

2016

Using Advanced Conflict Waivers to Teach Drafting, Ethics, and Professionalism

Edward R. Becker

University of Michigan Law School, tbecker@umich.edu

Available at: <https://repository.law.umich.edu/articles/1886>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Legal Education Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Becker, Edward R. "Using Advanced Conflict Waivers to Teach Drafting, Ethics, and Professionalism." *Transactions: The Tenn. J. Bus. L.* 18, no. 2 (2016): 660-70.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

they're like oh you sound like my mother. You sound like my father. And I say no you can say sister. You can say aunt, but don't do the mother and father.

When I do other examples of sports figures that were back when I was growing up, they don't even know who some of those players are.

Audience

Excellent. It's always depressing when those references don't fly.

USING ADVANCED CONFLICT WAIVERS TO TEACH DRAFTING, ETHICS, AND PROFESSIONALISM

Ted Becker

One of the things that Seletha was describing when she asked the first students whether the law is enough is an issue that will definitely resonate throughout the topic of my discussion. I am Ted Becker, and I want to begin with a little bit of a caveat. My topic today is about a very specific teaching technique for drafting, and those of us who teach transactional drafting. I would suspect that none of us ever have the problem of not having enough content to fill our course.

You are probably out there. You might be out there at least thinking to yourself, "great, here is one more thing that this guy up here wants me to try and cram into my class." I have been there. I hear you. I have been at other conferences where my reaction sounds like, "great idea, really interesting. I don't have any idea how I am going to fit it in." If that's you, I completely understand it. I just ask that you bear with me, and I hope that by the time my talk is done today maybe I have moved you off of that a little bit.

This is the graphic that I put up for my students when I'm talking or just introducing the subject of advance conflict waivers. It's about five years old, and it illustrates, back in about 2011, who was suing who in the mobile industry in patent related suits. Here, you have got all sorts of Amazon and Apple, Erickson, and various companies of that nature all going at it, hammer and nails. If you were to then add into this graphic all the firms representing the various parties in these cases, all of the parties subsidiaries, and potentially the firm's representing them (and if you really wanted to go whole hog if you then started to try to think well what about bringing in the individual attorneys who are working on these matters and perhaps if they were laterals from other firms the sorts of things that they had done in the past) and then try to figure out all of the potential conflicts and connections between those. It is going to be an impossible task to try and make sense of it on a graphical level.

On a substantive and ethical level, I tell my students to take on faith that if you were to do all of this and take all this into account, if you were to apply the conflict of interest and the disqualifications rules, it could make it extremely difficult for many of the firms involved in these matters to avoid

being conflicted out; especially, if the parties and the kind of firms involved were not dealing with these conflicts and issues until a problem arose. The question I ask my students again at this point is what could be done. What could be done proactively from a contractual matter to try and avoid these sorts of problems? And one of the answers to that is, as part of retainer agreements between firms and their clients, advance conflict waivers as a way to fend off an advance or try to fend off an advance potential disqualification if conflicts of interest arise down the road.

That is how I set up the initial discussion in my course. Now I tell my students that there are lots of other ethics issues out there that could and should be discussed in a transactional drafting course. Why advance conflict waivers? Well, there are various reasons. This is just some of them. I am going to touch on these, but like most professors who teach transactional drafting – I should say all professors who teach transactional drafting – I try to expose my students to ethics and professionalism matters as often as possible. I do so sometimes in an unplanned fashion when they come up as a result of student questions or they just pop up during discussions of other topics. And then as part of what I typically do the last class of the semester, we have a class dedicated to transactional ethics.

Now, here is where I have some trepidation. I have found that oftentimes some of those discussions of ethical issues that arise, at least for me, can seem a little bit tangential to my course, which is focused on specific drafting techniques. It is critical. It is vital that students are exposed to the standard types of ethics scenarios that come up often when we're teaching drafting negotiation – what you can say in negotiation, what you can't say, how you would respond to a mistake in the document made by the other side or the counter party. Students need to be exposed to those sorts of things and they need to have a sense of what they need to do in those scenarios.

But, in my view at least, those common scenarios oftentimes are focused more on what not to do. And when this comes up, don't be that person as opposed to more what to do, more how to draft. Put it another way. When I discuss some of these other ethics scenarios to my students when they come up in class, they don't always lend themselves very easily to the typical professor question of what you would do differently to prevent that. How would you draft the contract in question differently to prevent that because oftentimes there are scenarios that don't specifically call that into question? This is sort of how would you avoid a scripser error, but don't make the error.

In some respects, this might be avoidable. These are ethics issues that we have to tell our students about. They are not all going to lend themselves to . . . , well okay, it's going to serve as a way to teach drafting or teach specific drafting techniques. But, I think that using advance conflict waivers as part of the ethics discussion allows me to get around this problem a little bit by giving the students the term of a business deal – in this case it's the deal between the client and the outside lawyers perhaps – and then asking the students what they

think would need to be drafted or how they would draft a particular provision in advance for a conflict waiver to accurately express the deal.

In this way, drafting these waivers reinforces the sorts of obligations that I am trying to convey through the entirety of the course that the students as drafters in training are going to face in any drafting scenario. For example, there is a need to become familiar with the substantive legal requirements (here, the underlying ethics rules) and the need to familiarize themselves with the business concerns at stake (here, why obtaining an advance waiver might be of significance on a business level to both say an outside firm and perhaps to the clients). Exploring that intersection of law and business in this particular context exposes students to a professionalism topic that has high significance in practice, at least for some sorts of lawyers, firms, and clients.

Moreover, even if the students have already taken a professional responsibility course and been introduced to the topic of conflict of interest, it is not always the case that they get that in-depth, at least in my experience, in talking to the students about it. They certainly have not been exposed to it from the perspective of: how do we draft to avoid or potentially avoid that issue? They may vaguely remember that you can have these conflict waivers from their professional responsibility courses. But, if they have not even had that course yet, then they certainly have not been given that drafting guide with respect to that.

This is the general time and a little graphic that I put up for my students to explain to them what is going on. We have here Matter X in this case, which can be any type of matter, litigation, transactional, regulatory compliance, IPE, whatever -- whatever it is that a firm could be doing to represent a client. Matter Y over on the right side doesn't have to be litigation. It could be transactional if we're talking about adverse matters. It could be say a hostile takeover. The point though is that the firm originally and still currently was representing A, and then, down the road wants to represent B in this matter that's going to be adverse to A.

Now, I just want to point out, just to be clear, that students always sometimes have questions about this. In Matter Y, over there on the right side, the firm is not representing A. So, they're not representing A and B in the same case. A is being represented by another firm. As we know from the ethics rules, a firm cannot do this -- that would be a non-waivable conflict there in a litigation matter. So, this is the basic timeline that I put up here to give the students some guidance after the graphic to just to sort of explain what's going on.

Then, we jump into the language of the rules. Now, I have given you a handout that has some of this text. I know we are probably familiar with this. But, in any event, there are rules. Rule 1.7 and Rule 1.9 are critical. Rule 1.7 in particular is the critical rule here. Here, what I'm focusing on is direct adversity to another client. There are some other circumstances that can trigger this. But, then there is the exception, notwithstanding the existence of that conflict.

You can still represent your client if each affected party gives informed consent confirmed in writing. For the purposes of what I am trying to teach the students on this topic, this is what I'm focusing on to start – informed consent confirmed in writing.

What is informed consent? This is the key issue in determining the validity of advance conflict waivers, at least those that get challenged. Now, there are other issues that the rules present, but this is the one that seems to jump out. The court is going to conclude that a challenged advance conflict waiver is invalid; thus, probably leading to disqualification of the firm in question. Almost certainly, it's going to be under this sort of rationale.

We have a couple of different sources, and there are lots of different sources that you can direct the students to. We have some actual definitions of informed consent in rule 1.0 that applies throughout the entirety of the model rules. It is not specific to conflict of interest situations. We have some comments. Comment 19 to 1.7, the concurrent representation rule, gives another general explanation of informed consent. There are other sources as well. If you want to direct your students to the Restatement Third the Law of Governing Lawyers, that is yet another source you can take a look at to get some guidance on this. But, essentially, you are trying to figure out what informed consent means in this advanced conflict scenario.

Next, we want to move past this general language to look at comment 2 of Rule 1.7. I draw your attention to Comment 22 of Rule 1.7, because it sets up a continuum; a broad versus specific continuum of what these advance conflict waivers cover. The question is: "do you have a conflict that at one end covers all of a firm's clients in all sorts of matters?" I am asking new clients to waive any sorts of conflicts that might arise in such a very, very open ended way.

Through the other end of the continuum, a waiver that is limited to specific clients and only asking you to waive advance conflicts that might arise with Client X and with regards to specific matters. If I was going to graph up a demonstration here, just of how this might look, it breaks down easily into two different categories: (1) clients general and specific, and (2) matters general and specific. And if we want to look at one that is general with regards to clients and general with regards to the sorts of matters that are covered, just look at the first one on page 3 -- the next page in the handout. Actually both of these are general with regards to both of these matters. For example, if we look here in the second sentence, we recognize that we shall be disqualified from representing any other client -- that's the general -- it's applying to any client that the firm represents.

Moving down to the next to the last sentence about three quarters of the way down, we're free to represent other clients including clients whose interests may conflict with yours in litigation, business transactions, or other

legal matters, again, covering the whole gamut of potential matters that could be addressed. So, that is your board covering everything open-ended.

Contrast that to say more specific sorts of examples here. So, if we're looking for one that is specific as to matters that are covered but general as to clients, I draw your attention to page 5 of the handouts, the bottom version -- version 2 on page 5. Here, we're agreeing that we may represent other entities or person, so General in terms of what clients, but limited in terms of subject, including in litigation, arbitration, or other dispute resolution procedures. General with regards to the clients that are covered. Specific with regard to the sorts of matters that are covered. So, we have sort of a mixture of the general and specific. If you want an example of one that is specific in both regards, just look up at version 1 on page 5. Here we have a waiver that is applicable to specific clients; in this case, the "other clients" and with regards only to a limited category of matters with respect to patent and intellectual property matters including litigation -- the "patent matters". So, that is an example on the far right end if you want to think of it in that way of the continuum-- specific in all regards, specific with regards to client, specific with regards to subject matter. So, I give the students that as examples of how we look at this.

Then, if we go back to Comment 22, and look at it again in the light of this informed consent concern that we have, we see that if the consent is general and open-ended -- so if it's here -- then the consent ordinarily is going to be very difficult to get. A client must be able to provide informed consent, because as the rules and comments explain, it's not reasonably likely the client will have understood the material risks involved. But, broad, open-ended, advance-client waivers and conflict waivers maybe the rules out a little bit of hope perhaps from a firm's perspective, may be enforceable, may be valid in some instances if the client's an experience of the legal services involved and is reasonably unformed regarding the risk that a conflict may arise if you have a sophisticated client essentially is how.

We have this question of informed consent. We measure it in terms of broad versus specific waivers, and there's going to be some starting that I think of them almost as presumptions with regards to whether they're going to be enforced. And then finally, couple that with the one last thing we have to address: whether it is substantially related. Where does this come from? It's not from the language of 1.7. This is actually imported from 1.9 that deals with conflicts with former clients. It is not technically a requirement imposed by Rule 1.7, the concurrent client rules or Comment 22, the comment explaining advance conflict waivers for concurrent representation. But, an ABA ethics opinion dealing with advanced waivers has adopted it for conflict waivers under 1.7 -- concurrent waivers as well. And many although not all -- many advance conflict waivers that you see in the wild, so to speak, exclude substantially related matters even though, again, technically their not obligated to under the language of 1.7. Many commentators suggest that they be excluded and many firms actually do exclude them from their language.

Try to give a quick summary of this for the students -- try to walk through it quickly. I give a little bit of this material in advance. We talk a little bit. I don't make them read the materials about the differing approaches of some ethic authorities here. It used to be very difficult in 2002. They have the tools remanded at lots of different levels, but 1.7 in particular was amended to allow, adding the Comment 22 to allow, for the possibility of these advance waivers.

We then had an ABA opinion to flush that out a little bit. That is the opinion that I referenced which adopted the language about going to use this substantially related concept in interpreting these. Since then, you've had various states climbing on board to a greater or lesser extent in terms of how likely it is that a blanket, open-ended, advance waiver is going to be adopted. New York and the D.C. bar are probably on the extreme end of being willing to allow blanket advanced waivers, even though there may be limitations to sophisticated clients.

The problem though is that courts take a little bit of a different approach from this. I just pulled some represented sites out here. There are lots more you could find, but if you take cases on the top, those are fairly recent 2015 cases out of the Eastern District of California, Western District of Pennsylvania that have been dealing with open-ended, advanced, conflict waivers in various settings. The courts have found them invalid on the grounds of informed consent compared to cases on the bottom like the *Galderma* case, the very recent *Redeci* case, which have upheld very open-ended, conflict waivers. There is still a lot of uncertainty that firms and clients are dealing with that they need -- that may not have -- any great sense of whether or not these rules are going to be enforced.

What I tend to do with the students is I say, "Alright, let's just take a look at some of these sample clauses." These are back to versions one and two on page 3. And the question I ask from my students is what's the difference. And then I pause and pause and pause and finally usually a student raises their hand. And they say this or that or this or that, and we talk about some of the things -- some of the differences that exist. But my takeaway for the students really is what's the difference between Version 1 and 2. My answer is that the difference is that there really is no difference other than the jurisdiction that these causes are brought in. The top is *Galderma*. That's on the previous slides. That's one of the jurisdictions that upholds these general waivers. The bottom, Version 2, is from a case out of New Jersey. It wasn't on the slide, but it's a case that invalidates it. The language of these two is essentially the same. The reasoning is just different in terms of what the courts in these cases say that they are going to accept what they want. Was the consent sufficiently informed or not? So, without getting into the details of it, the takeaway point of that for the students, first of all, is of course know your jurisdiction. That's not a point that reoccurs all the time in any kind of drafting scenario.

The question I ask of the students is: “Is this better?” This is a full-page conflict waiver that goes into great detail about various aspects of the firm’s practice, and you can read it. There’s lots of different things that are addressed. It’s one of those things where, when you read it for the first time, it’s like: “what could possibly be lacking in this advance conflict waiver?” It seems like it’s got to cover the gamut. If you think that, you’d be wrong. This is from a 2015 case out of California, and the court concludes that despite all this language, it did not provide sufficient and informed consent because it was too general. So, even though you are dealing with a very, very specific client -- a very sophisticated client and clearly a very, very sophisticated firm -- still the court looked at it from the perspective of and sort of disregarded the Comment 22 of 1.7, which provides that for sophisticated clients, you probably should be okay. He said regardless, we don’t care -- I don’t care. If you’re not, as a firm, specifically identifying the clients or the matters that this advance waiver might apply to, this particular judge is not going to enforce it.

This is one of the lessons that students can take away: that it is okay that there’s risks to be general. Even though the rules say, you know is the law enough. Even though the law itself seems to suggest that, okay a general open-ended waiver might be okay with sophisticated clients at least -- that’s what all of this is focusing on -- this suggests, as we see from some court opinions, that you’re not able to get the courts to buy into it.

So, what do we do then? We could draft these more specifically. So, is this any better? This is page 5 of the Version 1. This is the one up here that I mentioned was specific on both grounds, specific as the other clients, specific as to the patent matters. It’s got that covered. It’s a sophisticated client. The client actually is Brigham Young University, a college represented by a general counsel’s office; a very sophisticated client and the firm itself is sophisticated as well. You think then, okay, this is a sort of matter. They drafted it very specifically on both grounds and they’re trying to ensure that they’re not overreaching. Is it okay? And the answer though, is that it’s not. And the reason that it’s not is that the court really digs in deep on the language, and they say that the issue here is that there’s a definition of other clients. The firm currently represents multiple pharmaceutical companies with respect to patent and intellectual property matters—collectively—the other clients.

When the conflict arises, a particular new client that was involved was not a client at the time that this retainer agreement was signed and was not being currently represented by the firm. The court concludes that even though, yeah, the waiver in general is sufficiently specific, still, we’re going to interpret it strictly against the firm. And because the firm did not currently represent this client, it’s Pfizer, in patent IP matters at that time, then Pfizer was not an “other client,” and the advance waiver didn’t apply to them. So, you’ve drafted it very specifically, but too specifically.

Last example -- this is the bottom of page 5. So, this is one that was specific as to client matters. Again, an example, if you try to draft these waivers more specifically to cover -- not to sweep too much into your waiver. So, what

we have here, although it is general as to client, is specific in the sense that it is including in litigation, arbitration, or other dispute resolution procedures. So, it's limited in subject matter. It's not covering the entire gamut of legal matters that the firm could be representing another client in, but that in turn came back to bite the firm, because the client for which the firm tried to invoke this waiver was being represented not in a litigation arbitration or other dispute resolution procedure, but actually in a hostile takeover situation. So, again, the court looks at the waiver and says, this is not specific, but we're going to interpret the language strictly against the firm, and since it's not one of the three specific categories – litigation, arbitration, or the dispute resolution – the procedure is invalid. So, even when you try to draft these things specifically, then you run the risk of a court construing it very, very strictly against you. It can be difficult to predict cause because you're trying to draft it now for a problem that might arise a year, two years, three years, four years down the road. You try to narrow it to litigation and arbitration dispute resolution procedure; not anticipating that in four years you might be representing a client not in one of those scenarios, but a hostile takeover scenario. You try to draft it specifically to avoid the problems with having them too general. By drafting it too specifically, you run the risk of not capturing everything you might want to capture down the road.

Audience:

What about the risk (that you're presenting this to a client)?

Ted Becker:

That's a great point.

Audience:

(Unintelligible).

Ted Becker:

To in-house counsel.

Audience:

And (unintelligible) relationship.

Ted Becker:

That is a great point because that's one of the business points that courts have to -- not courts but you know try to get across to -- once we turn from the legal issue just is something valid. But, I want to expose the students to the sorts of business interest that the clients might have, whether it's a firm or the outside counsel. We find lots of articles and things of that nature,

whereas you say in-house counsel say, “Why would we do this? Why would we ever agree in advance to an advance conflict waiver, at least an open-ended one?” In fact, I saw a quote in one that one in-house counsel made the point that you have to be senile to agree to that, and you know students ask that question. It’s like we can understand why the outside firm might want it. Why would the inside firm agree to it? Does anybody have any thoughts about that? I said I wasn’t going to do Socratic but I’ll just see.

Audience:

This is not (unintelligible). There are a number of firms that have particular reputation, achievements, specialty (unintelligible) areas to where they can say to new clients, we’re happy to take you on but this is (unintelligible).

Audience:

And you know that’s right. And the response in-house (unintelligible).

Audience:

That’s right.

Audience:

We would never agree in a matter that significant. That firm could sue us for representing somebody else in any matter no matter what. If that was an acceptable (unintelligible) relationship. (Unintelligible) the old days (unintelligible) never do that.

Ted Becker:

So, I think both of you have raised great points with regards to this, because on the one hand you can have the firm -- perhaps if the outside firm was valuable enough to in-house counsel, maybe they may have the market power to force that. Perhaps. But, as you say there may be other in-house counsel that think okay you’re not that valuable to us. I mean we can go to another firm that’s going to be able to provide similar services and give us a similar result.

Audience:

There’re a lot of people that pay \$1,000 an hour to them.

Ted Becker:

Sure. That’s exactly right.

Audience:

I've seen this situation get turned around the firm and (unintelligible) my firm on a situation where a regulatory partner (unintelligible) institution every internal compliant rule general counsel (unintelligible) institution was back on page 332 rules for outside counsel.

Ted Becker:

Yes, outside counsel guidelines, right.

Audience:

Outside counsel guidelines. And they stated in there that any firm that took us on (unintelligible) was agreeing to policies and guidelines including a provision in those guidelines that any advanced waivers that might be included (unintelligible) letter between the firm and the institution were overridden by (unintelligible).

And the concern in that case was the regulatory litigation guy in the D.C. office (unintelligible) business had no comprehension about how this would work in a transactional setting. And the law firm was really sandbagged by this (unintelligible). So, this could go both ways.

Ted Becker:

Oh yeah, absolutely. All I try to do in the time that I have with my students is just expose them to these concerns that are out there. I mean the drafting aspect of it how would you draft it to make it enforceable if that's your goal. But, the business issue of it I mean how do you get the -- okay it's great if I can drive -- this would be enforceable, but how do I get in-house counsel to agree to it. And that's a completely different questions. And if I were in-house, is there any way that I might agree to these language that's narrowly focused.

Audience:

Well, I've actually seen situations where the business people overrule the general counsel's office, and said pull back from this (unintelligible) and no advance conflict waiver policy. (Unintelligible) law firm (unintelligible).

Ted Becker:

The firm has particular expertise on this matter. We want them for that. Absolutely. Absolutely. So, lots of issues that can be discussed with regards to that.

Leaving that aside, the business aspect are professionalism issues. I will just point out that there's a couple of readings on the handout, the bibliography, kind of do a nice job of expressing both sides of this to the extent that advance conflict waivers that they're more widely used or viewed as and certainly impinging on an attorney's duty of loyalty, that's fundamental to the ethics rules. How big of a problem is that? And that's not something I can resolve today and I can't resolve it in the time that I talk about it with my students. I would just draw your attention to the Fox article that is on the bibliography.

In case you're wondering Seletha and Sue and I had sort of divided time here, so it wasn't quite an equal split, so I'm just about at the point where I don't want to impinge on the time that Sue is planning on. I'll be happy to take questions at the end. I've got other materials and matters that we can discuss afterwards. If you need to reach me, please reach us my email. I'm happy to chat about this at any point. But, I will turn the floor over to Sue.