of the affected clients will be preserved, including through screening and other information-control devices; (d) the sophistication of the client and the client's ability to understand the reasonably foreseeable risks of the conflict; and (e) if the firm is still representing the waiving client when the conflict arises, whether the lawyer's relationship with the clients is such that the lawyer is likely to favor one client over another. These same factors also help determine whether an advance waiver passes muster when that waiver includes substantially related matters in a transactional setting.

We conclude here that a law firm may ethically request an advance waiver that includes substantially related matters if the following conditions are met: (a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation and opposite sides in a starkly disputed transactional matter; (c) the law firm is able to ensure that the confidences and secrets of one client are not shared with, or used for the advantage of, another client; (d) the conflict is consentable under the tests of DR 5-105(C); and (e) special consideration is given to the other factors described in Formal Opinion 2001-2.

Drafting Advance Waivers

An advance waiver need not be in writing if informed consent can be found under the circumstances. Nevertheless, under most circumstances a written confirmation of the advance waiver is salutary because it may avoid disputes over the nature and extent of the waiver.

Given this, we believe it useful to provide guidance regarding the drafting of an advance waiver. To that end, we have attached two examples, A and B, of blanket waivers and one example, C, of an advance waiver covering substantially related matters. These are merely examples of the many forms that a workable advance waiver might take. But it bears emphasis, as this opinion concludes, that an advance waiver must be tailored to the specific situation at hand.

In this vein, because a waiver is more likely to be enforced the more specifically it refers to a conflict that eventually arises, it is advisable to supplement the general language of these examples with non-exclusive reference to particular clients or circumstances which may

then present foreseeable conflicts. This is particularly true of an advance waiver with respect to substantially related matters.

CONFLICTS WAIVER: EXAMPLE A

(Blanket Advance Waiver Not Including Substantially Related Matters)

Other lawyers in the Firm currently do [XXX] work for [existing client] and its affiliates, and expect to continue to do such work. In order to avoid any misunderstanding in the future, we ask that you confirm that the Company agrees to waive any conflict of interest which may be deemed to arise as a result of such representation. Please also confirm that neither the Company nor any of its affiliates will seek to disqualify our Firm from representing [existing client] or its affiliates in existing or future [XXX] or other matters.

Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliate in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects, to a large number of clients both in the United States and internationally, some of whom are or may in the future operate in the same area(s) of business in which you are operating or may operate. (A summary of our current practice areas and the industries in which we represent clients can be found on our web site at www.XXX.com.) You acknowledge that you have had the opportunity to consult with your company's counsel [if client does not have in-house counsel, substitute: "with other counsel"] about the consequences of this waiver. In this regard, we have discussed with you and you are aware that we render services to others in the area(s) of business in which you currently engage.

CONFLICTS WAIVER: EXAMPLE B

(Same Type of Advance Waiver as A)

This firm is a general service law firm that [insert client name here] recognizes has represented, now represents, and will continue to represent numerous clients (including without limitation [the client's] or its affiliates' debtors, creditors, and direct competitors), nationally and internationally, over a wide range of industries and businesses and in a wide variety of matters. Given this, without a binding conflicts waiver, conflicts of interest might arise that could deprive [the client] or other clients of the right to select this firm as their counsel.

Thus, as an integral part of the engagement, [the client] agrees that this firm may, now or in the future, represent other entities or persons, including in litigation, adversely to [the client] or any affiliate on matters that are not substantially related to (a) the legal services that [this firm] has rendered, is rendering, or in the future will render to [the client] under the engagement and (b) other legal services that this firm has rendered, is rendering, or in the future will render to [the client] or any affiliate (an "Allowed Adverse Representation").

[The client] also agrees that it will not, for itself or any other entity or person, assert that either (a) this firm's representation of [the client] or any affiliate in any past, present, or future matter or (b) this firm's actual, or possible, possession of confidential information belonging to [the client] or any affiliate is a basis to disqualify this firm from representing another entity or person in any Allowed Adverse Representation. [The client] further agrees that any Allowed Adverse Representation does not breach any duty that this firm owes to [the client] or any affiliate.

CONFLICTS WAIVER: EXAMPLE C

(Advance Waiver Including Substantially Related Matters)

You also agree that this firm may now or in the future represent another client or clients with actually or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without waiving the generality of the previous sentence, you agree that we may represent [*to the extent practicable, describe the particular adverse representations that are envisioned, such as "other bidders for the same asset" or "the lenders or parties providing financing to the eventual buyer of the asset"*].

This waiver is effective only if this firm concludes in our professional judgment that the tests of DR 5-105[4] are satisfied. In performing our analysis, we will also consider the factors articulated in ABCNY Formal Opinion 2001-2, including (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information-control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.

[4] 22 NYCRR § 1200.24(c).