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The Dangers of Resolving Client Conflicts by 'Dropping the Hot Potato'

By David P. Atkins and Marcy Tench Stovall

A 2018 decision by the United States District Court for the District of Massachusetts highlights a risk faced by law firms tempted by the prospect of business from a new client whose interests are, or may be, adverse to those of an existing firm client. Altova GMBH v. Syncro Soft SRL, 320 F.Supp. F.3d 314 (D. Mass. 2018).

David P. Atkins and Marcy Tench Stovall of Pullman & Comley.

A Client Comes Calling with a New Matter

The court described the background as follows. In late June 2017, the Boston based intellectual property law firm, Sunstein Kann Murphy & Timbers, was approached by Altova GMBH about representing it in a patent infringement action against one of its competitors, Syncro Soft SRL. Sunstein had been representing Altova in unrelated trademark matters which were not adverse to Syncro. However, as is not uncommon in the world of IP law firms, the firm also had been representing Syncro Soft in various matters going back to 2004. And one of those matters had been a 2009 copyright (not patent) dispute with Altova, since completed.

Faced with the opportunity to represent its existing client (Altova) in a new patent dispute against another client (Syncro), the firm was faced with an obvious conflict of interest. It attempted to solve its dilemma as follows: within a few weeks of being contacted by Altova for representation in the patent dispute, the firm wrote to Syncro terminating its relationship with Syncro. The firm described the reason for the termination as "potential conflicts in relation to other clients' work that [the firm] would like to undertake and that those other clients would like [the firm] to undertake." 320 F.Supp. 3d at 318. In its letter the Sunstein firm did not identify Altova as one of the "other clients" at issue, let alone ask for Syncro's consent for the firm to represent Altova in the anticipated patent litigation against Syncro.

In short, the letter reflected the firm dropping one client like a "hot potato" in an effort to "cure" a conflict of interest triggered by taking

on an adverse matter for a different client.

Was the Dropped Client a "Current" Client or a "Prior" Client?

After notifying Syncro of its termination of the engagement, Sunstein filed the infringement action for Altova against Syncro. Not surprisingly, Syncro moved to disqualify the firm.

In addressing the disqualification motion, the court first took note of the judicially created "hot potato" doctrine. The rule expresses the preference that "…lawyers should, as a general matter, remain loyal to their current client and decline to take on a new, conflicting representation" of a different client. Id. "'A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.'" Id. at 319, quoting Picker International, Inc. v. Varian Associates, Inc., 670 F.Supp. 1363, 1365-66 (N.D. Ohio 1987).

The court slapped down the notion that such a gambit necessarily will convert the dropped client into a "former" client for purposes of conflicts analysis. When a client falls into the category of a "former" client, the law firm's conflict of interest obligations are governed by the more lenient standards of Rule 1.9 of the Rules of Professional Conduct, rather than the more stringent conflict of interest requirements applicable to a "current" client under Rule 1.7. But given that the Sunstein firm dropped Syncro within mere weeks of being asked to represent Altova against Syncro, the court readily found that Syncro plainly was a "current client" at the time Altova first approached the firm about suing Syncro.

Was the Conflict "Unforeseeable"?

The court acknowledged that even under the stricter standards of Rule 1.7, where the conflict in question arises in a way a law firm could not reasonably foresee, the firm "may have the option to" terminate the representation of the first represented client, and continue with the recent client, as a proper way of avoiding the conflict. Id. at 320, quoting Comment [5] to Rule 1.7. The authors of the Rule 1.7 Commentary note that such "'unforeseeable developments'" include "'changes in corporate and other organizational affiliations, or the addition or realignment of parties in litigation…'" Id.

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In opposing Syncro's disqualification motion, the Sunstein firm argued that it fell within this so-called "thrust upon" exception to the "hot potato" rule." After all, the firm argued, when Altova first became a client of the firm's, in 2011, the firm did not know - and could not have known - about the patent dispute with Syncro. The court rejected this argument. It pointed to the fact that in light of the ongoing representation of each of the two clients, a "reasonable lawyer should have known there was a significant risk that" the interests of Altova would have become adverse to the interests of Syncro. Id. This should have been obvious to the firm when it learned that Altova received its patent for a product the firm knew competed directly with a product marketed by Syncro.

While a law firm might be entitled to drop one client in favor of another unrelated client when the two clients become embroiled in a dispute that was "unpredictable," the Sunstein firm had been performing ongoing work for Altova, including having previously sent Syncro a cease and desist letter relating to an alleged copyright infringement involving the same property at issue in the patent dispute. The court found in light of these facts, the 2017 patent "altercation was foreseeable." Id. at 321.

Based on Sunstein's concurrent, albeit unrelated, representation of Syncro, the court granted Syncro's motion to disqualify the Sunstein firm from representing Altova in the patent dispute.

Law Firm Risk Management Lessons

As a general rule, courts will not countenance a law firm's attempt to avoid disqualification in a dispute between two current clients by the firm terminating its representation of the client it deems, for whatever reason, less desirable. The authors of Rule 1.7 command that "a lawyer must not accept a second client if the directly

adverse conflict is known in advance and [therefore] must withdraw if the conflict is discovered after the concurrent representation has" begun. Hazard, Hodes & Jarvis, The Law of Lawyering §12.03 (4th ed. 2019).

The courts also will not apply the conflicts analysis under the more lenient standard of Rule 1.9 addressing former clients where the law firm has unilaterally dropped one client in an attempt to instantly convert a current client into a former client.

The courts are not sympathetic to firms attempting to justify dropping one of the current clients on the basis that its work for that client had been episodic, limited in scope, or not particularly lucrative. Such factors will not be deemed "good cause" to fall within an exception to the "hot potato" rule.

In the event the law firm asks each of the two affected clients for its consent to the firm's representation of one client in a matter directly adverse to the other, the firm must live with the result. Dropping a client after it expressly has refused consent to the conflicting representation will not avoid disqualification.

A common concurrent client conflict scenario occurs where, as a result of two law firms combining, or a practice group or individual lawyer affiliation, the firm finds itself with new clients adverse to one or more of the firm's existing clients. In these circumstances the courts will not necessarily require a disqualification, deeming conflicts brought about by such changes in law firm affiliation to be "thrust upon" the firm. However, if in conjunction with such a law firm merger or lateral affiliation one or each of the affected clients refuses consent, the firm is left with a choice: either decline the adverse matter the newly affiliated lawyers are bringing to the firm, or decline to affiliate with the migrating lawyers, at least until the dispute between the two clients has been resolved.

One suggestion for enhancing the chances a client will consent to the firm's adverse representation: a pledge to thoroughly screen from the anticipated adverse matter for the second client those individual lawyers and staff who have serviced the first client. However, in the context of the "hot potato" scenario, Rule 1.7 contains no mention of such "ethical screens." And so in the event the client refuses consent, a screen, no matter how rigorously implemented, will not immunize the firm from a disqualification motion.

In support of its decision to go the "hot potato" route, the Sunstein firm faced yet another ethical conundrum: how to properly obtain the consent of the client against whom it planned to file suit without violating its duty of confidentiality to the client on whose behalf it intended to file the suit. But the very fact that the firm found itself on the horns of this dilemma suggests the only proper resolution. If the firm cannot carry out its obligation to obtain informed consent to the conflict without violating its confidentiality duties to one of the clients, it must decline to take on the new engagement.

In the vast majority of "hot potato" cases, the worst the law firm in question faces is an order disqualifying the firm from continuing to appear in the litigation in question. But in circumstances in which the law firm deliberately defies one client's express objection to the representation, or fails to establish an effective screen, or is chastised in a disqualification ruling for intentionally violating its duty of loyalty, the consequences could be worse: disciplinary sanctions for having violated Rule 1.7. See, e.g., In re Johnson, 84 P. 3d 637, 641 (Mont. 2001) (public censure of lawyer for violating Rule 1.7 by dropping existing client after filing suit against the client on behalf of a new client).

Law firm risk managers should be wary of colleagues who, in their eagerness to take on a lucrative piece of litigation, urge the firm to jettison another firm client like a "hot potato." The "heat" generated by the less desirable client may turn out to be far less intense than that generated by a published disqualification ruling, or even worse, by a disciplinary sanction. ■

David P. Atkins and Marcy Tench Stovall are attorneys in the Professional Liability Practice Group of Pullman & Comley, LLC. Both represent lawyers and law firms, as well as practitioners in other professions.

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