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## Broad Advance Waivers of Future Conflicts and *Galderma*

By Michael Downey

Lawyers sometimes doubt the effectiveness of advance waivers of future conflicts, particularly when the waiver is broad and does not specify potential adverse parties or representations. The recent trend nationally, however, is to enforce such waivers, at least where the client is sophisticated and has independent counsel evaluate the waiver.

One recent important decision evidencing this trend is *Galderma Laboratories, LP v. Actavis Mid Atlantic LLC*, Case No. 3:12-cv-2038 (N.D. Tex. Feb. 21, 2013). This column examines the enforceability of advance waivers of future conflicts, particularly in *Galderma*.

***As-Needed Conflict Waivers.*** Ordinarily lawyers seek conflict waivers when a disqualifying conflict – a conflict that must be resolved for a representation to continue – has arisen. Then, as discussed in my October 2012 column “Resolving a Conflict of Interest,” the Missouri Rules of Professional Conduct normally require the lawyer to obtain an affected client’s “informed consent confirmed in writing” to assume or maintain the conflicted representation. *See, e.g.*, Mo. S. Ct. R. 4-1.7(b)(4).

For an as-needed conflict waiver to be effective, the lawyer must adequately address three aspects with each affected client: (1) the circumstances giving rise to the conflict; (2) the risks created by those circumstances; and (3) reasonably available alternatives to the conflicted representation.

***Advance Waivers of Future Conflicts.*** When a lawyer seeks an advance consent to future conflicts, instead of an as-needed waiver of a present conflict, uncertainty about future circumstances and risks complicate obtaining a client’s informed consent. The lawyer and client must speculate who may be adverse or what representations may arise, and there is an increased likelihood the conflict that actually does arise was not previously considered.

Adopted word-for-word from ABA Model Rule 1.7, Missouri Rule 4-1.7 Comment [22] addresses this complexity. Comment [22] warns the effectiveness of such an advance waiver of future conflict should “generally [be] determined” based upon six factors:

- the extent to which the client reasonably understood the material risks that the waiver entails;
- the comprehensiveness of the explanation of future circumstances and the “foreseeable adverse consequences” (that is, risks) of those circumstances;
- the client’s familiarity with the foreseeable risks;
- the specificity of the consent;
- the experience and sophistication of the client as a user of legal services; and

- whether the client was represented by independent counsel.

In considering the effectiveness of advance waivers, lawyers must first ensure a particular conflict is waivable. Comment [22] warns, “In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under Rule 4-1.7(b).” Thus, before evaluating whether an advance waiver is effective, the lawyer must first confirm the conflict can be waived.

With this background, we turn to *Galderma*.

***Background of the Galderma-V&E Dispute.***

In *Galderma*, Galderma and affiliated plaintiffs moved to disqualify Vinson & Elkins, LLP (“V&E”) from representing the defendant Actavis in intellectual property (“IP”) litigation because, when V&E started representing Actavis in the litigation, V&E was still representing Galderma in other unrelated matters.

In 2003, when Galderma retained V&E to provide legal advice on employment law and employee benefit issues, Galderma’s general counsel signed a V&E engagement letter that contained the following advance waiver:

We [V&E] understand and agree that this is not an exclusive agreement, and you [Galderma] 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 that 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

interests 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.

In June 2012, represented by the megafirm DLA Piper, Galderma filed an IP lawsuit against Actavis. Without consulting Galderma, V&E then filed an answer and counterclaim for Actavis, a six-year client of V&E.

Upon learning V&E represented Actavis in the IP litigation, Galderma asked V&E to withdraw. V&E refused, instead terminating its representation of Galderma. Galderma then moved to disqualify V&E from representing Actavis in the IP lawsuit.

V&E sought to avoid disqualification by claiming it had already secured Galderma’s consent to the conflicted representation through the 2003 advance waiver. The district court characterized the “crux” of the issue as “whether or not Galderma, 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.”

***Analysis of the Galderma Advance Waiver.***

To analyze this issue, the *Galderma* court ignored a more permissive Texas rule and looked to national law – ABA Model Rule 1.7, which Missouri Rule 4-1.7 copies in all material respects – to decide whether the advance waiver permitted V&E to continue representing Actavis. Clearly the *Galderma-Actavis* lawsuit was not anticipated in 2003: Actavis was not even a V&E client. Nevertheless, the *Galderma* court found V&E’s broad, open advance waiver adequately addressed the three key elements for a conflict waiver – what I call

*circumstances, risks, and alternatives* – at least for such a sophisticated client.

Of particular import, the court found the 2003 advance waiver gave V&E “wide ranging freedom to represent other clients, including those whose interests conflict with Galderma,” as long as the matter giving rise to the conflict was not “substantially related to the representation of Galderma” and there was no “reasonable probability that confidential information Galderma furnished could be used to its disadvantage.”

Galderma also argued the advance waiver was too broad and vague to evidence informed consent. The court rejected this argument, emphasizing that 2002 amendments to Comment [22] allow enforcement of advance waivers that do not specify potential adverse parties or representations. The court elaborated, “While specifying a particular party or type of legal matter does make it more likely that the waiver will be effective for a wider range of clients, using a general framework for determining a course of conduct does not render the waiver unenforceable.”

The *Galderma* court also emphasized that V&E’s engagement agreement told Galderma its alternative to accepting the advance waiver. Galderma was “free to retain any other counsel of [its] choosing.”

Upon finding the three key elements for informed consent in the waiver, the court next assessed Galderma’s sophistication both as a

company and as user of legal services. Galderma was a global leader in its industry, with approximately \$1.7 billion in gross sales. Galderma also employed a variety of legal counsel including several large firms, had filed more than 5500 patent applications, and had litigated numerous cases (including very complex intellectual property cases) in numerous state and federal courts.

The court then determined Galderma had independent counsel evaluate the waiver. Galderma’s general counsel, a sophisticated lawyer with twenty years’ experience, had signed the engagement agreement.

These and other considerations led the court to deny Galderma’s motion to disqualify V&E.

*Conclusion.* *Galderma* and Rule 4-1.7 comment [22] allow lawyers to rely upon broad, general advance waivers of future conflicts. But a lawyer should take care to ensure that the conflict is waivable, that the waiver itself is complete and consents to the desired representation, and that other factors – such as the sophistication of the client and presence of independent counsel – favor enforcement of the advance waiver.

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