Nostradamus, Esquire?

Making the Enforceability of Advance Conflict Waivers by Sophisticated, Independently Represented Clients More Predictable for Non-Clairvoyant Lawyers

by Patrick Matusky and Francesco P. L. Suglia

Few would argue that there have not been significant changes in the practice of law since the American Bar Association (ABA) Canons of Professional Ethics were adopted more than a century ago, or even during the few short decades since the New Jersey Supreme Court adopted New Jersey's original version of the ABA's Model Rules of Professional Conduct in 1984.

Gone are the days when the predominant business model in the profession was individual lawyers or small law firms representing clients of relative lesser sophistication, servicing all of the client's legal needs. Increasingly, the market for legal services has become dominated by larger, more sophisticated clients, especially large corporations, frequently with in-house legal staffs. These larger, more sophisticated clients often have widespread business operations and a great variety of diverse legal problems. No longer do these clients look to a single law firm, much less a single lawyer, to satisfy all of their legal needs. These clients routinely hire different law firms, in different jurisdictions, with competence in different areas of law. They also frequently have and exercise significant bargaining power in the discussions relating to the business terms of an engagement with outside counsel, as well as access to the advice of independent counsel in negotiating and agreeing to those terms.

These developments in the market for legal business have had a dramatic impact on law firms. In response to the expanding business needs of clients, law firms themselves have grown both geographically and in the scope of their practices. They are now frequently widespread organizations representing many corporate clients, often on discrete matters that have little or no impact on other aspects of the corporation's diverse operations. These changes on both sides of the equation in the practice of law have resulted in a proliferation of potential lawyer-client conflicts, many in situations where the core values of loyalty and confidentiality are not threatened in the same direct and serious way they were when the canons and rules were adopted and the predominant business model was very different.

In an effort to address this proliferation of conflicts, law firms have increasingly included in engagement letters and retainer agreements provisions that have come to be known as advance conflict waivers. By these provisions, lawyers and clients seek to establish their own set of ground rules that will govern conflicts that may arise in the future, in the event the law firm desires to undertake a new engagement adverse to the client. Because of the inherent inability to foresee the precise circumstances in which all such future conflicts might arise, these advance conflict waiver provisions may be written in broad, open-ended terms. They typically reflect the client's

informed consent to waive any future conflict to allow the law firm to be adverse to the client (even in litigation), provided the future matters are not substantially related to the firm's work for the client and do not implicate confidential, non-public information obtained by the firm in the course of its representation that could be used to the disadvantage of the client.

Unfortunately, for New Jersey lawyers there is little authority in the state providing guidance on the validity and enforceability of these types of open-ended advance conflict waiver provisions. No New Jersey judicial decision or opinion of the New Jersey Advisory Committee on Professional Ethics squarely addresses the issue. The few cases applying the New Jersey Rules of Professional Conduct that do address the question were decided by federal courts.[1]

Celgene Corp. v. KV Pharmaceutical Co. held open-ended advance conflict waivers were unenforceable because lawyers who secured the waivers were not clairvoyant and did not specify a particular party for whom, or matter in which, those lawyers might later be adverse to the waiving client.[2]

Because *Celgene* is not consistent with the current approach of the ABA, and its rationale and holding may disserve the interests of clients and lawyers alike, the New Jersey courts and ethical authorities applying the New Jersey Rules of Professional Conduct should revisit *Celgene*. A refusal to enforce an open-ended advance conflict waiver given under the conditions recited may afford a degree of paternalistic protection to sophisticated, independently represented parties that is unnecessary. Likewise, it may operate to deprive clients of freedom in the selection of counsel—both those who might give an advance waiver to secure the representation of a particular firm and those who might later seek to engage the lawyer on the basis of such a waiver.

Refusal to enforce such an open-ended advance conflict waiver given by such a sophisticated, represented client, may deprive another client (one perhaps that has been represented by the firm for many years) of the firm's representation in a subsequent matter adverse to the waiving client, even though the subsequent matter is entirely unrelated to the prior matter. Such a denial of freedom of choice in selecting counsel may result even though there is no risk of adverse effect on the representation of either client or of compromise of confidential information. A refusal to enforce these types of advance conflict waivers in these circumstances will discourage law firms from accepting new clients and deprive clients of that which the conflicts rules seek to secure to them—loyalty.

Given the developments in the legal profession recited above, and the case law that has developed in the federal courts, there is a need in New Jersey to reassess the question of the enforceability of open-ended advance conflict waivers in the circumstances before the court in *Celgene*. Many considerations weigh in favor of finding these provisions enforceable where the client: 1) is a sophisticated, experienced user of legal services; 2) is independently represented by other counsel in giving consent; and 3) the consent is limited to future conflicts arising from matters not substantially related to the subject matter of the representation.

The ABA's Approach to Advance Conflict Waivers

The ABA's position regarding the enforceability of open-ended, advance conflict waivers has gravitated from an initial hesitancy to a recognition that such waivers may be effective.

ABA Opinion 93-372

In 1993, the ABA Committee on Ethics and Professional Responsibility issued an opinion on advance conflict waivers.[3] The opinion was premised on the propositions that an advanced waiver "must meet all the requirements of a waiver of a contemporaneous conflict of interest...."[4] The opinion stated, "if the waiver is to be effective with respect to a future conflict, it must contemplate the particular conflict with sufficient clarity so that the client's consent can reasonably be viewed as having been fully informed when it was given."[5] The opinion concluded: "Given the importance that the Model Rules place on the ability of the client to appreciate the significance of the waiver that is being sought, it would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny."[6] The opinion also concluded that in some circumstances, the lawyer may have to identify the nature of the future matter.

Although the 1993 ABA opinion acknowledged that clients differ in their level of sophistication, it did not vary its conclusions regarding the likely effectiveness of advance conflict waivers with respect to sophisticated versus unsophisticated clients, or clients with or without independent representation. To the contrary, the specific client used in the opinion to explain the committee's conclusion was one that most would consider quite sophisticated, and that most would expect to have the advantage of in-house counsel:

> For example, a prospective waiver from a client bank allowing its lawyer to represent future borrowers of the bank could not reasonably be viewed as permitting the lawyer to bring a lender-liability or a RICO action against the bank, unless the prospective waiver explicitly identified such drastic claims.[7]

ABA Opinion 05-436

In 2002, the ABA amended Model Rule 1.7 to replace the prior "consent[] after consultation" standard for waivers of concurrent conflicts with the current requirement that "each affected client give[] informed consent, confirmed in writing." The ABA's official comments to the amended rule in Comment 22 specifically addressed advance waivers.[8] The comment is much more flexible than the 1993 ABA opinion in its approach to the enforceability of advance conflict waivers when given by experienced users of legal services represented by independent counsel. Three years later, in 2005, the ABA issued a new opinion on the subject of advance waivers, by which it withdrew its 1993 opinion.[9]

Similar to the 1993 ABA opinion, the 2005 ABA opinion recognizes that the effectiveness of advance waivers "is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails[,]" and that, therefore, "general and open-ended" waivers, generally, are ineffective.[10] Unlike the prior opinion, however, the 2005 ABA opinion, echoing the approach of Comment 22, provides:

> if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, [a general and open-ended waiver] 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.[11]

New Jersey Law Leading Up to the Federal Court Decisions

The 2005 ABA opinion gave jurisdictions like New Jersey, that have historically looked to the ABA for guidance on ethics issues, the ability to continue to do so, and, at the same time, adopt a more practical and more predictable approach to advance waivers given by sophisticated, independently represented clients. Moreover, by the time *Celgene* was decided in July 2008, the law of New Jersey with respect to ethical obligations in analogous contexts had developed in such a way that there was sufficient justification for following the 2005 ABA opinion.

By the time of the *Celgene* decision, the New Jersey Advisory Committee on Professional Ethics had already endorsed consideration of the client's level of sophistication in determining the enforceability of waivers of existing conflicts.[12] Moreover, by then, the New Jersey Supreme Court and the Appellate Division had recognized the following factors, among others, to be considered in determining the enforceability of provisions of a retainer agreement:

1. the extent to which the retainer agreement is negotiated;
2. the client's level of sophistication;
3. the client's experience in retaining counsel; and
4. whether the client was represented by either in-house or outside counsel in negotiating the retainer agreement.[13]

Granted, these factors had been applied only to determine the enforceability of provisions requiring the client to give the attorney fair notice before terminating the representation and waiving the client's right to a jury in disputes with its attorney.[14] Nonetheless, the 2005 ABA opinion opened the door to having these factors considered in the context of assessing the enforceability of advance conflict waivers by sophisticated, represented clients.

In its 2006 decision in *Tax Authority, Inc. v. Jackson Hewitt, Inc.*,[15] the Court made clear the "great weight" to be given to the ABA's interpretation of the Model Rules when construing corresponding New Jersey Rules of Professional Conduct.[16] This is especially true where, as here, the New Jersey rule is virtually identical to the Model Rule.[17]

The amended Model Rule 1.7 requires that for a conflict waiver to be effective "each affected client [must] give informed consent, confirmed in writing." The New Jersey rule adds only the language: "after full disclosure and consultation." While, at first blush, this added language may appear to create a higher threshold than the Model Rule, it does not.

The Report of the New Jersey Supreme Court Committee on the Model Rules (commonly referred to as the Debevoise Committee) makes this clear. In discussing a prior version of Model Rule 1.7, the Debevoise Committee concluded that "consultation" is "something less than full disclosure," and that "full disclosure" is disclosure sufficient to "allow a client to give an informed consent."[18] Thus, where there is "informed consent," as required by the Model Rule, it necessarily follows that there has been "full disclosure" and, in turn, "consultation" under the New Jersey rule. Under both the Model Rules and the New Jersey RPCs, "informed consent" means "agreement…to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[19]

Although, in *Tax Authority, Inc.*, the Court held that current New Jersey RPC 1.8(g) rendered *per se* invalid the advance consent of multiple clients to abide by a majority decision in respect of an aggregate settlement, the Court also recognized the substantial practical considerations that lean in favor of relaxing that rule.[20] Based on those considerations, the Court referred the issue to the Commission on Ethics Reform for further review and recommendation to the Court. The Court's actions reflect its recognition that ethical rules and guidelines should take

into consideration the practicalities and realities of modern practice.

In light of the foregoing, when the *Celgene* case was before the federal district court, the stage was set for that court, applying the New Jersey rules, to reject unambiguously the clairvoyance-requiring approach of the 1993 ABA opinion to open-ended advance conflict waivers given by sophisticated parties represented by independent counsel. Unfortunately, *Celgene* did not seize that opportunity.

The Federal Court Decisions

Celgene cited and relied upon *In re: Congoleum Corp.,* and distinguished *In re: Gabapentin Patent Litigation*.[21]

In *Celgene*, the plaintiff in a pharmaceutical patent lawsuit moved to disqualify the law firm representing the defendant. The law firm had represented the plaintiff in a broad range of matters for over four years, including patent, securities, transactional and litigation matters. In the context of those representations, the plaintiff twice executed retainer agreements containing advance conflict waiver language that permitted the law firm to be adverse to the plaintiff in future matters, including litigation, provided the law firm agreed not to accept any matter that would be either substantially related to the law firm's representation of the plaintiff or impair the confidentiality of the plaintiff's confidential information. The first retainer agreement was executed by the plaintiff's "assistant secretary" in 2003, and the second by the plaintiff's "chief counsel" in 2006.

In 2007, the plaintiff brought a patent infringement action against the defendant. While still representing the plaintiff in other matters, the law firm was retained by the defendant to defend it in the patent action. The plaintiff moved to disqualify its counsel from representing the defendant. In opposition to the disqualification motion, the firm argued that because the plaintiff was a sophisticated client that had the advice of in-house counsel in executing the waivers, and the waivers were limited to matters that were not substantially related to the firm's work for the plaintiff and would not impair its confidential information, the plaintiff's advance conflict waiver should be deemed a product of informed consent and enforceable, regardless of whether the law firm consulted with the plaintiff beyond the language of the retainer agreements themselves. The court rejected the argument and disqualified the defendant's counsel.

The *Celgene* court found the Third Circuit's decision in *Congoleum* "controlling authority." Quoting from *Congoleum*, and apparently reading that case to impose a standard for advance conflict waivers that is more stringent than the informed consent standard of RPC 1.7(b), the *Celgene* court concluded that "a prospective waiver will be ineffective in the absence of truly informed consent."[22] The *Celgene* court construed *Congoleum* to require the law firm to have engaged in "meaningful consultation" with the plaintiff about potential conflicts before the advance waiver could be deemed to have been given with the requisite "truly informed consent."

Celgene's reading of *Congoleum* is questionable. The written conflict waivers at issue in *Congoleum* were executed not by the alleged waiving clients (*i.e.*, approximately 10,000 *individual* asbestos injury claimants), but rather, by *attorneys who represented those individuals*. In deeming those waivers ineffective, the court held that:

> [t]he record [did] not establish that [the claimant's counsel] had the authority to issue waivers on behalf of the thousands of individual claimants.... In addition, the record [did] not include the information, if any, that [was] furnished to the individuals nor does it indicate whether they were given the opportunity to object....[23]

Thus, the actual holding in *Congoleum* as it relates to advance conflict waivers is the uncontroversial proposition that, regardless of what other requirements may govern the effectiveness of such waivers, as an absolute minimum, there must be evidence that the waiving clients knew of the waiver and authorized it.

The Third Circuit in *Congoleum* did say that "the effect of a waiver, particularly a prospective waiver, depends upon whether the clients have given truly informed consent."[24] But, the court's insertion of the word "truly" before the words "informed consent" seems little more than artistic license. Certainly, the *Congoleum* decision contains no analysis that would support a conclusion that some standard higher than informed consent (*i.e.*, truly informed consent) governs the effectiveness of a waiver of either an existing or a prospective conflict. Nonetheless, the *Celgene* court repeatedly emphasized *Congoleum*'s reference to "truly informed consent," and construed those words to require something more than the rules themselves require. Without addressing the above-quoted language from the Debevoise Committee report that suggests otherwise, the *Celgene* court interpreted the *Congoleum* truly informed consent standard as establishing a "consultation" requirement without which there could be no informed consent, regardless of the client's sophistication or separate representation.

In *Celgene*, there was no evidence in the record that the law firm engaged in any consultation with the plaintiff about the advance conflict waivers separate and apart from the language of the retainer agreements themselves. Regard-

ing the retainer agreements, the court found they did not constitute sufficient consultation because in the court's view they: 1) were "very open-ended and vague[,]" 2) did not communicate "adequate information or explanation about the risks of the proposed course of conduct, with regard to concurrent conflicts of interest[,]" and 3) did not "explain… reasonably available alternatives…."[25]

The court also placed considerable weight on its finding that the language of the waiver limiting its scope to matters not "substantially related" to the subject matter of the law firm's representation of the plaintiff was "ambiguous." Of course, if that is so, then the Rules of Professional Conduct themselves are ambiguous. RPC 1.9 uses exactly that phrase, "substantially related," in defining the scope of former client conflicts:

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a *substantially related* matter in which that person's interests are materially adverse to the interests of the former client….[26]

The New Jersey Supreme Court has defined the meaning of phrase "substantially related":

> matters are deemed to be 'substantially related' if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation.[27]

Because the legal profession is required to comply with the substantially related standard in discerning and avoiding former client conflicts, there is no reason why that same phrase cannot provide a workable standard for defining the scope of an advance conflict waiver in an engagement letter with a sophisticated, represented client.

Despite the court's attempt in *Celgene* to align its decision with the 2005 ABA opinion, the decision is, in fact, at odds with that opinion, and reflects an adherence to the since-rejected 1993 ABA opinion's clairvoyance-requiring standard. The opening sentence of the final paragraph of *Celgene's* analysis of the retainer agreements demonstrates this: "In the instant case …, neither waiver provision specifies a particular client or a particular matter."[28] The *Celgene* court's reliance upon the earlier district court decision in *Gabapentin* also serves to demonstrate this point.

In *Gabapentin*, two lawyers who previously represented a defendant in a patent infringement action moved laterally to a law firm that at the time represented the plaintiff, but in a different lawsuit. Before the lateral move was completed, the law firm secured the consent of the defendant to waive any conflict that might arise from the lawyers joining the law firm, including any conflict in connection with the *Gabapentin* matter. The law firm was subsequently engaged to represent the plaintiff in *Gabapentin*, and the defendant the lateral lawyers had previously represented moved to disqualify. The court found the waiver effective, because the law firm's letter "clearly informed [the defendant] that it might represent [the plaintiff] in the *Gabapentin* matter, and [the defendant] was represented by sophisticated counsel in reaching its decision to consent."[29]

The court in *Celgene* distinguished *Gabapentin* because in *Celgene*, unlike *Gabapentin*, "neither waiver provision specifies a particular client or a particular matter."[30] Again emphasizing the more-demanding standard of truly informed consent, the court said, "[w]hen waiver provisions clearly anticipate a specific conflict, they provide strong evidence that the client's consent was truly informed."[31] Thus, the *Celgene* court's retreat to the 1993 ABA opinion appears evident.

Conclusion

It should be noted that the *Celgene* court was faced with troubling facts that likely impacted its decision, not the least of which was the testimony of one of the law firm's attorneys to the effect that he understood the plaintiff's broad advance conflict waiver to mean that "we would not represent any parties adverse to my client in intellectual property matters."[32] Thus, *Celgene* may be an example of bad facts making problematical law. Perhaps under more favorable (or less unfavorable) facts, future courts and ethical authorities addressing advance conflict waivers under the New Jersey Rules of Professional Conduct will consider the practical impact of the clairvoyance-requiring approach of a 1993 ABA opinion on the modern practice of law, as well as the other policy considerations discussed above—including a client's right to counsel of its choosing—in adopting a more flexible approach to the enforceability of such waivers.

There is sufficient justification and authority for New Jersey to accept the proposition that open-ended advance conflict waivers are enforceable where the waiving client is a sophisticated client represented by independent counsel and the waiver is limited to matters not substantially related to the representation of the waiving client. Under this standard, the law of advance conflict waivers would not only be more predictable, but it would continue to protect those who actually need protection, while affording greater flexibility and freedom in the selection of counsel for those who do not. ⚖

Endnotes

1. *In re: Congoleum Corp.*, 426 F.3d 675 (3d Cir. 2005); *Celgene Corp. v. KV Pharmaceutical Co.*, Civil Action No. 07-4819 (SDW), 2008 WL 2937415 (D.N.J. July 29, 2008) (Arleo, U.S.M.J.) (not for publication); *In re: Gabapentin Patent Litigation*, 407 F. Supp. 2d 607 (D.N.J. 2005).
2. *Celgene*, 2008 WL 2937415 at *4-5.
3. ABA Formal Op. 93-372 (April 16, 1993).
4. *Id*. at 1.
5. *Id*.
6. *Id*. at 4.
7. *Id*.
8. ABA Model RPC 1.7, Comment 22.
9. ABA Formal Op. 05-436 (May 11, 2005).
10. *Id*. at 2.
11. *Id*.
12. N.J. Eth. Op. 679 (1995) ("The sufficiency of the disclosure and consultation, and thus the adequacy of the waiver, depends on the facts of the case, including, significantly, the sophistication of the parties.").
13. *Cohen v. Radio-Electronics Officers Union, Dist. 3, NMEBA*, 146 N.J. 140, 160-161 (1996); *Kamaratos v. Palias*, 360 N.J. Super. 76, 84-85 (App. Div. 2003).
14. *Cohen*, 146 N.J. at 160-161; *Kamaratos*, 360 N.J. Super. at 84-85.
15. *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 187 N.J. 4 (2006).
16. *Tax Authority, Inc.*, 187 N.J. at 21.
17. RPC 1.7(b)(1).
18. Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct, June 24, 1983 (Debevoise Report), reprinted in Kevin Michels, *New Jersey Attorney Ethics*, at p. 1283 (Gann 2011).
19. RPC 1.0(e); Model Rule 1.0(e).
20. *Tax Authority, Inc.*, 187 N.J. at 23.
21. *Supra* at note 1.
22. *Celgene*, 2008 WL 2937415 at *4.
23. *Congoleum*, 426 F.3d at 690.
24. *Id*. at 691.
25. *Celgene*, 2008 WL 2937415 at *8.
26. RPC 1.9(a).
27. *City of Atlantic City v. Trupos*, 201 N.J. 447, 467 (2010).
28. *Celgene*, 2008 WL 2937415 at *10.
29. *Gabapentin*, 407 F. Supp. 2d at 612.
30. *Celgene*, 2008 WL 2937415 at *10.
31. *Id*.
32. *Id*. at *10; *13.

Patrick Matusky *is a partner in the trial and professional liability practice groups of Duane Morris LLP, and the loss prevention partner for the firm's Cherry Hill office. He regularly represents lawyers and law firms in professional liability and responsibility matters.* ***Francesco P. L. Suglia*** *is an associate in Duane Morris' Cherry Hill office and a member of the firm's trial group, and regularly represents lawyers and law firms in professional liability and responsibility matters.*