

Conflicts of Interest

A 'Safe Harbor' for Future Conflicts Waivers



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Summary and Introduction

Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC, ___ F. Supp.2d ___, 2013 WL 655053, 29 Law. Man. Prof. Conduct 114 (N.D. Tex. Feb. 22, 2013), enforced a relatively short form future conflicts waiver given by a legally sophisticated business client after review by the client's in-house counsel. Whether this opinion is regarded as a step forward, a step back, or just marching in place,¹ it raises the question of how

¹ Other recent opinions addressing future conflicts waiver questions include: *In re Shared Memory Graphics LLC*, 659 F.3d 1336, 27 Law. Man. Prof. Conduct 634 (Fed. Cir. 2011); *GSI Commerce Solutions, Inc. v. BabyCenter, LLC*, 618 F.3d

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much disclosure should clearly be "more than enough" for future conflicts waivers to pass muster in the absence of truly extraordinary circumstances. This article seeks to answer that question.

After first discussing *Galderma*, the article identifies both the general preconditions for and general subjects that might be included in future conflicts waivers. Following these two sections, the article then provides draft language that should, in our opinion, provide a safe harbor for such waivers.

We do not mean to say that a letter that does not meet all of the preconditions or address all of the subjects identified in this article will or should be unenforceable. As already noted, our goal is to present a letter that will be "more than enough" for future waivers to be effective. We also want to stress that there is no pride of au-

204, 26 Law. Man. Prof. Conduct 529 (2d Cir. 2010); *Marks Const. Co., Inc. v. Huntington Nat. Bank*, 2010 BL 73716, 2010 WL 1404590 (N.D. W. Va. April 2, 2010); *United States v. Hatfield*, 2009 BL 246123, 2009 WL 3806300 (E.D.N.Y. Nov. 13, 2009); *Celgene Corp. v. KV Pharmaceutical Co.*, 2008 BL 158060, 2008 WL 2937415, 24 Law. Man. Prof. Conduct 427 (D.N.J. July 29, 2008); *UMG Recordings Inc. v. MySpace*, 526 F. Supp.2d 1046, 24 Law. Man. Prof. Conduct 9 (C.D. Cal. 2007). See also ABA Formal Ethics Op. 05-436; Oregon Formal Ethics Op. 2005-122; New York City Bar Association Formal Ethics Op. 2006-1.

thorship here. What is important is the substance of the communication, not the specific words used.

The Galderma Decision

Before Vinson & Elkins (“V&E”) began to represent Galderma in several employment law matters that were factually and legally unrelated to the subsequent litigation brought by Galderma against Actavis, Galderma had signed a so-called advance conflict waiver provided by V&E which stated in part:

We [i.e., V&E] understand and agree that this is not an exclusive agreement, and you [i.e., 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 yours 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.

(*Galderma*, ___ F. Supp.2d ___, at *1.) The court then analyzed whether this advance waiver gave enough information to support informed consent and whether the information was reasonably adequate for the particular client.

In upholding the waiver, the court noted the following:

- The waiver included “agree[ment] to a course of conduct” for handling conflicts by specifying when the firm would and when it would not handle matters for other clients with adverse interests. (*Id.* at *7.)

- The waiver included an “explanation of the material risk of waiving future conflicts of interest” because it specified that the firm would be able to represent clients adverse to plaintiff. (*Id.* at *8.)

- The waiver explained “reasonably available alternatives to the proposed course of conduct” by specifying that plaintiff could retain any other counsel of its choosing. (*Id.* at *9.)

With regard to *Galderma*, the particular client giving the waiver, the court discussed the company’s substantial size and sophistication, noting how *Galderma* held itself out to the general public, its revenues, the quantity of its patent applications, and the fact that *Galderma* “routinely retains different, large law firms to advise the corporation on various matters across the country.” (*Id.* at *11.)

The court also noted that *Galderma*’s in-house counsel, who had reviewed and approved the waiver, was an attorney with over 20 years’ experience. As the court stated: “When a client has their own lawyer who re-

views the waivers, the client does not need the same type of explanation from the lawyer seeking the waiver because the client’s own lawyer can review what the language of the waiver plainly says and advise the client accordingly.” (*Id.* at *14.)²

The court effectively decided this case under the ABA Model Rules even though it took note of the fact that the Texas Rules of Professional Conduct do not require any informed consent for concurrent representations of adverse parties in unrelated matters. (*Id.* at *4.) The court distinguished *Celgene Corp. et al. v. KV Pharmaceutical Co.*, 2008 BL 158060, 2008 WL 2937415, 24 Law. Man. Prof. Conduct 427 (D.N.J. July 29, 2008), the principal case cited by *Galderma*, on the ground that New Jersey law provides a more stringent standard for informed consent than the ABA Model Rules. (*Galderma*, ___ F. Supp.2d ___, at *9.)

Effective Future Conflicts Waivers: Nonsubstantive Terms and Preconditions

Some of these nonsubstantive terms and preconditions for effective future conflicts waivers are clear from *Galderma* itself. Some are not.

Waiving Clients Should Have Business AND Legal Sophistication

As *Galderma* makes clear, a client with a high degree of business and legal sophistication is much more likely to be able to give an effective waiver. (*Id.* at *10.) This makes sense because such a client is more likely to understand both what the client is in fact waiving and how that waiver might affect the client in the future. In other words, any consent is more likely to be “informed.”

We stress both business and legal sophistication because they are not necessarily the same thing. Although one New York City Bar ethics opinion appears to state in a footnote that mere access to counsel makes a client sophisticated for at least some purposes,³ a client that not only engages in sophisticated business matters but has also had substantial and multiple interactions with lawyers (or even multiple law firms) is a much better candidate for a future conflicts waiver. It also seems likely that such a client will more readily have access to multiple law firms, at least some of which will not require a future waiver or will be more willing to limit the scope of a waiver.

Review by Independent Counsel

No black-letter rule requires independent counsel review before a present or future conflicts waiver letter can be effective. Similarly, the fact of independent counsel review will not necessarily save an otherwise

² The court also noted that in-house counsel had previously approved another future conflicts waiver for another firm in another matter. (*Id.* at *14.)

³ New York City Bar Association Formal Ethics Op. 2006-1, n. 1.

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deficient disclosure. Nonetheless, and as *Galderma* and many other cases make clear, actual review by independent counsel helps a great deal.⁴ As with client sophistication, review by independent counsel makes it much more likely that the client will in fact have understood what it was being asked to waive.

To the extent that sophisticated clients, as we have defined them, tend to have in-house counsel who interact with outside counsel in the engagement and conflicts waiver letter process, this precondition will often be met without any special effort on the law firm's part. Absent in-house counsel, however, a law firm that wants to rely upon a future conflicts waiver should at least expressly recommend (and perhaps in some situations require) such review.

Conspicuousness

Some law firms use fairly short engagement/conflicts waiver letters in which all of the language can reasonably be said to be conspicuous. Others use separate engagement and conflicts waiver letters, with the result that the conflicts waiver provisions clearly stand out. And still others use quite lengthy letters which cover both engagement letter and conflicts waiver issues and in which the existence and effect of the waiver language may go unnoticed.

The benefits of "conspicuousness" can and should be met in part through a verbal discussion of conflicts issues between the client and the law firm. Regardless of those discussions, however, clearly conspicuous waiver language will make it more difficult for the client to argue at a later time that it was not in fact aware of what it was giving up.

Internal Screening

In almost all instances, the lawyers at a firm who work for a client that is asked for a future conflicts waiver will not be the same lawyers who would expect to represent other clients in matters adverse to that client. At least in part, this follows as a result of lawyer specialization and of what it means for matters to be unrelated. It also follows from the fact that the pressures on the lawyer-client relationship are likely to be greater if the same lawyer is both friend and enemy.

It therefore is minimally burdensome for the law firm to guarantee or agree that the lawyers who work for a client from whom a waiver is being requested will not simultaneously work on any matter adverse to that client and will not share files or discuss their respective assignments with lawyers who do. Where practicable, this kind of voluntary screen should also include paralegals and support staff.

Client Signatures and Other Formalities

Some, but not all, states require client signatures for conflicts waivers. Better practice is always to get the signature—whether by traditional mail, facsimile, or email. And if independent counsel has been consulted,

⁴ *Galderma*, ___ F. Supp.2d ___, at *11-12. See also *General Cigar Holdings, Inc. v. Altadis, S.A.*, 144 F. Supp.2d 1334 (S.D. Fla. 2001); Restatement (Third) of the Law Governing Lawyers § 122, Comment g(iv) ("Decisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel, such as by inside legal counsel, rarely hold that a conflict is nonconsentable.").

either that counsel's signature or at least a reference to that consultation should be present as well.

Whether considered as a "formality" or as part of the substance of the waiver letter, clients should also be told that they should not sign the letter unless they are satisfied that they understand the letter in full and that they have no unanswered questions or concerns about the conflicts waiver or its effects.

Effective Future Conflicts Waivers: the Substance

Excluding Non-Waivable and Extreme Conflicts

Some present conflicts cannot be waived. To the extent that a future waiver attempts to obtain client consent to a non-waivable conflict, it will necessarily be no more effective than a present waiver. (Oregon Formal Ethics Op. 2005-122.) A future conflicts waiver which appears on its face to apply to non-waivable conflicts is therefore more likely to be successfully challenged. The same is true for other relatively extreme conflicts even if they could conceivably be waived.

Suppose, for example, that a law firm that is presently representing a client in one or more business or litigation matters is asked by a prospective new client to bring a RICO action, a securities fraud action, or a common law fraud claim seeking punitive damages from the existing client. Even if the new action is factually and legally unrelated to the firm's present work for its present client, the firm is likely to face a steep uphill battle in attempting to argue that its disclosure adequately informed the client of these risks or that it is reasonable for a client to consent thereto.⁵ We therefore recommend that future conflicts waiver letters expressly exclude this extreme kind of adverse representation.

Potential Limits on the Adverse Parties or Types of Matters to Which the Waiver May Apply

Law firms are well advised to be clear about what they want and not to ask for more than they need. Based on our experience, one of the reasons in-house counsel sometimes reject future conflicts waiver letters is that they appear to be too open-ended or to go further than in-house counsel believe the law firm really needs. In such situations, "half a loaf" may be a whole lot better than no loaf at all.

Does the firm want and need a future waiver for business/transactional matters only or is a waiver also needed for litigation or arbitration? Does the firm want and need a future waiver limited to the right to represent a specific firm client or group of clients, as distinct from all present or potential future clients regardless of subject matter? Case law teaches that to the extent the general scope of a waiver is limited, the likelihood that it will be sustained increases.⁶

⁵ Needless to say, it is also quite difficult to imagine that many clients would approve a waiver that included the risk of adverse claims or litigation of this type.

⁶ See, e.g., *MJK Family LLC v. Corporate Eagle Management Services, Inc.*, 676 F. Supp.2d 584 (E.D. Mich. 2009); *In re Congoleum Corp.*, 426 F.3d 675, 21 Law. Man. Prof. Conduct 549 (3d Cir. 2005); *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp.2d 1100 (N.D. Cal. 2003); *Worldspan, L.P. v. Sa-*

Addressing Conflicts That Already Exist or Have Already Been Foreseen

The *Galderma* court adhered to the commonly accepted distinction between the need for specificity between conflicts that already exist and conflicts that may only arise in the future. (*Galderma*, ___ F. Supp.2d ___, at *11.) This makes sense both because a present conflict may be more significant to a client than the risk of a future conflict and because the failure to mention a present conflict could conceivably be seen as an attempt by the law firm to sweep it under the rug. Consequently, any present or clearly foreseen conflicts should be expressly disclosed and discussed.

Risks to Confidential Client Information

Without question, the duty of confidentiality that lawyers owe their clients is broader than the attorney-client privilege.⁷ Even if the matters on which a law firm may oppose a present client are strictly circumscribed in a way that makes it highly unlikely that there is any material risk of adverse disclosure or use of confidential client information, the risk should nonetheless be discussed.

Risks to Zeal/Competence and Diligence

Almost by definition, any limitation on the duty of undivided loyalty creates at least a risk that the law firm with a conflict may be less zealous or eager when working on a client's behalf—even when the conflict arises in connection with an unrelated matter. It is therefore necessary to discuss this risk as well.

Defining Related and Unrelated Matters

A great deal of judicial ink has been spilled in the course of defining when matters are and are not sufficiently or significantly related for conflict of interest purposes.⁸ Although no definition will be impervious to challenges, a reasonable definition should reduce the risk of such challenges considerably.

When and How the Waiver Will End

A client that waives future conflicts as a precondition to being represented by a law firm at Time A is not permanently foreclosed from ever changing its mind in the future. For example, a client could decide when giving a new matter to that law firm at Time B that it is no longer willing to continue with the future waiver at or after Time B and that the law firm must, as a condition of accepting the new work, apply the normal conflicts rules as to new adverse matters. Two points follow.

bre Group Holdings, Inc., 5 F. Supp.2d 1356, 14 Law. Man. Prof. Conduct 246 (N.D. Ga. 1998).

⁷ See, e.g., Restatement (Third) of the Law Governing Lawyers §§ 59, 68, 71.

⁸ See, e.g., *City of Atlantic City v. Trupos*, 201 N.J. 447, 992 A.2d 762, 26 Law. Man. Prof. Conduct 282 (2010); *Knight v. Ferguson*, 149 Cal.App.4th 1207, 57 Cal.Rptr.3d 823, 23 Law. Man. Prof. Conduct 233 (Cal. App. 2 Dist. 2007); *State v. Hunsaker*, 74 Wash.App. 38, 873 P.2d 540 (Wash. App. Div. 1 1994); *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992); *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984); *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953).

First, the rights of the client if it decides to change its mind should be addressed. For example, the waiver letter might state that while the client retains the right to revoke the waiver in the future, such revocation will not be effective as to matters undertaken by the firm prior to receipt of such notice. The waiver letter might also state that, to the extent permitted by any applicable rules of professional conduct, the client consents to the lawyer's withdrawal from any matters then under way if withdrawal is necessary for the firm to continue representing other clients.

Second, a lawyer or law firm that takes on a new matter for a client that has previously provided a conflicts waiver should refer to, and in effect ask for reaffirmation of, the future waiver at the time of the engagement letter for the new matter.

Other Issues: Materiality 101

In the course of helping many lawyers and law firms draft conflicts waiver language over many years, we have sometimes been told that certain subjects or risks should be left out. When we ask why, we are sometimes told that it is because their inclusion will cause the client to refuse to grant a waiver.

To us, this is as good a definition of "materiality" as one can provide. If, in fact, a client may refuse to sign a waiver letter if a specific subject or risk is discussed, it is much better to know that before the representation begins than after the disqualification motion or damage claim for breach of the duty of loyalty or fee disgorgement is brought.

Effective Future Conflicts Waivers: the Language

We now turn to what we believe should generally be a safe-harbor future conflicts waiver letter. Although the following sample is set up in the form of a separate letter from attorney to client it could easily be changed to become a part of an overall engagement letter.

Re: Future Conflicts Waiver

The Purpose of This Letter

As you know, you have asked _____ ("the Firm") to represent _____ ("the Client") in _____ ("the Matter"). As you also know, the Firm's ability to represent any and all clients is governed by what are commonly called Rules of Professional Conduct, which include but are not limited to rules regarding conflicts of interest between multiple clients of a law firm or between a law firm and its clients (collectively, "the Conflicts Rules"). Although the Firm is not presently aware of a conflict created by the proposed work on the Matter that would trigger the Conflicts Rules at this time, the nature and scope of the Firm's work for other clients may give rise to conflicts of interest in the future.⁹ The purpose of this letter is to explain how the Firm proposes to resolve future conflicts issues so that the Client can decide whether or not to be represented by the Firm. In other words, the purpose of this letter is to seek a waiver of future conflicts

⁹ [Note: if there are any current conflicts requiring waivers, they must be expressly discussed and waived.]

but to do so subject to the conditions and limitations noted herein.

The Scope of the Requested Waiver

The Firm only seeks a waiver for work that is entirely factually and legally unrelated to the Matter. Thus, the Firm **does not** request a waiver that would allow it:

- at any time, to attack the work that the Firm performs for the Client in the Matter;
- at any time, to disclose or use adversely to the Client, or to place itself in a position to disclose or use, any confidential client information;
- for so long as the Firm continues to represent the Client, to refrain from screening the lawyers who work for the Client from any lawyers who may work on matters adversely to the Client, and vice versa;
- [optional: for so long as the Firm continues to represent the Client, to sue the Client/represent any clients other than _____ adversely to the Client, etc.];
- for so long as the Firm continues to represent the Client, to allege criminal or fraudulent conduct by the Client.

Outside of these limitations, the Firm is and will remain free to represent other clients adversely to the Client. In other words, we may represent other clients in negotiations, business transactions, litigation, alternative dispute resolution, administrative proceedings, discovery disputes, or other legal matters even if those matters are adverse to Client. For example, and solely by way of illustration, the Firm could [list at least some types of clients and/or specific clients who could be represented adversely to the Client in at least some types of matters].

Although the terms of this waiver shall last indefinitely, the Client may revoke this waiver at any time. You agree, however, that any revocation will not affect any matters undertaken by the firm prior to receipt of notice of the revocation, and that, to the extent permitted by any applicable rules of professional conduct, you consent to our withdrawal from any of Client's matters if withdrawal is necessary for the firm to continue representing other clients. If the Firm does withdraw from a matter, however, it will assist Client in transferring the matter to other counsel of Client's choice and will not bill Client for legal fees, expenses, or other charges arising from the need to assist successor counsel in coming up to speed.

Considerations Relating to the Decision to Waive

As you know, we have discussed this conflicts waiver and its potential implications with you [by phone/in person] and we strongly urge you not to sign this waiver if you have any unanswered or unaddressed reservations or concerns. [If sent to someone other than in-house or outside counsel: We also [insist/encourage/recommend] that you discuss this waiver with independent counsel of your choice.]

As we have already explained, there are questions that Client should address before a decision to waive future conflicts is made:

- Is there a material risk of adverse disclosure or use of confidential client information?
- Is there a material risk that the Firm will be less zealous or eager when representing the Client in the Matter because of other adverse representations?
- Is the Client ready, willing, and able to live by its commitments in the future?

As to the first two questions, we believe that any risk to the Client is minimal to nonexistent in light of the protections and limitations contained in this letter. As to the final question, that is necessarily the Client's choice and not ours. Although we are certainly willing to discuss potential amendments to this waiver that you would like us to consider, you should know that without a mutually acceptable waiver, we will be unable to represent Client.

If you find these conditions acceptable, please sign the enclosed extra copy of this letter and return it to me for my files. If not, please let me know.

Very truly yours,
Attorney

Concluding Remarks

Motions to disqualify raise satellite issues that do not typically advance resolution of the underlying disputes between the parties. To the extent that clearer standards for future conflicts waivers can be enunciated, their use should decrease the time devoted to these issues by the parties, their counsel, and the courts. Similarly, lawyers and their firms can be more certain of their right to proceed without disciplinary risk. Our "safe harbor" approach should provide more than a little margin of safety to questions from even the most skeptical of courts. A client who falls within the criteria described in this article and who signs a conflicts waiver letter consistent with our suggestions will have nothing other than "tactical advantage" to pursue and should therefore not be heard to complain.