Big Law Firms Gain Upper Hand with Advance Conflict-of-Interest Waivers

The power dynamic between major law firms and their corporate clients is shifting as firms increasingly rely on **advance conflict-of-interest waivers**. These legal tools allow firms to represent competing corporations simultaneously under specific circumstances, reshaping the legal landscape.

Recent court rulings have largely favored these waivers, granting law firms greater flexibility while redefining how conflicts of interest are managed.

Courts Warm to Well-Drafted Waivers

Over the past 18 months, federal courts have upheld the use of advance conflict waivers by leading firms such as **Kirkland & Ellis**, **Sullivan & Cromwell**, and **Paul Hastings**. These rulings have involved corporate giants like Coca-Cola and IBM, demonstrating a trend that contrasts with the more skeptical judicial stance seen just six years ago.

“Over time, firms have started drafting better waivers, so that clients feel like their interests are being better protected,” explains **Doug Richmond**, senior vice president at Lockton Companies, which advises law firms. This increased precision has led courts to view waivers more favorably.

Lawyers like **Cornell Law Professor W. Bradley Wendel** also observe this shift. Historically, courts rejected “broad blanket waivers” as overly vague. But well-crafted waivers, designed to protect clients’ interests while addressing potential conflicts, are now gaining traction.

What Are Advance Conflict Waivers?

Advance conflict waivers are provisions in retainer agreements allowing clients to pre-approve potential conflicts of interest. By agreeing in advance, clients enable law firms to represent other parties—even those with competing interests—under certain conditions.

Legal ethics rules, such as the **American Bar Association’s Model Rule 1.7**, prohibit lawyers from representing clients with conflicting interests unless the affected parties provide **informed consent in writing**. To ensure validity, firms must clearly outline the potential risks and scenarios where conflicts might arise.

The ABA has endorsed these waivers through a formal comment emphasizing that the more detailed the disclosure, the greater the likelihood of enforceability. As **Bruce Green**, director of the Louis Stein Center for Law and Ethics, notes, these comments effectively “blessed” the practice of advance waivers.

Key Cases Establishing Precedent

Several recent cases have clarified the scope and enforceability of advance waivers, setting significant precedents:

Micro Focus vs. Kirkland & Ellis

A federal court upheld Kirkland & Ellis’s ability to represent IBM in a copyright dispute against Micro Focus, despite a potential conflict. Judge **Vincent L. Briccetti** ruled that Micro Focus, a sophisticated corporate client, had provided “informed consent” in a waiver that explicitly allowed Kirkland to represent adverse parties in unrelated matters.

Coca-Cola vs. Paul Hastings

Paul Hastings faced Coca-Cola’s challenge over its representation of SuperCooler Technologies, which sued the beverage giant for over $100 million. Magistrate Judge **Robert M. Norway** rejected Coca-Cola’s objections, citing a clear and unambiguous waiver in the firm’s engagement letter.

Gregoire Tournant vs. Sullivan & Cromwell

In another notable case, Judge **Laura Taylor Swain** ruled in favor of Sullivan & Cromwell, which faced allegations of conflict during its representation of hedge fund manager Gregoire Tournant. The court found the firm's engagement letter adequately disclosed potential risks, and Tournant had independent counsel review the waiver.

Trends and Implications for Big Law

The growing acceptance of advance waivers represents a broader trend favoring Big Law firms. "IBM and SuperCooler are bellwether cases," says **Matthew Henderson**, a legal ethics partner at Hinshaw & Culbertson. These decisions reflect a growing willingness by courts to recognize waivers as valid tools for navigating ethical complexities in large-scale litigation.

However, not all rulings have gone in firms' favor. High-profile disqualifications—such as **Sheppard Mullin's 2018 removal from a $1 billion case** and **Quinn Emanuel's recent exclusion in a dispute involving X Corp.**—show that courts remain vigilant about vague or improperly disclosed conflicts.

Ethical Concerns: Are Waivers Undermining Client Loyalty?

Critics argue that advance waivers risk compromising fundamental legal ethics principles like **loyalty and fiduciary duty**. **Ashley London**, a professor at Duquesne University, warns that these waivers may prioritize firms' interests over clients'.

"Clients hire lawyers to be on their side," London emphasizes. In her research, she highlights how waivers feed into the perception that only large firms can handle complex corporate matters, potentially leaving clients feeling sidelined.

While courts increasingly uphold these waivers, London suggests that pushback will grow as clients encounter situations that test the limits of their consent. "Until a client reaches a breaking point and files for disqualification," she notes, firms may continue pushing the boundaries of ethical lawyering.

The Future of Advance Waivers

The evolving legal framework surrounding advance conflict waivers signals a **paradigm shift in attorney-client relationships**. As law firms refine their strategies and engagement terms, corporate clients must weigh the risks of granting advance consent against the benefits of retaining top-tier legal representation.

For firms, the challenge lies in striking a balance—crafting waivers that provide flexibility without eroding trust. As courts continue to shape the boundaries, this tug-of-war between ethics and business interests will remain a defining issue in the legal industry.

Don't be a silent ninja! Let us know your thoughts in the comment section below.