SIDEBAR

In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty

By Adam Liptak

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If you listen to brainy law professors who have been studying big injury cases, you will learn that lawyers no longer owe their clients a duty of loyalty. They say this approvingly, even enthusiastically.

The idea that lawyers must represent one client at a time, give independent advice, follow instructions and, in general, act with fierce and single-minded loyalty is, these professors say, a lovely idea but an outmoded one. It is something out of the Age of Chivalry, or at least the 20th century.

"Speaking of individualized notions of lawyer loyalty is sort of like the mindset of the French military in 1940," said Richard A. Nagareda, a law professor at Vanderbilt and the author of a recent book called "Mass Torts in a World of Settlement."

Professor Nagareda was speaking at a forum at the American Enterprise Institute this month, and he was explaining why a proposed $4.85 billion settlement of lawsuits concerning the painkiller Vioxx represents progress, even though the deal puts extraordinary pressure on the lawyer-client relationship.

"The French generals hunkered down in a series of reinforced bunkers along the German border called the Maginot Line," Professor Nagareda said. "Meanwhile, the new world of warfare literally blitzed right past them."

If Professor Nagareda and his colleagues have their way, the ideals of the legal profession will collapse before anyone notices they are gone. The new Maginot Line is the Vioxx settlement, and the blitz is on.

The first thing to know about the settlement, announced in November, is that it intends to address tens of thousands of individual lawsuits in which people claimed that Vioxx caused their heart attacks and strokes. It is not a class action.

The second is that the settlement does not become effective until 85 percent of the plaintiffs sign up. That concept is not particularly controversial, and it is perfectly understandable. Merck & Company, which made Vioxx, wants to settle only if it can buy something like global peace.

The third is that the settlement agreement is not between Merck and the plaintiffs, but between Merck and various plaintiffs' lawyers. And what lawyers promise to do is to settle on behalf of all of their clients or none of them. That is, a lawyer with 100 clients can participate in the settlement only if all 100 agree or if the lawyer fires those clients who will not go along.

The reason for that last provision in profound tension with traditional notions of legal ethics was that Merck feared that plaintiffs' lawyers might act in the best interests of the clients who had the strongest cases.

Andy D. Birchfield Jr., a plaintiffs' lawyer who helped negotiate the deal, said at the forum that what Merck wanted to avoid was "cherry picking." Participating lawyers could not be allowed to settle their weaker cases and keep their stronger ones.

"Merck wanted to make sure," Mr. Birchfield said, "that a lawyer was not gaming the system, holding out a handful of cases in premier venues that would be in their best interest."

That would make perfect sense if the cases belonged to the lawyers. They could trade in their strong cases along with their weak ones and, on average, make out just fine. It makes less sense in the old world, the one in which the client's interests came first.

George M. Cohen, a law professor at the University of Virginia and a critic of the settlement, said that the deal ran afoul of a fundamental ethics rule prohibiting lawyers from promising not to handle certain cases in exchange for settlement money.

Worse, Professor Cohen said, it amounts to an antitrust conspiracy in which plaintiffs' lawyers have ganged up "to coerce claimants into joining the settlement even if they don't want to do so by depriving them of the ability to be represented by the best qualified lawyers," as he put it in an informal complaint to the Federal Trade Commission on Jan. 9.

Professor Nagareda, he of the Maginot Line, is willing to concede that loyalty to clients has "a long and distinguished tradition." It is, he said, "deeply ingrained in our civil justice system."

"There is just one problem," Professor Nagareda added. "The nature of representation in mass litigation, particularly in mass torts, is increasingly bypassing these individualized notions of loyalty."

The reality, he said, is that mass injury claims often have value only in the aggregate. Individual cases are too expensive to litigate against a determined adversary like Merck. But large numbers of claims take on value collectively.

Merck and the plaintiffs' lawyers were still tinkering with the settlement document last week. They added language saying that each plaintiffs' lawyer was "expected to exercise his or her independent judgment in the best interest of each client individually." The new language is surprising only in that it needed to be said at all, and it did nothing to alter the fundamental structure of the deal.

But it seemed to be enough for the federal judge overseeing the settlement.

"I'm satisfied that nothing in the agreement imposes on a lawyer any impermissible restriction on the practice of law," Judge Eldon E. Fallon of Federal District Court in New Orleans said Friday at a court conference, according to The Associated Press.

Professor Nagareda is right that the Merck litigation is different from an ordinary injury case, and he is honest enough to say that its settlement is at odds with traditional ideas about what lawyers do. The solution, though, is not to let money warp the law.

If mass injury settlements require different rules of legal ethics, the states can change those rules. And if clients in mass injury cases are hiring lawyers who will not put their interests first, they should be told that up front and not as their lawyers are salivating over the payday of a lifetime.