

What Do Hot Potato Clients Have in Common With Thrust Upon Clients?

One Heck of a Conflict of Interest Dilemma

Conflicts of interest problems are the hardest for lawyers to deal with for many reasons. To begin, the professional responsibility rules governing conflicts are the most difficult to apply (at least for me). Next, throw in the fact that lawyers really do not want to see conflicts if they can help it. This is not a cynical observation – conflicts are practice stoppers. The conflict rules seriously diminish how large a firm can grow, either by adding lawyers or merging with another firm, and how much money can be made.

There is a current theory that it takes only six steps of connecting people you know to people they know to make a connection between you and virtually everyone in the world. If there is any validity to this theory, it is hard to see how the national mega-firms can begin to meet their conflicts professional responsibility. My two favorite purported conflict of interest tests are the cash flow test: “If this situation is going to interfere with my cash flow, it is not a conflict of interest;” and the large law firm different floors test: “If the lawyer in the firm with a client causing a conflict with my client works on a different floor, it is not a conflict of interest.”

Two of the more agonizing conflict situations lawyers frequently face are:

After accepting a new client, a prospective client seeks representation in an unrelated lucrative matter adverse to that new client; and

After accepting a new client, the lawyer suddenly realizes this creates a conflict in an unrelated matter with an existing, but less preferable client.

May you resolve either conflict situation by dropping the client like a ‘hot potato’ for the prospective client or for the later in time acquired client?

Related to the hot potato client is the ‘thrust upon client.’ The conflict with the thrust upon client arises when, through no fault or action of his own, a lawyer suddenly finds himself representing clients with conflicting interest. An example is when representing the plaintiff in a suit the defendant is acquired by a business that the lawyer represents in unrelated matters. Unforeseeably, the lawyer now has a conflict. Absent waiver must he drop one or the other of the clients – or both?

Failure to resolve hot potato and thrust upon client conflicts can lead to disqualification motions, malpractice claims, breach of contract suits, and bar complaints. To assist you in avoiding those risks, this article reviews both conflict situations and their resolution. As will be seen, there is less flexibility in resolving hot potato client conflicts than thrust upon client conflicts.

The Hot Potato Rule

A seemingly easy fix to resolving a conflict on an unrelated matter between two clients is

to disengage from one client converting that client to a former client. This move invokes Kentucky Rule of Professional Conduct (KRPC) 1.9 that governs former client conflicts. The essence of that rule is that if the matter of a current client that is adverse to a former client is not substantially related to the representation of the former client, the lawyer does not have a conflict of interest. As charming as this analysis is, it has proven unacceptable in the great majority of jurisdictions considering it. Lawyers Mutual's Fall 1999 Newsletter illustrated the hot potato client problem and the rationale for rejecting the former client solution:

An Iowa lawyer got suspended from practice for violating the Hot Potato Client rule. He was representing a client in a bankruptcy action at the time he accepted the defense of a new client involved in an automobile accident. Turns out that the plaintiff in this personal injury case was his bankruptcy client. The lawyer claimed that he did not realize this until after he had begun representing the second client. As there was only a little more to do to finish the bankruptcy action he unilaterally withdrew from representation. The lawyer said he believed the bankruptcy client could complete the bankruptcy on his own. Eureka! By withdrawing the lawyer converted the bankruptcy client to a former client. Since there was no substantial relationship between the bankruptcy action and the personal injury case, no more conflict of interest -- and the billing is good!

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Unfortunately, the Iowa lawyer was unaware of the rule that you don't cure a conflict of interest by dropping a current client like a hot potato to accept a new client with a more lucrative matter. When a lawyer accepts a client there is a fiduciary obligation of loyalty to complete the work if at all possible. Withdrawal is appropriate only for compelling professional reasons. Fee optimization doesn't meet the test. If you inadvertently find yourself representing two clients resulting in an unconsented conflict of interest, your professional responsibility [*almost always*] requires withdrawal from both representations.

The Restatement of the Law Governing Lawyers, Third, comes to the same conclusion on hot potato clients:

If a lawyer is approached by a prospective client seeking representation in a matter adverse to an existing client, the present-client conflict may not be transformed into a former-client conflict by the lawyer's withdrawal from the representation of the existing client. A premature withdrawal violates the lawyer's obligation of loyalty to the existing client and can constitute a breach of the client-lawyer contract of employment.

The strict approach of the hot potato doctrine is sometimes contested with the point that professional conduct rules allow unilateral withdrawal by a lawyer for no reason provided withdrawal does not cause material adverse effect on the interest of the client (KRPC 1.16 (b)). That being the case, it is not unethical to disengage from one client to take on another for more challenging or lucrative matters as long as the now former client suffers no material adverse effect.

One authority summarily dismisses this approach as having little but consistent language in the rules to support it and added:

The most obvious problem is a moral one: the lawyer's motivation is patently base and disloyal to the abandoned client. Courts, obviously motivated by concern over the lawyer's disloyalty, have spoken with one voice. The now widely accepted rule is that a lawyer who withdraws – whether otherwise in conformity with the lawyer code or rules or not – from representing a current client for the purpose of proceeding adversely to the client on behalf of another client does not thereby convert the representation into that of a former client.” (*footnotes omitted*)

A New York City Bar ethics opinion echoes this view:

While the Code may not expressly prevent a lawyer from dropping one client in order to represent another, it is well-settled that the duty of loyalty prevents an attorney from doing so opportunistically. For example, under the so-called "hot-potato" rule, a lawyer or law firm should not ordinarily be permitted to abandon one client in order to take on the representation of a more lucrative client, where representing both would create a conflict of interest. This approach has been followed in several court cases involving attorney disqualification motions, where courts have articulated the need to protect confidential client information, as well as to protect the disfavored client from being "cut adrift" simply because a more lucrative client comes along with a claim against it.

The best way to solve the hot potato situation, if feasible, is to get both clients to consent to waive the conflict. Some lawyers try to anticipate the problem by getting an advance waiver for possible future conflicts in a letter of engagement. While it is difficult to describe potential future conflicts in sufficient detail to enable clients to give informed consent, advance waivers are permissible according to the ABA. Use the KBA Ethics Hotline if in doubt about how to proceed.

Thrust Upon Clients – An Exception to the Hot Potato Rule

While the hot potato rule appears to be a bright line test, as so often happens in the practice of law developing business trends introduce new considerations in conflict resolution – enter the thrust upon client. The case of *Installation Software Technologies, Inc. d/b/a Installshield Software v. Wise Solutions, Inc.* and the New York City Bar Ethics Opinion 2005-05, *Unforeseeable Concurrent Client Conflicts*, are two opinions that explain well when a lawyer may resolve a conflict by disengaging one client while continuing to represent another when the conflict is thrust upon the lawyer.

In *Installshield Baker & McKenzie* represented Installshield in a suit against Wise for copyright infringement and misappropriation of trade secrets. Five months after filing suit Altiris, a client of Baker, acquired Wise creating a conflict of interest for Baker that Installshield agreed to waive, but Altiris would not. Baker then moved to withdraw from representing Installshield or other appropriate relief due to a conflict representation. The NYC Bar opinion provides this analysis of the case in terms of the thrust upon client and the hot potato rule:

For purposes of this opinion “thrust upon” conflicts are defined as conflicts between two clients that (1) did not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where (2) the conflict was not reasonably foreseeable at the outset of the

representation, (3) the conflict arose through no fault of the lawyer, and (4) the conflict is of a type that is capable of being waived . . . , but one of the clients will not consent to the dual representation. Although the “thrust upon” conflict may be unforeseeable and arise through no fault of the lawyer or law firm affected, when it gives rise to a concurrent conflict . . . the lawyer must nevertheless take action to avoid [a *conflict of interest*] violation The customary response to such conflicts is for the lawyer to withdraw as necessary to avoid the conflict.

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The "hot potato" rule prohibiting the abandonment of a current client to take on a more lucrative representation is a salutary one, but it is not commanded by the text of the Code or the ABA Model Rules and should not apply to situations where its underlying rationale would not be served. The rule condemns affirmative self-interested acts of disloyalty by an attorney to an existing client in order to switch allegiance to a new one. In circumstances where an attorney is representing two clients, and an unforeseeable conflict between the two arises during the ongoing representation of both, concerns about opportunistic attorney activity are less evident: by definition, the problem was "thrust upon" the lawyer.

Many courts have also found that the duty of loyalty concerns underpinning the “hot potato” rule are not present in the “thrust upon” situation where the lawyer has not instigated the conflict or deliberately sought to abandon a client. In addition, in the current business climate, corporate mergers and acquisitions occur with sufficient regularity that conflicts of interests between two clients will often arise unexpectedly and through no fault of the lawyer, creating conflict situations that are not governed by the “hot potato” rule. Consequently, many courts have applied a flexible approach to “thrust upon” situations that focuses on balancing the interests of all affected parties rather than mechanically applying the “hot potato” rule to prevent a lawyer from withdrawing from one client in order to continue representing the other.

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In *Installation Software Technologies* . . . for example, a conflict of interest arose when a current client of the law firm representing the plaintiff acquired the defendant and then refused to consent to the dual representation. The plaintiff’s law firm sought guidance from the court by moving for permission to withdraw or for “other relief.” The court denied the motion to withdraw after balancing (i) the prejudice to the non-consenting client, including whether its confidential information was at risk if the law firm stayed in the case; (ii) the financial costs to the plaintiff if it was forced to retain new counsel in the matter, (iii) the complexity of the matter, and (iv) the origin of the conflict so as to ensure that the ‘conflict by acquisition’ . . . [did] not become a means for [the defendant] to strategically disadvantage [the plaintiff].”

In adopting the thrust upon client exception to the hot potato rule the NYC Bar opinion added these caveats:

the conflict must truly be unforeseeable,
the conflict must truly be no fault of the lawyer,

the conflict must be between concurrent clients, and implementation of the balancing test for thrust upon conflicts must be performed in good faith.

Finally, the NYC Bar opinion offers some ideas for avoiding the thrust upon client conflict issue:

“When client relationships change during the course of a representation, the lawyer should first determine whether the changed circumstances create an actual conflict.”

What may initially appear to be a conflict may, in fact, involve a former client instead of a current client. Many lawyers represent clients intermittently or have a pattern of repeated retainers with a client that open the door to a claim of continuous representation that creates a conflict of interest with a new client. While it may seem good business to have an open-ended relationship with an inactive client, the best practice is to cleanly indicate the representation is over with a closing letter to the client. This is proof positive that the client is now a former client and that future representation of a client adverse to the former client on an unrelated matter is not a disqualifying conflict.

“Representation of one member of a corporate family ... does not automatically constitute representation of another member of the same corporate family. For the purposes of the ethics rules, a current client's adversary that, due to a merger or acquisition, has become the parent or subsidiary of another client, may not be considered a "client" at all.”

KRPC 1.7, comment (2) recognizes this concept in the following language: “... simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.” See ABA Formal Op. No. 95-390 (1995) for factors to consider when determining whether this exception applies.

Obtain advance waivers for future conflicts.

Since by definition thrust upon conflicts are unforeseeable, an advance waiver that provides a client sufficient information to make an informed waiver is difficult in the extreme – but is worth the effort. As observed in the NYC Bar opinion: “... in appropriate instances clients can give informed and therefore effective waivers in advance to a sufficiently described set of circumstances without necessarily knowing all details or the identity of the other client. ... the lawyer seeking an advance waiver should be as specific as possible regarding the types of possible future adverse representations, the types of matters that might present conflicts, and at least the class of potentially conflicted clients”

Use letters of engagement that carefully describe the relationship and scope of engagement.

Include in letters of engagement:
whether a representation is ongoing,
who is and is not the client,
specify which entities of a corporation are represented,
expressly exclude other affiliates and future acquisitions,
limitations on the scope of engagement to a described area of practice or matter, and
that new business requires a new agreement of engagement.

Summing Up

A conflict of interest involving a hot potato client or thrust upon client cannot go unresolved. Obtaining the consent of both clients to waive the conflict is the best resolution. If you find yourself in a conflict with a hot potato client and cannot get a waiver from both clients, with few, if any, exceptions the required resolution is disengaging from both clients – the worst of all results. If the circumstances involve a prospective client and a hot potato client, a prudent solution is not to engage the prospective client and avoid the conflict at the outset.

The balancing test described in *Installshield* and the NYC Bar opinion for thrust upon clients offers the opportunity to retain one of the clients provided the balancing of interest is done in good faith. The NYC Bar opinion concluded with this guidance on deciding which client to drop: “In reaching this decision, the overarching factor should be which client will suffer the most prejudice as a consequence of withdrawal. In addition, the attorney should consider the origin of the conflict, including the extent of opportunistic maneuvering by one of the clients, the effect of withdrawal on the lawyer's vigor of representation for the remaining client, and other factors mentioned in this opinion.”

The Kentucky Rules of Professional Conduct are contained in SCR 3.130.

There is apparently no Kentucky authority addressing the hot potato client doctrine.

Sec. 132, Comment c and Reporter's Note to Comment c.

Wolfram, *Former Client Conflicts*, 10 Geo. J. Legal Ethics 677, 708(1998).

The Association Of The Bar Of The City Of New York Committee On Professional And Judicial Ethics Formal Opinion 2005-05, Unforeseeable Concurrent Client Conflicts.

ABA Formal Op. No.93-372 (1993). Advance waivers have a greater possibility of being successful in transactional matters than litigation

2004 WL 524829 (N.D.Ill).

The Association Of The Bar Of The City Of New York Committee On Professional And Judicial Ethics Formal Opinion 2005-05, Unforeseeable Concurrent Client Conflicts.