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**COURT OF CHANCERY
OF THE
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Re: *Express Scripts, Inc., et al. v. Crawford, et al.*
Civil Action No. 2663-N

Dear Counsel:

I have carefully considered all briefs, arguments, and submissions regarding defendants' Motion to Disqualify Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"). Defendants assert that Skadden must be disqualified due to its prior work involving anti-trust issues in the merger of Caremark and Advance PCS. I cannot agree.

I. FACTS

Skadden provided legal services as counsel to Advance PCS during a merger with Caremark in 2003. Skadden executed a joint-defense agreement with Caremark's counsel for the merger. During the merger process, Skadden attorneys had access to confidential information regarding both Caremark and Advance PCS. After the merger, Advance PCS became a wholly-owned subsidiary of Caremark.

In the present action, plaintiffs challenge a proposed merger, approved by defendant directors, between defendants CVS and Caremark. On December 18, 2006, plaintiff Express Scripts, Inc. ("Express") announced in a press release an unsolicited competing offer to purchase Caremark. The accompanying press release named Skadden, and only Skadden, as advisor to Express.

On January 2, 2007, Caremark received a communication on behalf of Express from the Skadden anti-trust attorney who had represented Advance PCS during the earlier merger. Five days later, and twenty-one days after Skadden had been publicly named as counsel to Express, Caremark notified Skadden that it believed representation of Express constituted a conflict of interest under Rule 1.9 of the Delaware Lawyers' Rules of Professional Conduct.

Plaintiffs filed this lawsuit on January 10, 2007. Count IV of plaintiffs' complaint asks this Court for a declaratory judgment holding that Skadden faces no conflict of interest in representing Express.

II. ANALYSIS

The proscriptions of Rule 1.9 are not optional: they establish conditions under which an attorney shall not act.[1] Nevertheless, disqualification does not always serve as an appropriate remedy for violations of Rule 1.9. In considering a motion for disqualification, this Court measures the interests of the former client in protecting confidences revealed during representation with the prejudice that would be suffered by the current client were the attorney or firm to be disqualified.[2] One factor to be considered is the moving party's timeliness in notifying opposing

[1] Del. Lawyers' Rules of Prof'l Conduct R. 1.9.
[2] *See Sanchez-Caza v. Estate of Whetstone*, 2004 WL 2087922, at *4 (Del. Super. Sept. 1, 2004).

counsel of the conflict,[3] because motions to disqualify are often brought less out of concern for confidentiality than as a tactic in litigation.[4]

The parties in this litigation currently find themselves embroiled in a dispute that is moving at a rapid pace. Defendants, having selected February 20, 2007 as the date for shareholder consummation of their proposed transaction, bear much of the responsibility for a compressed schedule for discovery, motion practice, or other legal maneuvering. In such an environment, failing to notify opposing counsel of a perceived conflict does not bespeak of a particular concern with the importance of confidential information.

On the other hand, Express will suffer significant delay if they are forced to change horses in midstream. Although Delaware courts have disqualified attorneys even upon the eve of trial, none of the cases cited by defendants involved former clients who had deliberately hesitated in notifying opposing counsel of their objections.[5] Express has accommodated Caremark's concerns by screening its conflicted anti-trust attorneys (albeit after the fact), removing Skadden as counsel to this litigation, and engaging new counsel for anti-trust issues. To the extent that Caremark may still be disadvantaged due to Skadden's former representation, the wound is largely self-inflicted and does not justify the Court's intervention.

In denying defendants' motion, I make no decision as to the merits of Count IV of the complaint, nor do I declare that Skadden has no conflict of interest. Caremark may, if it chooses, bring separate disciplinary actions against Skadden or its attorneys.[6] Defendants' own delay, however, makes disqualification an inappropriate remedy, particularly in a case such as this, where every tick of the clock counts.

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[3] *Id.*

[4] *See Acierno v. Hayward*, 2004 WL 1517134, at *4 (Del. Ch. July 1, 2004).

[5] *See Queen's Quest Condo Council v. Sea Coast Builders, Inc.*, 605 A.2d 580 (Del. Super. 1992) (disqualifying attorney when conflict of interest disclosed on eve of trial); *In re Meridian Auto. Sys. Composite Operations, Inc.*, 340 B.R. 740 (Bankr. D. Del. 2006) (disqualifying law firm given notice of conflict eight months prior to filing of motion).

[6] Outside of the traditional powers necessary to address, rectify, or punish actions of counsel that threaten the legitimacy of a judicial proceeding, matters of attorney discipline are the sole domain of the Supreme Court. *See In re Appeal of Infotechnology*, 582 A.2d 215, 219-222 (Del. 1990).

Defendants' motion is denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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