Law firm disqualified after dropping client

A law firm that jettisoned a longtime client in order to hire lawyers representing a party suing that client violated the “hot potato doctrine,” a U.S. District Court judge has determined.
The judge found that the doctrine, which bars attorneys from dropping one client in favor of another with adverse interests, disqualified Greenberg Traurig, along with the two lawyers it hired, from representing the new client.

The underlying case was brought by Markham Concepts Inc. — a business entity set up to hold the assets of Game of Life creator Bill Markham — and Markham’s widow, Lorraine. They sued Hasbro Inc. for withholding more than $2 million in royalty payments for sales of the board game and for Hasbro’s other unauthorized uses of Markham’s intellectual property.

In March, two lawyers who represented Markham Concepts departed from Cadwalader, Wickersham & Taft to join Greenberg Traurig. In doing so, Louis M. Solomon and Michael S. Lazaroff sought to bring the Markham case to Greenberg, which had represented Hasbro since 2008.

When Hasbro refused Greenberg’s request to waive the conflict, the law firm ended the relationship and Hasbro responded with a motion to disqualify the firm from the Markham case.

Greenberg claimed Hasbro was a former client because the firm had cut ties with the company five days before Solomon and Lazaroff came on board at the firm. It argued that Hasbro’s former client status meant Rule 1.9 of the Rhode Island Rules of Professional Conduct, pertaining to duties to former clients, applied — not Rule 1.7, which concerns conflicts of interest with current clients.

In rejecting Greenberg’s Traurig’s argument, Chief Judge William E. Smith noted that while the Rhode Island Supreme Court had not expressly adopted the hot potato doctrine, it “comports with the state’s rules of professional conduct.”

If Greenberg Traurig could transform Hasbro into a former client by quickly dropping it when a conflict was imminent, Smith observed, any law firm would be able to avoid Rule 1.7 by converting a current client into a former one.

“Such a rule would render meaningless the duty of loyalty a lawyer owes to his or her client. Accordingly, for the purposes of this Motion, Hasbro is GT’s current client,” Smith wrote.

The 18-page decision is Markham Concepts, Inc., et al. v. Hasbro, Inc., et al., Lawyers Weekly No. 52-058-16. The full text of the ruling can be found here.

‘Important decision to business of law’

If the judge had ruled in Greenberg Traurig’s favor, both Rule 1.7 and the duty of loyalty would have been completely eviscerated, said Providence litigator Steven E. Snow, who was not involved in the case.

“If this helps to quell any such act by lawyers and law firms, the decision is a good thing,” Snow said.

A spokesperson for Greenberg Traurig said in an emailed statement that the firm believed withdrawing from the litigation would have harmed Markham, its client. The firm’s work for Hasbro, on the other hand, was finished and “completely unrelated to the case.”

“We concluded that, although there was a conflict argument, our responsibility to attempt to prevent prejudice to our client in the case was clearly the stronger ethical obligation which prevented us from simply withdrawing,

and instead let the court decide this issue," the firm stated.

Donoghue, Barrett & Singal in Providence, counsel for Greenberg Traurig, Solomon and Lazaroff, did not respond to requests for comment.

But Providence business litigator Robert G. Flanders Jr. said the ruling offers important direction for law firms given that lawyers frequently jump to different firms and law firms actively seek lateral hires who can bring business with them.

"This is an important decision to the business of law. It basically underscores the message that loyalty to the client has to trump the natural desire to maximize one's profits and business arrangements," said Flanders, a former Rhode Island Supreme Court justice.

Providence's Stephen M. Prignano observed that Smith's ruling will have significant influence on how Rhode Island courts review such disputes, especially because the decision appears to be consistent with the spirit, if not the letter, of the state's rules on ethics.

The fact that Smith did not articulate a per se rule requiring disqualification when a lawyer drops an existing client in favor of a new one is also important guidance, Prignano said. Courts might view other circumstances differently, such as when a firm drops an existing client that failed to comply with a retainer agreement, he said.

"There could be other instances where the balance might shift more toward the attorney," Prignano said.

Neither Hasbro nor its lawyers at Adler, Pollock & Sheehan in Providence and Holland & Knight in Boston responded to requests for comment.

Shifting priorities

The plaintiffs — Markham Concepts and Lorraine Markham — claimed Hasbro stopped making royalty payments in late 2014 and entered into unauthorized licensing deals related to gambling and electronic gaming utilizing the game's intellectual property.

They also claimed that Hasbro and the successors-in-interest to a toy promotion company that Bill Markham had contracted with in 1959 had entered into a TV deal that excluded Markham Concepts.

The legal questions concerned whether Hasbro breached any contracts; who controlled Game of Life's intellectual property; and whether Hasbro could authorize works that were derivative of the game.

The dispute over representation stemmed from Greenberg Traurig's work for Hasbro. The law firm started advising the company on sales promotion and charitable promotion laws at the end of 2008 and in 2011 began filing patent applications for the company. From 2013 to 2015, the firm's billings to Hasbro ranged from $14,325 to $21,849.

In a bid to generate more work from the client, a Greenberg Traurig lawyer met with Hasbro's chief legal officer on Feb. 25 to tout several of the firm's practice areas.

On March 7, the firm informed Hasbro that it planned to hire Solomon and Lazaroff and take on the Markham case. When Hasbro declined Greenberg Traurig's request to waive the conflict, Greenberg notified the company on March 11 that it was ending their relationship and withdrawing from open patent matters.

Solomon and Lazaroff joined Greenberg Traurig on March 16, at which point Hasbro requested that the firm decline the Markham matter. When the firm refused, Hasbro filed the motion to disqualify Greenberg Traurig, Solomon and Lazaroff.

Current client

Smith framed his analysis by determining that Hasbro was Greenberg Traurig's current client, holding that Rule

1.7's stricter bar against representing parties adverse to a client's interests applied, not Rule 1.9's more lenient standard.

Although the state Supreme Court had referenced the hot potato doctrine only "in passing," Smith emphasized that many other jurisdictions have recognized the doctrine and that it aligns with Rule 1.7's comments. Those comments direct a lawyer to decline a new representation that conflicts with an existing one unless each client gives informed consent. Although that language does not create a per se disqualification rule, it also does not validate dropping a current client to sidestep a conflict with a prospective one, Smith wrote.

"It espouses just the opposite — that lawyers should, as a general rule, remain loyal to their current clients and decline to take on the new, conflicting representation. All of this authority, taken together, suggests that the hot potato doctrine is consistent with, and furthers the purpose of, the [state's professional conduct rules]," Smith wrote.

In figuring out whether to disqualify a firm, courts must weigh various factors, such as how the non-moving party would be affected if the court disqualified its attorney, Smith wrote.

He found the circumstances in the case before him "particularly egregious." Greenberg Traurig, for its part, took on a conflicting relationship it identified before Solomon and Lazaroff joined the firm. When Hasbro would not waive the conflict, Smith wrote, the firm could have rejected the Markham case or not hired Solomon and Lazaroff — or at least delayed hiring them until the matter ended.

Solomon and Lazaroff, too, had other options that would not have violated Rule 1.7, the judge noted. They could have stayed with Cadwalader, transferred the case to other Cadwalader lawyers upon joining Greenberg Traurig, or moved to a firm that was not already representing Hasbro, Smith said.

"As far as the Court can tell, the Markham conflict constitutes the only reason GT abruptly decided to end its longstanding relationship with Hasbro. So while GT's net billings to Hasbro may not have been substantial, the representation was regular and sufficient to warrant a try at growing the relationship. The test is not one where the more valuable matter wins the loyalty contest," Smith wrote.

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