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The “Hot Potato” Rule

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Imagine this scene: You have long courted a major technology firm, Big Bucks Software. Big Bucks’ general counsel calls to tell you that a \$100 million patent infringement claim has just been filed against it in Portland by a small local firm, Up Start Technology, and Big Bucks would like you to defend it. The general counsel asks if you have any conflicts. You don’t think so but will run a conflict check just to be sure. To your chagrin, you learn that one of your partners took on a land use matter three months ago for Up Start. To your greater chagrin, your partner tells you that the land use matter is expected to last at least a year and, although completely unrelated to the patent infringement case, Up Start will not waive the conflict. In your desperation, you come up with the bright idea of simply withdrawing from the land use matter to “cure” the conflict. Your firm’s management committee likes the idea but wonders whether there is any “down side.” Can your firm “fire” Up Start?

Welcome to the “Hot Potato” Rule. The short answer, as put by the Oregon State Bar in Formal Ethics Opinion 2005-11 (at 2 n.1), is “no”: “A lawyer cannot ‘fire’ a current client in mid-matter to avoid the current-client conflict of interest rules.” Formal Ethics Opinion 2005-11 cites the seminal case of *Picker Intern., Inc. v. Varian Assoc., Inc.*, 670 F Supp 1363, 1365 (ND Ohio 1987), *aff’d*, 869 F2d 578 (Fed Cir 1989), where the court gave this concept one of the

catchiest names in legal ethics: “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.”

In this column, we’ll look at the contours and consequences of the hot potato rule.

Contours

The theory underlying the hot potato rule is that a firm can’t take advantage of the more forgiving former client conflict rule by withdrawing from one of two clients who are adverse. Under the former client conflict rule, RPC 1.9, a conflict with a former client only exists if the matter involved is either the same or substantially related to an earlier matter the firm handled for the former client or would involve using the former client’s confidential information adverse to it. Under the more stringent current client conflict rule, RPC 1.7, any adverse representation between current clients creates a conflict that, absent waiver, would in my example prevent the firm from taking on Big Bucks adverse to Up Start. The hot potato rule holds that the current client conflict standard continues to apply even if a firm has withdrawn from one representation in an effort to avoid a conflict. The Ninth Circuit in *Unified Sewerage Agency v. Jelco, Inc.*, 646 F2d 1339, 1345 n.4 (9th Cir 1981), summarized this rationale in applying Oregon law: “If this were not the case, the challenged attorney could always convert a present client into a ‘former client’ by choosing when to cease to represent the disfavored client.”

The principal exception to the rule occurs when a conflict is “thrust upon” a law firm by, for example, a corporate merger involving a client and an adverse party. In that narrow situation, the “thrust upon” exception allows the firm to withdraw from one of the representations. New York City Bar Formal Opinion 2005-05 (available at www.nycbar.org) contains an extended discussion of this exception.

Although not technically “exceptions,” the lateral-hire screening rule (RPC 1.10(c)) and the withdrawal rule (RPC 1.16(c)) provide other potential remedies in some situations that would otherwise give rise to “hot potato” issues. The screening rule allows a firm to hire a lawyer who has worked on the other side of an active matter without having that lawyer’s conflict imputed to the hiring firm as long as the new lawyer is screened from the matter involved. The withdrawal rule allows a firm to stay on a matter that would otherwise involve a conflict if ordered to do so by a court.

Consequences

Although the hot potato rule most often arises in the disqualification context, it has also been applied in the disciplinary setting. See, e.g., *In re Johnson*, 84 P3d 637, 641 (Mont 2004) (citing the rule in a disciplinary case and noting that “[s]uch behavior is unethical[.]”) The violation of an ethics rule does not typically give rise to a civil damage claim. But, the Oregon Supreme Court in *Kidney Ass’n of Oregon, Inc. v. Ferguson*, 315 Or 135, 142-44, 843 P2d 442

(1992), found that the conflict rules reflect a lawyer's underlying fiduciary duty of loyalty. Therefore, a "fired" client in a "hot potato" situation might well bring a breach of fiduciary duty claim against the firm.

ABOUT THE AUTHOR

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