



Advance Waiver Approved by Federal Court in Texas

An increasing number of law firms are asking clients to sign advance waivers that seek to minimize the risk of future disqualifications due to potential conflicts of interest, especially in the context of companies with many affiliates and large law firms with many offices. A recent federal court decision supported the enforceability of such advance waivers. In a decision of the United States District for the Northern District of Texas in *Galderma Labs, L.P. v. Actavis Mid Atl. LLC*, 2013 U.S. Dist. LEXIS 24171, the court concluded that Galderma gave informed consent to the representation by Vinson & Elkins of clients directly adverse to Galderma in substantially unrelated litigation and where there was no reasonable probability that confidential information would be used to Galderma's disadvantage. The court explained why the facts of this case supported that conclusion based on the application of four primary sources of authority: Comment 22 to Model Rule 1.7 of the ABA Rules of Professional Conduct, Comment 6 to Model Rule 1.0; ABA Formal Opinion 05-436; and §122 of the Restatement(Third) of the Law Governing Lawyers. The court distinguished the opinion in *Celgene Corp. v. KV Pharmaceutical Co.*, 2008 U.S. Dist. LEXIS 58735, in part because that decision did not give full effect to the 2002 amendments to the Model Rules, which recognize that under certain circumstances, general and open-ended consent to advance waivers of future conflicts may be valid.

Background

The *Galderma* case involved representation by V&E of Galderma Labs for employment related matters beginning in 2003. In 2012, while V&E was advising them on employment issues, the company filed an intellectual property lawsuit against Actavis which was also represented by V&E. Galderma Labs is a global company often represented by large law firms and also has an in-house legal department. Its affiliates have operations around the world and reported worldwide sales of approximately \$1.8 billion in 2011.

The crux of the issue presented to the court was whether or not a sophisticated client, represented by in-house counsel, gave informed consent when it agreed to a general, open-ended waiver of future conflicts of interest in V&E's 2003 engagement letter.

The company argued that it did not give informed consent when it signed the agreement. By contrast, V&E argued that the waiver language was reasonably adequate to advise Galderma of the material risk of waiving future conflicts.

The exact language of the open-ended waiver of future conflicts involved in this case is critical to an understanding of the court's reasoning. The engagement letter signed by the client provided in part as follows:

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 the 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 interest 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.

Reasoning of the Court

The court recognized the potential for abuse when motions to disqualify are filed by opposing parties. The court also recognized that large law firms would never be able to take on small, specialized matters for a client unless those firms could reasonably protect against the potential abuse by preserving their ability to practice in other areas where the client has chosen to retain different counsel.

ABA Model Rule of Professional Conduct 1.7(b) acknowledges an exception to the general prohibition against a lawyer representing a client if their representation involves a concurrent conflict of

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interest. The exception applies if four criteria are satisfied: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. (By comparison, the applicable Texas Rule does not require informed consent).

Much of the court's analysis addressed whether the consent provided in this case was informed consent. ABA Model Rule 1.0 defines informed consent as involving reasonable steps to ensure that the client or other person possesses information reasonably adequate to make an informed decision. See Rule 1.0, Cmt. 6. The three factors used to determine whether a disclosure is reasonably adequate to allow for informed consent pursuant to Rule 1.0 are first, whether the waiver identifies a course of conduct with regard to concurrent conflicts of interest. Second, whether the letter includes an explanation of the material risk of waiving future conflicts of interest. Third, the letter must explain an alternative course of conduct. The court found that an analysis of the facts of this case supported the conclusion that the company manifested informed consent.

Whether or not consent was informed turns on an objective standard of reasonable disclosure and reasonable understanding. An essential part of the analysis and reasoning of the Court was a determination that the company was a sophisticated client and that it had independent counsel when reviewing and agreeing to the advance waiver.

The waiver was reviewed by in-house counsel, regarded by the court as independent of Vinson & Elkins. Comment 6 to Rule 1.0 provides that "generally a client...who is independently represented by other counsel in giving their consent should be assumed to have given informed consent."

Conclusion

The court concluded that the company gave informed consent to V&E's representation of clients directly adverse to Galderma in substantially unrelated litigation. Because V&E's representation fell within the scope of that informed consent, V&E was not disqualified from representing Actavis.

This short ethics column cannot provide comprehensive treatment of the many nuances and factual details that are often determinative in these cases.

The concluding point that one should take away from this short overview is that advance waivers of potential future conflicts may be enforced by the courts if one carefully observes the applicable prerequisites controlling in one's jurisdiction. ♦

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