



Your Advance Conflict Waiver May Be A Conflict Creator

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Can your advance conflict waiver actually create new conflicts? A recent decision by a magistrate judge in the Western District of Pennsylvania carved out new ground in the already fertile fields of affiliate conflicts and advance conflict waivers by recommending that [Kirkland & Ellis LLP](#) be enjoined from representing the would-be purchaser of a Kirkland client's parent company. Kirkland, consistent with the practice of many firms, had included an advance conflict waiver provision in its engagement letter, undoubtedly to free it as much as possible from future conflicts. But the court construed the waiver as broadening, rather than limiting, the default prohibitions on representations adverse to clients. Attorneys and law firms that use advance waivers in their engagement agreement would be wise to scrutinize the decision — as well as the wording of their advance waivers — to ensure they do not suffer similar unintended consequences.



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Factual Background

Beginning in about early 2013, Kirkland represented [Mylan Inc.](#), Mylan Pharmaceuticals Inc., Mylan Technologies Inc. and Mylan Specialty LP (collectively, "Mylan") in connection with a number of regulatory, commercial and contractual matters relevant to Mylan's pharmaceutical business. The engagement was formalized in a January 2013 engagement letter, which contained an advance waiver provision permitting Kirkland to undertake representations adverse to Mylan and "any of [its] affiliates" under certain circumstances discussed in further detail below. During the engagement, Kirkland was privy to confidential and proprietary information related to many of Mylan's products.

In April 2015, [Teva Pharmaceutical Industries Ltd.](#) asked Kirkland to represent it in connection with the proposed acquisition of Mylan's parent company, Mylan NV. Notably, Mylan's parent had been formed just two months previously, and Mylan accounted for 90

percent of its revenue. Kirkland conducted a conflict check and determined that it had never represented Mylan's parent and that it could accept the Teva representation. As a precaution, however, Kirkland created an ethical wall between the attorneys who would work on the proposed acquisition of Mylan's parent and the attorneys who had previously performed work for Mylan. Kirkland did not seek a waiver from Mylan or otherwise inform Mylan of the representation. Mylan first learned of it when Teva made its unsolicited initial offer. Following Mylan's parent's rejection of the offer, Teva began to pursue a hostile takeover.

In early May 2015, Mylan filed a complaint against Kirkland in Pennsylvania state court, alleging that Kirkland's representation of Teva constituted a breach of Kirkland's fiduciary duties. Kirkland removed the matter to federal court, and Mylan subsequently moved for a preliminary injunction to prohibit Kirkland from acting as Teva's counsel in connection with the proposed takeover.

In a report and recommendation dated June 9, 2015, a magistrate judge recommended that Mylan's motion be granted based on the court's finding that there was a substantial likelihood (1) that Kirkland's representation of Teva constituted a conflict under Pennsylvania Rule of Professional Conduct 1.7,[1] and (2) that the engagement letter did not effectively waive the conflict.

Application of Rule 1.7

Rule 1.7 provides, among other things, that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," such as where "the representation of one client will be directly adverse to another client," unless "each affected client gives informed consent." [2] (Advance waivers are an attempt to obtain this informed consent.) Applying Rule 1.7, the court found that Kirkland's representation of Teva in a hostile takeover attempt of Mylan's parent was adverse not only to Mylan's parent but also to Mylan, explaining that "it would be hard to imagine a representation more opposed to a current client's interests ... than one in which the client's counsel sells his professional services to advance the interests of a competitor in a hostile takeover attempt of the clients' entire corporate affiliate group." [3]

In addition, guided by [American Bar Association Formal Opinion 95-390](#) (1995), the court also found that Kirkland's representation of Teva "related to" Kirkland's representation of

Mylan, and was therefore adverse to Mylan, because Kirkland had knowledge of confidential and proprietary information that would grant Kirkland and Teva a strategic advantage in pursuing the hostile takeover of Mylan's parent.[4]

The court thus concluded that, absent an effective advance waiver, there was a substantial likelihood that Kirkland's representation of Teva violated Rule 1.7. While the court's application of Rule 1.7 and Formal Opinion 95-390 is worthy of discussion for its contribution to a developing body of case law on affiliate conflicts,[5] our focus will be on the court's treatment of the waiver issue.

Interpretation of the Advance Waiver

The court next turned to the efficacy of the engagement letter's advance conflict waiver, which read as follows:

As an integral part of the Engagement, you agree that [Kirkland] may, now or in the future, represent other entities or persons, including in litigation, arbitration or other dispute resolution procedure, adversely to you or any of your affiliates on matters that are not related to (i) the legal services that [Kirkland] has rendered, is rendering or in the future will render to you under the Engagement and (ii) other legal services that [Kirkland] has rendered, is rendering or in the future will render to you or any of your affiliates under a separate engagement.[6]

In Kirkland's original draft, the provision's phrase "matters that are not related to" read "matters that are not substantially related to." However, the parties negotiated the engagement letter, and Kirkland agreed to drop "substantially" at Mylan's request.[7]

According to the court, this provision failed to waive the conflict created by Kirkland's representation of Teva for three reasons:

First, the waiver expressly did not apply to matters "related to" Kirkland's representation of Mylan. As discussed above, the court had already found that Kirkland's representation of Mylan and Teva were related.

Second, the court concluded that Mylan had not granted "informed consent" to the Teva representation. The court based its decision in part on "the commonly acknowledged intent

of such prospective waivers in the context of the legal representation of pharmaceutical matters” and also noted that the waiver language referred to “litigation, arbitration or other dispute resolution procedure[s],” but it did not refer to “acquisitions (hostile or otherwise).”[8]

Third, and most interestingly for our purposes, the court read the conflict waiver as expanding rather than limiting Kirkland’s obligations to Mylan’s affiliates, with the effect in this case that the waiver language would have created a conflict even if one had not existed otherwise. According to the court, when the parties agreed that Kirkland could act adversely to Mylan or any of its affiliates on matters that are “not related to” the legal services that Kirkland “has rendered, is rendering or in the future will render to” Mylan or its affiliates, they were also agreeing that any future representation of an interest adverse to Mylan or any of its affiliates must only involve matters that are “not related to” the legal services rendered or to be rendered by Kirkland to Mylan — even if Mylan’s affiliates were not also Kirkland’s clients.[9]

As the court acknowledged, its reading of the advance waiver provision expands the scope of conflicts beyond the Rules of Professional Conduct.[10] First, it creates a conflict if Kirkland is adverse only to a Mylan affiliate that had never been a Kirkland client. Second, under Model Rule of Professional Conduct 1.9, a lawyer has a conflict with a former client only on matters that are “the same or substantially related,” but the court found that Kirkland and Mylan expanded the scope of conflicts to matters that are “the same or related.”

While the court’s interpretation of the words used in the advance waiver may be a logical reading in the abstract, it is almost certainly not what Kirkland expected. Consistent with the comments to the Pennsylvania Rules of Professional Conduct and the Model Rules of Professional Conduct,[11] Kirkland no doubt viewed the advance conflict waiver as just that — an advance waiver of conflicts that would otherwise exist. And Mylan, for its part, also referred to the provision as an “advance waiver.”[12]

The court, however, analyzed the provision as though Kirkland and Mylan were writing on a blank slate and negotiating an “understanding as to related representations adverse not only to [Mylan] but to its affiliates,” which the court said would be desirable to a corporate client with either a parent company or subsidiaries.[13] Accordingly, the court viewed anything not included in the advance waiver provision as being “prohibited” rather than as being simply “not waived (and subject to the default rules of the Pennsylvania Rules of Professional Conduct).”

Implications

Although the report and recommendation is not binding on the district court, its impact on Kirkland was immediate and substantial: Teva replaced Kirkland with [Sullivan & Cromwell LLP](#) the very next day. Kirkland has objected to the report and recommendation before the district court, and the outcome there will not be academic. For Kirkland and the many other firms that use substantively similar advance waiver language in their engagement agreements, the magistrate judge's analysis of the advance waiver clause could be cited in future client disputes.

Attorneys and firms that employ advance conflict waivers should closely review the report and recommendation and follow subsequent proceedings in the district court. More significantly, they should analyze their own advance conflict waiver provisions to see if a court applying the logic of the magistrate judge in the Mylan case could construe these clauses to create conflicts that did not otherwise exist. If so, firms should consider changing the operative language of their advance conflict waiver from one that describes who the firm may represent to one that describes what conflicts the client is waiving. Firms should also consider adding a sentence to their advance waiver expressly providing that the clause does not create a conflict that would not otherwise exist under the applicable ethical rules.

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[1] Pennsylvania Rule of Professional Conduct 1.7 is virtually identical to Model Rule of Professional Conduct 1.7.

[2] Pa. R. Prof'l Conduct 1.7.

[3] Mylan Inc. v. Kirkland & Ellis LLP, No. 15-581, slip op. at 28 (W.D. Pa. June 9, 2015).

[4] Id. at 32-37.

[5] See, e.g., [GSI Commerce Solutions Inc. v. BabyCenter LLC](#), 618 F.3d 204, 211-212 (2d Cir. 2010) (agreeing with Formal Opinion 95-390 and applying “substantial operating commonality” test to determine whether affiliates should be considered single entity for conflicts purposes).

[6] Mylan, No. 15-581, slip op. at 38.

[7] Id. at 11.

[8] Id. at 42-43. The court noted that its conclusion would be the same under either the exacting standard or “informed consent” described in [Celgene Corp. v. KV Pharmaceutical Co.](#), No. 07-4819SDW, 2008 WL 2937415 (D.N.J. 2008), or the far more forgiving standard of that same concept in [Galderma Laboratories LP v. Actavis Mid Atlantic LLC](#), 927 F. Supp. 2d 390 (N.D.Tex. 2013). Mylan, No. 15-581, slip op. at 41-46.

[9] Mylan, No. 15-581, slip op. at 47 & n.61.

[10] Id. at 47 n.61.

[11] Model Rule of Prof'l Conduct 1.7 cmt. 22; Pa. R. Prof'l Conduct, 1.7 cmt. 22.

[12] Mylan, No. 15-581, slip op. at 47 (citing Mylan’s proposed findings of fact and conclusions of law).

[13] Id. at 49.