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Clearly Enforceable Future Conflicts Waivers

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I. Summary and Introduction

As practiced in every United States jurisdiction other than Texas, the “duty of undivided loyalty” means that unless the clients consent, individual lawyers and their firms cannot oppose any current firm client on any legal matter—even if the matters are entirely factually and legally unrelated. At times, this rule has been extended to prohibit representations adverse to related entities or affiliates as well. By contrast, many if not all European countries and
the Texas Rules of Professional Conduct allow a lawyer or firm to represent one current client adversely to another without client consent as long as the matters are factually and legally unrelated.

One way to think about the difference between the American and European rules is with respect to who has the burden of dealing with the conflict. In the United States, the burden is on the lawyer or firm to seek client consent to allow an adverse representation. In Europe, the burden is on the client to get the firm to agree up front not to undertake such a representation. In a perfect world, the two systems might end up with exactly the same ultimate net result. In the world in which we live, however, lawyers and their firms have at times found it difficult to obtain conflicts waivers that will be judicially enforced when the adverse representation subsequently arises. In addition, some commentators appear to believe that there is no such thing as an ethically sufficient future conflicts waiver.

We therefore set out to write what we believe to be a future conflicts waiver letter that should withstand virtually any imaginable ethical or legal attack. This article is the result. In short, our goal here is not to present the minimum that is or should be acceptable for a future conflicts waiver to be upheld but instead to present a letter that should clearly meet any and all requirements. As the reader will note, we will also discuss the factual and legal circumstances under which future waivers are more or less likely to be upheld.

Before turning to the letter itself, we will review three authorities from 2013 that uphold future conflicts waivers. After discussing these authorities, the article will first identify the general preconditions or helpful conditions for effective future conflicts waivers and then turn to the specific draft language.

II. Three Recent Authorities on Future Conflicts Waivers
A. Galderma v. Actavis

Galderma Laboratories, LP v. Actavis Mid Atlantic LLC, 927 F. Supp.2d 390, 29 Law. Man. Prof. Conduct 114 (N.D. Tex. 2013), enforced a future conflicts waiver given by a legally sophisticated business client after review by the client’s in-house counsel. 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.

(Id. at 393.) 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. 2
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 399.)

- 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 400.)

- 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.)

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 401-02.)

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 reviews 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 405.)

B. Macy's v. J.C. Penney

Macy's, Inc. v. J.C. Penney Corp., Inc., 107 A.D.3d 616, 968 N.Y.S.2d 64, 29 Law. Man. Prof. Conduct 393 (2013), also upheld a future conflicts waiver. At issue was the
question whether a conflicts waiver given by J.C. Penney in 2008 would allow Jones Day to represent Macy’s adversely to J.C. Penney in the prosecution of an action for tortious interference with contract notwithstanding the fact that Jones Day was representing J.C. Penney in unrelated intellectual property matters. As the court succinctly stated:

By agreement dated March 7, 2008 Jones Day undertook to represent defendant regarding certain “intellectual property litigation and trademark registration” in Asia. That agreement expressly informed defendant about the possibility that Jones Day’s present or future clients “may be direct competitors of [defendant] or otherwise may have business interests that are contrary to [defendant]’s interests,” and “may seek to engage [Jones Day] in connection with an actual or potential transaction or pending or potential litigation or other dispute resolution proceeding in which such client’s interests are or potentially may become adverse to [defendant]’s interests.” That agreement unambiguously explained that Jones Day could not represent defendant unless defendant confirmed this arrangement was amenable to defendant, thereby “waiv[ing] any conflict of interest that exists or might be asserted to exist and any other basis that might be asserted to preclude, challenge or otherwise disqualify Jones Day in any representation of any other client with respect to any such matter.” The agreement also provided, “However, please note that your instructing us or continuing to instruct us on this matter will constitute your full acceptance of the terms set out above and attached.” It is undisputed that Jones Day continued to represent defendant with respect to defendant’s Asian trademark portfolio thereafter and, thus, defendant accepted the terms of the agreement, including waiver of the alleged conflict at issue.

Moreover, the interests of defendant that Jones Day
represents, namely intellectual property litigation and trademark registration exclusively in Asia, do not conflict with defendant's interests at issue here.

(968 N.Y.S.2d at 616-17.)

C. New York State Opinion 990

New York State Ethics Op. 990, 30 Law. Man. Prof. Conduct 50 (2013), addressed several conflict of interest situations, one of which involved future conflicts waivers. In that portion of the opinion, a lawyer who regularly represents both Client A and Client B sought both a present waiver to represent Client A adversely to Client B negotiating a loan transaction while also obtaining consent to represent Client A adversely to Client B if the loan transaction led to litigation between the two. With respect to the future conflicts issue, the opinion states that “Whether each affected client can give informed consent to a future conflict depends on the extent to which the lawyer is able to explain adequately the material risks of the proposed course of conduct and reasonably available alternatives, and on the sophistication of the client.” The opinion notes, among other things, that as a part of meeting the required ethical obligations, the lawyer should consider factors including but not necessarily limited to: whether the client is likely to understand the content and implications of the lawyer's disclosures; the client's experience in dealing with lawyers; the steps to be taken to protect or limit harm to each client; the scope of the future waiver being sought; and whether the client is independently represented by in-house or outside counsel in deciding whether to waive the conflict.

III. Building Effective Future Conflicts Waiver Letters

A. Background Factors and Conditions for Effective Waivers

In this section, we note some of the general background
conditions that make it more likely that a future conflicts waiver will be upheld. As will become apparent, most if not all of these are referenced in one or more of the three authorities discussed above.

1. Waiving Clients Should Have Business AND Legal Sophistication

A client with a high degree of business and legal sophistication is much more likely to be able to give an effective waiver. This makes sense because such a client is more likely to understand what is at stake.

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, 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.

2. Actual Review by Independent Counsel

No black-letter rule requires independent counsel review before a present or future conflicts waiver letter can be effective. Nonetheless, actual review by independent counsel helps a great deal. As with client sophistication, review by independent counsel makes it much more likely that the client will in fact have understood, or at least be deemed to have understood, what it was asked to do.

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 condition 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 may sometimes even wish to require) such review.

3. Conspicuousness

Conflicts waiver language that is hidden within multiple pages of “boilerplate” engagement letter language are less likely to be upheld because they are less likely to have brought key points home to the client. Of course, the benefits of “conspicuousness” can be met in significant part through a verbal discussion of conflicts issues as well as written disclosure. In this context, a belt and suspenders approach is better than either one alone.

4. Internal Screening

In most instances, the lawyers at a firm who will or may work for a client will not be the same lawyers who will or may be expected to represent other clients in adverse matters. Generally speaking, it is therefore not at all burdensome for the law firm to include in a future conflicts waiver a commitment that different lawyers will in fact be involved and that they will not share files or information. Where practicable, this kind of voluntary screen should also include paralegals and support staff.

5. Client Signatures That Confirm Client Understanding

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 e-mail. Ideally, clients should also be told that they should not sign the letter unless they are satisfied that they understand it and have no unanswered questions or concerns.

B. Substantive Issues for Effective Waiver Letters

1. Don’t Ask for the Impossible or Implausible
To the extent that a future waiver attempts to obtain present consent to a conflict that could not be waived, even in the future, the future waiver will necessarily be ineffective. It is therefore a fool's errand to make such a request. Similarly, it is helpful to avoid waivers that, while arguably or theoretically permissible, may look quite extreme in retrospect.

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 existing 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 the client actually and reasonably consented. We therefore recommend that future conflicts waiver letters expressly exclude extreme adverse representations.

2. Ask Clearly for What You Need but Not More

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? The greater the limitation of the scope of the future conflicts waiver, the greater the likelihood that it will be upheld. In addition, and based on our experience, one of the reasons that in-house counsel sometimes reject future conflicts waivers is that they appear to be too broad.

3. Expressly Address Conflicts That Exist or Have Been Foreseen
Any existing or presently foreseen conflicts should be expressly disclosed and discussed. 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 or presently foreseen conflict could otherwise be seen as an attempt to sweep it under the rug.

4. Expressly Address Potential Risks to Confidentiality

The duty of confidentiality that lawyers owe their clients is broader than the attorney-client privilege. 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.

5. Expressly Address Potential Risks to Loyalty

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.

6. Expressly Define What Will and Will Not Be Considered 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. Although no definition will be impervious to challenges, a reasonable definition should reduce the risk of such challenges considerably.

7. Provide Updates for Additional Work
A lawyer or law firm that takes on a new matter for a client that has previously provided a conflicts waiver should ask for reaffirmation of the future waiver at the time of the engagement letter for the new matter. Otherwise, the new matter may be considered to have been undertaken without any waivers.

8. Materiality 101

In the course of helping many lawyers and law firms draft conflicts waiver language over many years, we have sometimes been told by lawyers that certain specific subjects or risks should be left out of a waiver letter 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 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, damage claim or action for fee disgorgement has been filed.

IV. Our Proposed Future Conflicts Waiver Form

We now turn to what we believe should, in our opinion, be an ethically and legally effective future conflicts waiver letter. Although this document is presented in the form of a separate conflicts waiver letter from attorney to client, it could easily be changed to become a part of an overall engagement letter.

Dear ____________:

You have asked _____________ (“the Firm”) to represent ________________ (“the Client”) in ______________________ (“the Matter”). As you know and as we have discussed, the Firm's ability to represent any and all clients is governed by what are

http://www.bna.com/clearly-enforceable-future-n17179907042/
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. 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 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 and nonpublic information of the Client;

- at any time, to allow lawyers [or nonlawyer staff] who work for the Client simultaneously to work adversely to the Client;

- [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.]; or

- for so long as the Firm continues to represent the Client, to allege criminal, fraudulent or intentionally tortuous 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 Client may revoke this waiver as to future matters at any time, such revocation will not affect any matters undertaken by the firm prior to receipt of notice of the revocation. In addition, and to the extent permitted by the applicable rules of professional conduct, the Client must consent to the Firm's withdrawal from the 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 [recommend/insist] 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 not represent the Client in the Matter or in any other matter.

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

Very truly yours,

Attorney

V. 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. A client who falls within the criteria described in this article and who signs a conflicts waiver
letter consistent with our suggestions should have little to nothing of substance to say in support of a disqualification motion, damage claim or ethics complaint.

1 This article is a revised and updated version of Jarvis, Lewis, Rhodes & Russell, “A Safe Harbor for Future Conflicts Waivers,” published in 29 Law. Man. Prof. Conduct 384 (June 19, 2013). The authors thank their former colleague, David Lewis, and their former firm, Hinshaw & Culbertson LLP, for their contributions to the prior version.

2 Although the matter arose in Texas, the court applied the ABA Model Rules of Professional Conduct rather than the Texas RPCs.

3 The court also noted that in-house counsel had previously approved another future conflicts waiver for another firm in another matter. (Id. at 406.)


5 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 (2000) 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.”).


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

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