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PROFESSIONAL CONDUCT

Court: Consent for Advance Waivers Must be Knowing, Intelligent, Voluntary

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Special to the Legal

In the not-too-distant past, a "large" firm had as many as 200 lawyers, supported by a sprinkling of rainmakers and a number of "service partners." In today's legal environment, 200 lawyers is a mid-sized firm, large firms have 600 lawyers or more and every partner needs a substantial book of business. These realities make clearing the firm's conflict check both more difficult and more important. The proliferation of intra-firm conflicts and the pressure to bring in business has led to an increase in the use of advance waivers of conflicts. In *Celgene Corp. v. KV Pharmaceutical Co*., Magistrate Judge Madeline Cox Arleo of the District Court for the District of New Jersey rejected an advance waiver and granted a motion to disqualify counsel for the defendant, explaining that an advance waiver must be based on informed consent and that such consent must be knowing, intelligent and voluntary. The problem is: How can a waiver of an unknown conflict that may or may not arise in the future meet those criteria?

In *Celgene Corp. v. KV Pharmaceutical Co.*, Buchanan Ingersoll & Rooney entered its appearance as counsel for defendant KV Pharmaceutical, adverse to its long-time client Celgene. Buchanan Ingersoll had been representing Celgene for several years in a securities litigation matter and in a Thalidomide matter, neither of which involved KV Pharmaceutical. The firm's representation agreements with Celgene, entered into at the outset of both matters, included provisions in which Celgene prospectively consented to waive certain conflicts that might arise, including representation of adverse parties in "substantially unrelated matters."

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Celgene moved to disqualify Buchanan Ingersoll as counsel for KV Pharmaceutical based on the apparent conflict. Buchanan Ingersoll argued that Celgene's advance waivers, executed by the general counsel of a sophisticated client, constituted informed consent to the conflict of interest. The court disagreed, concluding that the advance waivers at issue were too broad and the term "substantially unrelated" was too vague to constitute informed consent on the part of Celgene to the conflicted representation.

Once Celgene established that a concurrent conflict of interest existed, the court shifted the burden of proof to Buchanan to demonstrate that Celgene, through the advance waiver, gave informed consent to the firm's representation of KV Pharmaceutical. The court laid out four justifications for shifting the burden to the firm: the firm drafted the waiver; the firm has the responsibility of ensuring that the client is acting with informed consent; it is the firm's responsibility to avoid conflicts; and the firm is in the best position to anticipate future conflicts and apprise the client of their likelihood.

In analyzing whether the advance waiver could effectively insulate the firm from disqualification, the court turned to the rules regarding concurrent conflicts of interest. Rule 1.7 of the New Jersey Rules of Professional Conduct provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest unless: each affected client gives informed consent, confirmed in writing, after full disclosure and consultation; the lawyer reasonably believes he or she will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; and 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.

For purposes of Rule 1.7, a concurrent conflict of interest exists where a representation of one client is directly adverse to another client (as was the case in *Celgene*

Corp. v. KV Pharmaceutical Co.) or whenever "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer."

Based on the definition of the term provided by N.J. R.P.C. 1.0(e), the court concluded that truly "informed consent" requires, at a minimum, the provision of "meaningful consultation to the client about potential conflicts." According to Rule 1.0(e), "informed consent" can only exist where the lawyer has communicated to the client adequate information and explanation about the material risks of and reasonably available alternatives to a proposed course of conduct. The court therefore focused on how Buchanan Ingersoll actually consulted with its client, Celgene, and informed Celgene about the potential conflict when consent was obtained.

Turning to the advance waivers themselves, the court found that they contained only broad statements of consent, without any specific information concerning the risks and reasonably available alternatives to any potential future conflicts of interest. Further, the waivers proposed a "very open-ended and vague" future course of conduct, i.e., concurrent conflicted representations. Finally, the court noted that "the agreements only appear to benefit Buchanan Ingersoll — which further underscores the importance of Buchanan Ingersoll fully explaining the meaning and implications of the waiver." The court concluded that the representation of KV Pharmaceutical, directly adverse to Celgene, created a concurrent conflict that had not been knowingly, intelligently and voluntarily waived in advance.

The rules relating to concurrent conflicts of interest changed in 2002 when the current version of Model Rule 1.7 was adopted in response to the recommendations of the ABA Commission on the Evaluation of the Rules of Professional Conduct. The amended rule clarified earlier language that said a lawyer shall not represent a client if the representation "may be materially limited" by a lawyer's responsibilities to another client, and established the following four-part test to establish a valid waiver of a concurrent conflict: the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; 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 each affected client gives informed consent, confirmed in writing.

Comment 22 to the model rule specifically addresses informed consent to future conflicts. According to the comment, the effectiveness of such waivers is generally determined by the "extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding." The comment also notes that the greater the experience and familiarity of the client with the type of conflict to which he is consenting, the more effective the waiver will be. The involvement of independent counsel is also a factor weighing in favor of an effective waiver.

Pennsylvania's R.P.C. 1.7 and its comment 22 are identical to the model rule and comment, except that Pennsylvania does not require that the client's informed consent be confirmed in writing, and does not require that the attorney personally consult with the client.

In contrast to the Pennsylvania Rule, New Jersey's Rule 1.7(b)(1) expressly requires written confirmation of the client's informed consent "after full disclosure and consultation." The distinction is significant. Indeed, the court in *Celgene Corp. v. KV Pharmaceutical Co.* found the firm's failure to provide consultation to Celgene concerning the scope, risks, and available alternatives to the advance waivers at issue a critical omission negating the possibility of informed consent to the concurrent conflict of interest.

So back to our original question: How can we ensure that our clients are knowingly, intelligently and voluntarily waiving future potential conflicts of interest? In our view, the lesson to be taken from *Celgene Corp. v. KV Pharmaceutical Co*. is that, as an ethical and practical matter, advance waivers are a risky business. If you must include them in your retainer agreements, make sure that your client has independent representation, fully discuss and document in the waiver the possible situations to which the waiver might apply, and limit the waiver to certain specific types of representations. Finally, think about how the client who sits beside you at counsel table, listening to you argue eloquently on her behalf, is going to feel about you when she finds you at the table across the aisle, next to her adversary.

Litigation associates Macavan Baird and Karen M. Ibach assisted in the research and writing of this article. •