



EPISODE #20

The dos and don'ts of advance waivers

Total run time: 6:56 minutes

Announcer: Welcome to the Portable Ethics Lawyer. Today, we unlock the ALAS podcast vault, and bring you a previously unreleased episode, that we recorded when we were still in the studio. We hope you enjoy it.

Givonna: Advance waivers to future conflicts of interest can help lawyers avoid problems, if the waiver is drafted carefully and applied thoughtfully. I'm Givonna Long, and you're listening to The Portable Ethics Lawyer.

In this episode, we're joined by Jeff Kraus, Vice President and Senior Loss Prevention Counsel at ALAS, who will discuss some of the ethical considerations lawyers should keep in mind when seeking and applying an advance waiver.

Jeff, welcome.

Jeff: Thanks, Givonna. Nice to be here.

Givonna: Let's start by defining terms. What is an advance waiver to future conflicts?

Jeff: It's really just what it sounds like. It's an agreement from a client that it will prospectively waive a conflict of interest that might arise in the future, which will permit the lawyer to represent another client in a matter adverse to the first client.

Givonna: How do the ethics rules treat advance waivers?

Jeff: The answer can be found in the ABA's Model Rule of Professional Responsibility 1.7, which addresses current client conflicts. That rule, which has been adopted with some variation in most states, expressly contemplates the situation I just described. Comment [22] of the Rule is the touchstone. It says that a client can waive conflicts that arise in the future, under certain circumstances. Basically, as the comment puts it, [quote] the effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails [end quote].

Givonna: What should lawyers do to make sure the client “*reasonably understands*” the material risks?

Jeff: The more information you can provide to the client about the types of situations covered by the advance waiver the better. Telling the client about the types of future representations that would be covered helps. Telling the client about the reasonably foreseeable adverse consequences of having its lawyer represent the other side in those representations also helps.

Givonna: What about open-ended advance waivers?

Jeff: Comment [22] generally frowns on open-ended waivers. But the comment provides some leeway for sophisticated clients, especially if they’re experienced users of the legal services involved, the consent is limited to matters unrelated to the current representation, and the client is independently represented by other counsel in giving consent. In-house counsel satisfies that last prong.

Givonna: Does that mean that you don’t need to spell out too many specifics when asking a sophisticated client to agree to an advance waiver?

Jeff: Our recommendation even with sophisticated clients is to provide as much detail as possible regarding the type of adverse clients that may be involved, whether the waiver covers litigation as well as transactional matters, and the material risks the client may face if it consents. If the advance waiver is intended to apply to a particular client or a specific industry, the lawyer should consider identifying that client or industry, subject to confidentiality considerations of course.

Givonna: If you do all the things you suggest and the waiver is given by a sophisticated client, is that enough?

Jeff: I’d like to say yes, but in reality we suggest that when a conflict arises down the road the lawyer should reevaluate the advance waiver to assess the likelihood that a court would enforce it. The focus should be on whether the type of conflict now at issue was appropriately described in the advance waiver, how sophisticated the client who granted the waiver was, and whether that client was represented by independent counsel when it agreed to the waiver. Lawyers should also check to see if they have agreed to any outside counsel guidelines that might conflict with the terms of the advance waiver. All this should be done in consultation with the lawyer’s loss prevention partner.

Givonna: Let's say the lawyer can check all those boxes. Is she then free to represent the other client?

Jeff: Probably, but you never know what a court might do. In fact, there have been some decisions invalidating advance waivers that we believe were entirely appropriate. So, lawyers should also consider informing the about-to-be adverse client of the conflict and reminding that client that it consented in advance. Of course, the lawyer can't do that unless the current client agrees to that disclosure. But if the current client says ok, it would be helpful to know early on if your other client will oppose your involvement despite its advance waiver, rather than waiting to litigate a motion to disqualify in the middle of the matter, perhaps with more serious consequences.

Givonna: Can you give us an example of the "more serious consequences" you just mentioned?

Jeff: Perhaps the most infamous recent example involved the Sheppard Mullin law firm. There are a lot of complicated facts in that case, and it's unusual because the advance waiver at issue was the one obtained from the new client, not the old one. Briefly, Sheppard Mullin got an advance waiver from a new litigation client, and it already had one from one of the opposing parties, which it represented on unrelated matters. Based on those waivers, the firm concluded that it could take on the new matter and sue its existing client. That didn't work out, and it got disqualified some time after the lawsuit was filed. After the disqualification, its litigation client sought a return of almost \$2 million in fees it had paid the firm. Even though the client was by all accounts a sophisticated user of legal services, the California Supreme Court determined that its advance waiver was unenforceable because the firm did not tell the client about its relationship with the opposing party. Without an enforceable waiver, the court said the firm was not entitled to any fees accrued during the conflict period.

Givonna: That's a pretty painful illustration of why advance waivers need to be carefully drafted and thoughtfully applied. Thanks for explaining all of these issues, Jeff.

Jeff: My pleasure Givonna.

Givonna: Until next time. I'm Givonna Long, and this is the Portable Ethics Lawyer.

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