

Looking Into the Crystal Ball Advance Waivers of Future Conflicts

By Mark Kimball Blongewicz

A modern necessity of the business and ethics of law firms is the resolution of conflicts of interest, a process that can often become the source of difficult problems for practicing attorneys. That is particularly true when they seek waivers in advance for potential conflicts that, while they may be anticipated, do not yet exist. The ability to foresee and address what specific conflicts may arise in the future can be a critical component in the success of advance conflict waivers.

This article will focus on three key issues: 1) a description of advance waivers and their use in practice; 2) the challenges associated with the use of advance waivers; and 3) a discussion of several recent cases regarding advance waivers.

WHAT IS AN ADVANCE WAIVER?

Rule 1.7(a)¹ of the Oklahoma Rules of Professional Conduct (ORPC) states that, except as provided in Rule 1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- The representation of one client will be directly adverse to another client; *or*
- There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.²

Under the ORPC, clients may give consent to be represented by a firm in many instances,³ despite the existence of a conflict. Informed consent to a conflict is often referred to as a "waiver" of the conflict. Rather than simply wait for conflicts to arise and then seek waivers, many firms now seek "advance waivers" of future conflicts of interest.⁴ These advance waivers increasingly are necessary for law firms with extensive practices because the conflict of any one lawyer in a firm is imputed to every lawyer in the firm.⁵

Advance waivers are expressly discussed in Comment 22 to Rule 1.7. Comment 22 states:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that

might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if a client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent will ordinarily be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent will ordinarily be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, 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, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict non-consentable under paragraph (b).

In general, in order to promote the interests of the client and counsel, an acceptable advance waiver should:

- Advise the client of his right to consult with independent counsel regarding the waiver.
- Explain the risk that counsel may not be able to exercise professional judgment fully in the client's interest.
- Advise the client of the potential consequences that may arise in the event of an actual conflict, including that counsel may need to withdraw, which may result in increased expenses and delay.
- Assure the client that all non-public, sensitive proprietary or other confidential information will remain confidential and in particular will not be accessible by lawyers at the firm who may handle matters of other clients that represent a conflict.
- Guarantee that no lawyers on the client's matter will work on matters that represent a conflict to the client.
- Explain to the client the nature of the conflicting matters and the steps taken to maintain confidentiality.⁶

In addition, commentators have suggested the following additional items as helpful for effective advance waivers: 1) The waiver, if contained in an engagement letter, should be conspicuous; 2) include a commitment from the lawyer to establish internal ethical screens; 3) the waiver is actually signed by the client; 4) do not seek to waive non-waivable or extreme conflicts; 5) include limits on the specific parties or type of matters to which it applies; 6) address existing conflicts and any specific ones that are foreseen; 7) define related and unrelated matters; and 8) specify when and how the waiver will terminate.⁷

Identifying and including specific adverse clients and specific matters that may arise will increase a practitioner's ability to predict and obtain a favorable ruling if the advance waiver is challenged. Counsel will need to strike a balance as to the specificity of the waiver in consideration of the facts of each case and the duty of confidentiality owed to all clients. Accordingly, each proposed advanced waiver should be tailored to the specific circumstances presented.

SEEKING PREDICTABILITY: CHALLENGES AND EFFECTIVENESS

There are several challenges of using advance waivers in practice. While academics and bar associations have focused on advance waivers from a litigation standpoint (*i.e.*, when are advance waivers valid and enforceable), many practitioners are left without much guidance on the business aspects of seeking such waivers. Questions arise such as how insistent the lawyer should be about the waiver and how much should be disclosed to meet the informed consent standard while, at the same, protecting confidentiality.

Many in-house attorneys who review and consider advance waiver requests resist the inclusion of an advance waiver in an engagement letter, especially a blanket advance waiver. Clients also want predictability when they consider advance waiver requests. When resisting such requests, they often point to business reasons related to what they consider unpredictable and undesirable outcomes such as the possibility of providing an advantage to a competitor or the risk of inadvertent disclosure of sensitive information. If the client does not want to consent to a blanket advance conflict waiver, alternative language may be used that requires the client to review conflicts as they

arise on a case-by-case basis and not to withhold consent in bad faith.

Additionally, there have been an increasing number of challenges to the validity of advance waivers in litigation. The question of what exactly constitutes informed consent in the particular circumstances at issue lies at the heart of almost every aspect of the advance waiver debate. Broadly speaking, waivers may be either general or specific with regard to either parties or subject matter. Thus there are four typical kinds of advance waivers:⁸

- a) specific party, specific matter;
- b) specific party, general matter;
- c) general party, specific matter; and
- d) general party, general matter.

A waiver that is specific in both client and matter would be the easiest to demonstrate the existence of informed consent if challenged, whereas a general party, general matter waiver would obviously be the most difficult. The difficulty in dealing with broad general advanced waivers has led to little consistency in how courts, academics, practitioners, and bar associations handle advance waivers, if they are even addressed at all.⁹ The Restatement of the Law (Third) does not rule out advance conflict waivers but says that they 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.

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 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 assuring that the lawyer did not undertake a potentially disqualifying representation.¹⁰

The Restatement notes that if a material change in expectations that formed the basis of the informed consent subsequently occurs, the change must be brought to the attention of the client and new informed consent obtained.¹¹ It further provides that a client may revoke its consent.¹²

In 2002 the ABA Model Rules of Professional Conduct (Model Rules) were updated and Comment 22 added to address the use of advance waivers. First, Comment 22 emphasized that the primary issue with advance waivers is the sufficiency of the client's informed consent.¹³ Second, it took the position that a client agreeing to a general subject matter waiver will tend to lack sufficiently informed consent.¹⁴ Third, it suggested a few client characteristics, often summarily referred to as client "sophistication," that might increase the informed nature of the waiver.¹⁵ The Model Rules also provide that clients are generally free to revoke consent to a conflict of interest, but the effectiveness of the revocation as to other clients depends on an analysis of various factors.¹⁶ As noted earlier, Oklahoma has adopted Comment 22 into its Rules of Professional Conduct.¹⁷

Comment 22 is vague on the issue of general subject-matter advance waivers. While it states that they will ordinarily be invalid, depending on the sophistication and the independent representation of the client, it may be found that there was valid consent.¹⁸ ABA Formal Opinion 05-436 interpreted Comment 22 as "supporting the likely validity of an 'open-ended' informed consent if the client is an experienced user of legal services," and particularly if the client had the opportunity for representation by independent counsel in connection with the waiver.¹⁹

The District of Columbia Bar Association's Legal Ethics Committee has gone even further. In the District of Columbia, advance waivers are valid, but they must comply with the standards of informed consent.²⁰ An advance waiver by a client who has independent counsel is presumptively valid.²¹ The lawyer must make full disclosure of facts of which she is aware and she cannot seek a general waiver when she knows of a specific impending adverse situation unless that specific instance is also disclosed.²² If a lawyer cannot disclose the adverse circumstance to one client because of a duty to maintain confidentiality of another client's information, the lawyer simply cannot seek the advance waiver.²³ The less specific the circum-

stances considered by the client and the less sophisticated the client, the less likely that advance waiver will be valid.²⁴ The District of Columbia Bar Association has decided that no advance waiver of conflicts will be valid in matters substantially related *even if* it is reviewed by independent counsel.²⁵

In Formal Opinion 2006-1, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics acknowledged that:

[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 firm can competently represent the interests of all affected clients.²⁶

What is interesting about this opinion is that it leaves the door open to advance waivers of conflicts in substantially related matters so long as the attorney safeguards each "client's confidences and secrets and . . . ensure[s] that those confidences and secrets are not used to the respective client's disadvantage."²⁷ This treatment of substantially related matters stands in contrast to the District of Columbia Bar Opinion which does not allow waivers in those situations.

INCREASING PREDICTABLE OUTCOMES: RECENT DECISIONS

The United States District Court for the Northern District of Texas decided a case earlier this year, holding a general advance waiver as to both client and subject-matter was valid when it was signed by a sophisticated client's in-house counsel in a matter that was not substantially related to the matter for which the firm previously represented the client.²⁸ The court applied the stricter Model Rules rather than the more permissive Texas state ethics rules. Even so, the court concluded that when a sophisticated client is represented by independent counsel, the consent given to a general advance waiver may be considered "informed."³⁰

The circumstances surrounding the case were as follows: Galderma retained the law firm Vinson & Elkins (V&E) in 2003 for advice on employment and benefit issues.³¹ The firm sent Galderma an engagement letter with an ad-

vance waiver included, which was agreed to and signed by Galderma's general counsel.³²

We understand and agree that this is not an exclusive agreement, and you are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client with interest materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with ours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.³³

In 2012 Galderma, represented by other firms, filed a patent infringement suit against Actavis, a long time client of V&E.³⁴ Upon learning of Galderma's suit, V&E decided to terminate their attorney-client relationship with Galderma and represent Actavis in this suit. Galderma moved to disqualify V&E from representing Actavis.³⁵ The court denied that motion.

In its analysis the *Galderma* court separated the question of informed consent into two inquiries:³⁶

1. Is the information the law firm disclosed adequate for a client to form informed consent; and
2. If so, is the disclosure adequate for the particular client.

The court relied on Model Rule 1.0(e) to answer the first inquiry and identified the following three factors as critical to its analysis of the advance waiver:³⁷

1. Agreement to a proposed course of conduct;
2. Explanation about the material risks involved in waiving future conflicts; and
3. Communication of adequate alternatives to the proposed course of conduct.

In the situation before it, the *Galderma* court concluded that all three of those factors weighed in favor of finding informed consent. The waiver identified a course of conduct: V&E had broad freedom to represent clients that would result in conflicts of interest, except in cases that are substantially related to the work done for Galderma.³⁸ The waiver explained the risk: V&E could represent a client directly adverse to Galderma.³⁹ Finally the waiver identified an alternative: Galderma could choose to retain other counsel rather than V&E.⁴⁰ With these three factors satisfied, the court found that this waiver may be adequate in some situations to find informed consent.⁴¹

The second part of the analysis is whether in this particular case V&E's disclosures were adequate for Galderma. Relying on Comment 22 to Rule 1.7, the specific factors relevant to this question used by the court included the client's level of sophistication and its use of counsel independent of the firm issuing the waiver.⁴² The court noted that it makes no difference if the review of the waiver comes from an independent lawyer in the client's own legal department or from outside independent counsel.⁴³ Informed consent is an objective standard to establish if there was adequate disclosure and understanding, it does not require the client to actually intend to consent to the future conflicts that ultimately happen.⁴⁴

Galderma distinguished a contrary decision reached by a New Jersey federal court in *Celgene Corp. v. KV Pharm. Co.*,⁴⁵ a case with similar facts. The advance waiver in *Celgene* specifically outlined that the firm could participate in litigation that was directly adverse to the client.⁴⁶ Even though the waiver was reviewed and signed by the client's general counsel, the court in *Celgene* held that that was not sufficient and relied on New Jersey's stricter "full disclosure and consultation" standard that requires lawyers to inform clients of the specific details of all foreseeable areas of conflict even if they are already sophisticated.⁴⁷ In contrast to this, the court in *Galderma* noted that the Model Rules do not require additional consultation when a client is already aware of sufficient information required for informed consent.⁴⁸ Additionally, the court disagreed that an advance waiver needs to identify specific subject matters or adverse clients.⁴⁹ While that information may be helpful for proving informed consent, it is not required under *Galderma*. The *Galderma* court was careful to note that although the general

language used in the advance waiver would not be adequate in many cases, in this case it was adequate because of the client's high level of sophistication in legal matters and the use of large law firms, as well as the fact that the client's general counsel had signed the waiver.⁵⁰ This decision strengthens the value of advance waivers in Texas and may serve as a model for other courts applying the Model Rules.⁵¹

Another recent decision, *Macy's Inc. v. J.C. Penney Corp. Inc.*,⁵² upheld a trial court order which declined to disqualify Jones Day from its representation of Macy's in contract interference litigation against another firm client, J.C. Penney, based on an advanced conflict waiver signed by J.C. Penney when it had asked Jones Day to represent it in connection with some Asia trademark matters.⁵³

In defending against J.C. Penney's efforts to disqualify it, Jones Day relied on the express language of an engagement with J.C. Penney which addressed future conflicts of interest.⁵⁴ The engagement letter explained that Jones Day might represent other clients against J.C. Penney in litigation so long as those matters were not substantially related to any of our other engagement on behalf of J.C. Penney.⁵⁵ *Id.* Further, the letter sought confirmation that J.C. Penney would not attempt to disqualify Jones Day based on its representation of J.C. Penney and that J.C. Penney had been advised of and affirmatively waived any conflicts related to Jones Day's representation of it.⁵⁶ *Id.* In addition Jones Day cited New York City Formal Ethics Op. 2006-1 (2006), which specified that a law firm may seek an advance waiver from a client, even in the same matter.⁵⁷

The fact is that "Jones Day informed [Macy's] about potential conflicts, and [Macy's] waived its right to protest thereto."⁵⁸ Also emphasized by the appellate court was language in the engagement letter noting that other Jones Day clients may be business competitors of J.C. Penney with contrary business interests who might retain Jones Day in litigation or transactions "in which such client's interests are or potentially may become adverse to J.C. Penney's interests."⁵⁹ It was important to the court that the engagement letter expressly explained that Jones Day could not represent J.C. Penney unless it confirmed in writing that it was agreeable to such an arrangement and agreed to waive any conflict.⁶⁰ Finally, the court also noted that the engagement letter contained the following language: "Note that your instruct-

ing us or continuing to instruct us on this [Asia trademark] matter will constitute your full acceptance of the terms set out above and attached.”⁶¹ It had been undisputed that Jones Day continued to represent J.C. Penney on the Asia trademark issues after the engagement letter.⁶² Therefore, the court concluded that J.C. Penney had “accepted the terms of the agreement, including waiver of the alleged conflict at issue.”⁶³

If *Galderma* and *Macy’s* establish a permissive view of advance waivers then *McKesson Information Solutions, LLC v. Duane Morris, LLP*⁶⁴ sets the other end of the spectrum. Not only does this decision discuss the validity of an advance waiver, it also addresses choice of law for ethics rules, when two representations are substantially related, and when representing a corporate parent also results in representation of a corporate affiliate.⁶⁵ In *McKesson*, Duane Morris was substituted as lead counsel representing two individuals in an AAA arbitration proceeding brought against McKesson Information Solutions, LLC. At the same time, Duane Morris was also representing two other McKesson affiliates in a separate bankruptcy action. In connection with its representation of the McKesson entities in the bankruptcy matter, Duane Morris had sent an engagement letter to its client. That letter had not only sought to distinguish between various McKesson entities, but it included an advance conflict waiver.

After first undertaking a detailed factual analysis of the relationship between the various McKesson entities and concluding that they should be viewed as a single entity for conflicts purposes, the court evaluated the language in the engagement letter which Duane Morris sought to enforce as an advance waiver. It read:

Given the scope of our business and the scope of our client representations through our various offices in the United States and abroad, it is possible that some of our present or future clients will have matters adverse to McKesson while we are representing McKesson. We understand that McKesson has no objection to our representing parties with interests adverse to McKesson and waive any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to McKesson.

We agree, however, that McKesson’s consent to, and waiver of, such representation shall not apply in any instance where, as a result of our representation of McKesson, we have obtained proprietary information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to McKesson’s material disadvantage or potential material disadvantage. By agreeing to this waiver of any claim of conflicts as to matters unrelated to the subject matter of our services to McKesson, McKesson also agrees that we are not obligated to notify McKesson when we undertake such a matter that may be adverse to McKesson.⁶⁶

McKesson brought a separate action in Georgia state court for the specific purpose of disqualifying Duane Morris from its representation of the individuals in the arbitration. In defending against disqualification, Duane Morris relied on the advance waiver provisions in its engagement letter. In evaluating the enforceability of the waiver specifically, the *McKesson* court held the waiver was “inadequate and thus invalid as a matter of Georgia law because it [was] not a knowing waiver that identify[ed] the specific adverse clients and details of adverse representation.”⁶⁷ Because the waiver did not “refer to any particular parties or circumstances under which adverse representation would be undertaken,” the client “could not have reasonably anticipated that [Duane Morris] would actually consider representation of the Smiths in the concurrent action where the adverse party [was] attacking McKesson Corporation products and accusing it of fraudulent conduct.”⁶⁸ To support its holding the court quoted *Worldspan L.P. v. The Sabre Group Holdings, Inc.*⁶⁹ In *Worldspan*, the waiver stated that it applied to an “adverse matter” and the court concluded that language was not sufficiently explicit to cover adverse litigation.⁷⁰ Both the *Worldspan* and the *McKesson* decisions have been heavily criticized by practitioners and academics, but they both remain good law in Georgia, at least.⁷¹

CONCLUSION

Advance waivers serve as a useful tool for firms with expansive practices. They can mitigate the risk of disqualification and set the expectations of clients, but several courts have seen them as abusive tools to enhance firm profits at the expense of the reputation of the profession. The few cases that address the issue

of advance waivers highlight the need to be aware of the “sophistication” of the client and to consider what matters courts may find to be “substantially related.” While some courts have held that waivers that are general in both subject matter and client are valid, other courts have taken a very harsh view of such waivers. Based on the aforementioned cases and ethics opinions, the standard for the use of advance waivers in practice remains less than completely clear. However, predicting a successful outcome with an advance waiver can be hopefully enhanced by using some of the suggestions mentioned here.

1. Rule 1.7(a), Okla. R. Prof. Cond., 5 O.S. App. 3. The Oklahoma Rules of Professional Conduct will be referred to and cited herein as the “Rule,” “Rules” or ORPC.”
2. Rule 1.7(a)(1-2).
3. Rule 1.7(b)(1)-(4) provides that to effect such a waiver the lawyer must reasonably believe that the lawyer can competently and diligently represent any conflicting clients; the conflicting representation must not be otherwise prohibited by law; the conflict must not put the lawyer on both sides of the same litigation or proceeding; and the consent must be “informed” and confirmed in writing.
4. Advance waivers are sometimes referred to as “prospective waivers” of conflicts of interest.
5. See Rule 1.10.
6. See PLC US Federal Litigation 6-521-3395.
7. See “A ‘Safe Harbor’ for Future Conflicts Waivers,” 29 Law. Man. Prof. Conduct (ABA/BNA) No. 18 at 385-387, (June 19, 2013).
8. See 22 *Geo. J. Legal Ethics* 97, 98.
9. See William Freivogel, “Freivogel on Conflicts,” www.freivogelconflicts.com (stating that with regard to advance waivers, “any number of things can result in such a waiver not being enforceable”).
10. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §122, cmt. d (2000).
11. *Id.*
12. See *id.* §122, cmt. f (explaining that after a client revokes consent, the lawyer’s continued representation of others is dependent on “whether the client was justified in revoking the consent ... and whether material detriment to the other client or lawyer would result”).
13. Model Rules R. 1.7 cmt. 22.
14. *Id.*
15. *Id.*
16. Model Rules R. 1.7 cmt. 21.
17. *In re Application of the Okla. Bar Ass’n to Amend the Rules of Prof’l Conduct*, 2007 OK 22 (Okla. 2007).
18. Model Rules R. 1.7 cmt. 22.
19. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 05-436 (2005).
20. District of Columbia Bar Legal Ethics Comm., Op. 309 (2001).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. Ass’n of the Bar of the City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-01, 2006 WL 1662501, at *5 (2006) (emphasis added).
27. *Id.*; See *Pa. Bar Ass’n Ethics Digest*, 28 PA. LAW. 53, 57 (2006) (stating that a law firm may act “adversely to the client on matters substantially related to the law firm’s representation . . . of sophisticated clients”).
28. *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, 2013 U.S. Dist. LEXIS 24171 (N.D. Tex. 2013).
29. *Id.* at 12.

30. *Id.* at 42.
31. *Id.* at 3.
32. *Id.* at 4.
33. *Id.*
34. *Id.* at 5.
35. *Id.*
36. *Id.* at 19-20.
37. *Id.* at 20.
38. *Id.* at 21-4.
39. *Id.* at 24-5.
40. *Id.* at 25-7.
41. *Id.* at 28.
42. *Id.* at 29-30.
43. *Id.* at 33.
44. *Id.* at 34-5.
45. 2008 U.S. Dist. LEXIS 58735 (D.N.J. July 28, 2008).
46. *Id.* at 2.
47. *Id.* at 33; see N.J. Supreme Ct. Advis. Comm. on Prof. Ethics, Opinion 679 (1995).
48. *Galderma* at 39.
49. *Id.* at 38.
50. *Id.* at 41.
51. See “Advance Conflicts Waiver in Retainer Allows Firm to Represent One Client Against Another,” 29 Law. Man. Prof. Conduct (ABA/BNA) No. 5 at 114 (Feb. 27, 2013) (discussing the *Galderma* decision).
52. N.Y. Sup. Ct. App. Div., 1st Dep’t, No. 10486 N, 2013 NY Slip Op. 04891 (June 27, 2013).
53. *Id.* at *1.
54. “Broad Future Conflict Waiver Saves Firm From Disqualification, N.Y. Court Concludes,” 29 Law. Man. Prof. Conduct (ABA/BNA) No. 14 at 393 (July 3, 2013) (hereafter “Broad Waivers”).
55. *Id.*
56. *Id.*
57. “Broad Waivers,” 29 Law. Man. Prof. Conduct No. 14 at 394 (a copy of the relevant portions of the Jones Day engagement letter can also be found here).
58. *Macy’s Inc. v. J.C. Penney Corp. Inc.* at *1.
59. *Id.*
60. *Id.*
61. *Id.* at *2
62. *Id.*
63. *Id.*
64. No. 2006-CV-121110 (Ga. Super. Ct., Nov. 8, 2006).
65. *Id.*
66. *Id.* at 10-1.
67. *Id.* at 11.
68. *Id.*
69. 5 F. Supp. 2d 1356 (N.D. Ga. 1998) (waiver failed to mention litigation and too remote in time; court seemed highly skeptical of such waivers).
70. *Id.* at 1360.
71. See Richard W. Painter, “Advance Waiver of Conflicts,” 13 *Geo. J. Legal Ethics* 289, 307 (2000) (“hardly any advance waiver would meet the criteria for specificity that Judge Moye demanded”); See also 38 *St. Mary’s L.J.* 859, 912.

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