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Are Advance Waivers Enforceable? Maybe

On January 16, Michael Furey and Sylvia-Rebecca Gutiérrez wrote an article, "Are Advance Waivers Enforceable? Maybe," for the New Jersey Law Journal. The article discusses the use of advance waivers, in which a client agrees to waive conflicts its attorneys may encounter in the future, and identifies the issues that affect the enforceability of these waivers. Furey and Gutiérrez write that since future conflicts of interest can be difficult and often impossible to predict, "advance waivers may not be enforceable and attorneys must be careful in drafting them." Furey and Gutiérrez point out that ultimately a court, in considering the enforceability of an advance waiver, will balance the interests of the clients and the attorneys in a particular situation in an attempt to be fair, which adds to the unpredictability of advance waivers. According to Furey and Gutiérrez, an overriding concern is whether the client gave informed consent at the time of giving the advance waiver. The article points out that while challenging, "it is critical to analyze thoroughly when the waiver is sought whether an attorney can identify any possible relationship between a new representation and the existing or pre-existing representation." Furey and Gutiérrez write, "identifying the duration of the waiver" is also advised. "Courts view stale advance waivers less favorably because it is presumed that a conflict too far into the future could not be predicted, properly explained, and thus not amendable to informed consent," they explain in the article. "Procedures to periodically review and, where appropriate, renew advance waiver provisions are recommended."