September 26, 2016

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

Dear Ms. Hollins:

The Association of Corporate Counsel (ACC) and its California chapters are pleased to submit comments on the proposed amendments to the Rules of Professional Conduct of the State Bar of California. We write primarily to endorse California's approach to the issue of advance conflict waivers. California's practice of limiting the enforceability of broad, open-ended advanced conflict waivers should be continued, even as California aligns its conflict of interest rules with the ABA Model Rules.

ACC is a global bar association representing the interests of more than 40,000 in-house lawyers working for more than 10,000 organizations in over 85 countries. Our California chapters[1] have more than 5,300 members. In-house counsel have a unique interest in the issue of advance conflict waivers, as they are the lawyers who select outside counsel and negotiate the terms of engagement for their employer-clients. We think California has developed a sensible approach to the enforcement of advanced conflict waivers, and we support the state bar's proposed formulation of its conflicts of interest rule.

A. We Support the California Approach to Advanced Waivers over the ABA Model Rule Approach

As an association representing in-house counsel, we are pleased that California has proposed aligning its Rules of Professional Conduct with the ABA Model Rules. Consistent numbering and ordering of topics will make it easier for in-house counsel who temporarily practice in California to locate and apply the Rules of Professional Conduct to their activities in California. However, we do not support the ABA Model Rule approach to advanced conflict waivers as expressed in Comment 22 to ABA Model Rule 1.7. We are pleased that the Commission for the Revision of the Rules of Professional Conduct has proposed a different comment relating to advanced conflict waivers and support its adoption by the Board of Trustees and the California Supreme Court.

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[1] ACC has chapters in Sacramento, San Diego, San Francisco and Southern California (Los Angeles/Orange County).

Comment 22 to ABA Model Rule 1.7 supports the enforceability of broad, open-ended advance waivers of conflicts of interest against clients that are "experienced users of legal services" and represented by independent counsel.[2] While our members recognize the potential utility of advanced conflict waivers – both from the client perspective and the law firm's – the scope of many advanced conflict waivers has gone too far. For example, recent cases concerning the enforceability of advanced waiver conflicts have involved the following factual circumstances:

- After two law firms merged, the new firm ended up representing Client A in contentious litigation against Client B, a client that one of the former firms had a long-standing relationship with. The firm attempted to argue that an advanced waiver signed by Client B 16 years prior waived the concurrent conflict with Client A.[3]
- A law firm that had a long-standing relationship with Client A attempted to enforce an 11-year-old advanced waiver so that it could represent Client B in litigation where Client B had asserted counterclaims against Client A's subsidiary. The law firm had performed limited work for Client A's subsidiary at the time it agreed to represent Client B in the litigation.[4]
- A law firm attempted to enforce an advanced waiver of current and future conflicts from Client A that had been obtained without disclosing the reasonably foreseeable conflict that existed at the time of the waiver with Client B, which later became adverse to Client A in litigation.[5]

In all of these cases, state and federal California courts found that the advance waivers were not enforceable. The question of "informed consent" was key, notwithstanding the sophistication of the clients and their representation by in-house counsel, because these cases were decided under the California Rules of Professional Conduct.

As these cases illustrate, law firms feel they can push the bounds of informed consent when they are dealing with sophisticated clients, and the ABA Model Rule lowers the bar for the enforceability of advanced waivers against such clients. We question whether any client, regardless of sophistication or quality of representation, can ever truly give informed consent to an open-ended conflict waiver with no temporal or subject matter limits. This is why ACC fully supports the proposed Comment 8 to California's Rule 1.7, which does not explicitly condone the use of "general and open-ended" advance

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[2] Comment 22 to ABA Model Rule 1.7 addresses "Consent to Future Conflict." It states: "If the consent is general and open-ended, then the consent ordinarily will 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, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation."

[3] *Western Sugar Coop. v. Archer-Daniels-Midland Co.,* 98 F.Supp.3d 1074 (C.D. Cal. 2015)

[4] *Lennar Mare Island, LLC v. Steadfast Ins. Co.,* 105 F.Supp.3d 1100 (E.D. Cal. 2015)

[5] *Sheppard, Mullin, Richter & Hampton LLP v. J-M Manufacturing Co., Inc*., 244 Cal.App.4th 590 (January 29, 2016)

waivers against sophisticated clients. Of course, law firms are still free to request client consent to waive (consentable) conflicts when they do arise.

B. To Add Further Clarity to the Enforceability of Advanced Waivers, the State Bar Should Incorporate the *Visa* Factors into Comment 8 of Rule 1.7

As the examples above illustrate, law firms are attempting to enforce advanced conflict waivers in situations that are ethically questionable at best. If the State Bar of California and its Board of Trustees is looking to add greater clarity and protection for clients to its rule on conflicts of interest, we would recommend that Comment 8 incorporate the factors the used in *Visa U.S.A., Inc. v. First Data Corp.,* 241 F.Supp.2d 1100 (N.D. Cal. 2003) to evaluate whether the client signed an informed waiver of future conflicts. The factors are: (1) the breadth of the waiver, (2) the temporal scope of the waiver, (3) the quality of the conflict discussion between the attorney and the client, (4) the specificity of the waiver, (5) the nature of the actual conflict, (6) the sophistication of the client, and (7) the interests of justice. Notably, under the *Visa* factors, the sophistication of the client is but one factor of many to be considered in the enforceability of an advanced waiver. We think this strikes a reasonable balance between accommodating clients' interest in their attorneys' duty of loyalty and allowing lawyers to craft appropriate advanced waivers that allow them to be less restricted in the clients whom they can serve.

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Proposed Comment 1 to Rule 1.7 states that "loyalty and independent judgment are essential elements in the lawyer's relationship to a client." There is no exception to these duties for sophisticated clients. ACC is concerned that the ABA Model Rule policy of allowing open-ended advance conflict waivers to be enforced against sophisticated clients is steadily eroding those duties of loyalty and independent judgment. For this reason, ACC supports the adoption of California's Rule of Professional Conduct 1.7 as proposed.

Sincerely,

Amar Sarwal

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