

‘Markham Concepts v. Hasbro’: from Mr. Potato Head to hot potato

By Christopher R. Blazejewski



My law partners recently analyzed in Massachusetts Lawyers Weekly the impact of the Massachusetts Supreme Judicial Court’s decision in *Bryan Corp. v. Abrano*, 475 Mass.

504 (June 14, 2016), in establishing — if all but in name only — the “hot potato” doctrine in that state.

Five weeks later, the U.S. District Court in Rhode Island in *Markham Concepts v. Hasbro* issued an important decision on the same issue. There, Hasbro — the company that created the child’s toy “Mr. Potato Head” — played a critical role in reinforcing the hot potato doctrine in Rhode Island.

The *Hasbro* court held that, under the Rhode Island Rules of Professional Conduct, a law firm could not circumvent its duties to a current client by dropping the client “like a hot potato” solely in order to take on representation of a new (and likely more lucrative) client with interests that are directly adverse to the original client.

In issuing the decision, the judge outlined an approach the Rhode Island Supreme Court might take if confronted with adopting the hot potato doctrine in Rhode Island.

The facts of the case are fairly straightforward. In December 2008,

Hasbro hired a law firm to provide it with advice on sales and charitable promotion laws. Hasbro and the law firm executed an engagement letter stating, among other things, that Hasbro could not unreasonably withhold a conflict waiver under certain conditions.

In August 2011, the law firm’s representation of Hasbro expanded to include intellectual property work, such as patent prosecutions. In February 2016, the law firm pitched Hasbro on continuing to grow their relationship and providing additional legal services.

Shortly thereafter, on March 7, the law firm informed Hasbro that it intended to hire two attorneys who represented plaintiff Markham Concepts in a breach of contract and intellectual property action filed against Hasbro back in October 2015. The law firm asked Hasbro for a conflict waiver so that it could represent Markham Concepts against its then-current client Hasbro. Hasbro refused.

Within days, on March 11, the firm notified Hasbro that it was terminating its representation. Five days later, the firm hired the two attorneys and began representing Markham Concepts in the lawsuit adverse to Hasbro.

Hasbro then moved to disqualify the law firm from representing Markham Concepts in the case.

In adjudicating the motion, the judge began by deciding whether

Hasbro was a current or former client of the law firm. Rule 1.7 of the Rhode Island Rules of Professional Conduct applies to current clients and is more restrictive of lawyers, while Rule 1.9 applies to former clients and is less restrictive.

Rule 1.7 states that a lawyer shall not represent a client if, among other things, the representation will be directly adverse to another client. Rule 1.7 may be waived only if (1) the lawyer reasonably believes that he or she will be able to provide competent and

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diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding; and (4) each affected client gives informed written consent.

By contrast, Rule 1.9 states, among other things, that a lawyer shall not knowingly represent a client adverse to a former client in the same or substantially related matter in which

the lawyer had represented the former client, absent informed, written consent. It also states that a lawyer shall not reveal or use to its disadvantage the former client's confidential information.

In adopting the hot potato doctrine, the judge decided that Hasbro should be treated as a current client based on the Rule of Professional Conduct and case law. The judge reasoned that deciding otherwise would undermine Rule 1.7 by allowing a lawyer simply to drop the client when a new, more promising but directly adverse client appears on the horizon in order to take advantage of the less stringent Rule 1.9.

The judge did not, however, rule that the law firm's representation of Markham Concepts was a violation of the hot potato doctrine per se. Rather than automatically disqualifying the firm, the judge stated that he "must carefully examine the facts underlying the conflict situation" and "the specific ethical dilemma presented by the circumstances," including "the prejudice the non-moving party would face should the court disqualify the client's attorney."

After analyzing the facts of the case, the judge granted Hasbro's motion and disqualified the law firm. He found that the conflict was

particularly egregious because the law firm knew there was a conflict, could have avoided the conflict by not hiring the lawyers, hired the lawyers anyway, and terminated its relationship with Hasbro solely in order to take on Markham Concepts as a client in litigation adverse to Hasbro.

While the judge considered the law firm's argument that disqualification would prejudice Markham Concepts, he said he did not believe the prejudice sufficient to override the firm's duty of loyalty to Hasbro.

Hasbro provides important guidance for law firms that may, at some point, seek to represent a new client in a matter that is or may become adverse to a current client.

Specifically, the judge suggested that the engagement letter between the current client and law firm may be a key deciding factor: "The Court can imagine some instances where a client's refusal to waive a conflict, for example, where the stated conditions in a retainer agreement are met, could be unreasonable and warrant denial of a disqualification motion. This, however, is not such an instance."

In *Hasbro*, the judge was unmoved by the conflicts language in the engagement letter because he found that the firm did not meet the

conditions for waiver under terms of the letter, and that Hasbro was permitted under the engagement letter to refuse to consent to the waiver.

Under different circumstances, however, with less egregious facts, the conflicts language in the engagement letter might have led to a different result.

What is the takeaway? Law firms should consider including in their engagement letters a provision dealing with potential conflicts, advance waivers of conflict, and the firm's right to withdraw from the representation should a conflict arise.

The *Hasbro* case suggests that a law firm may be permitted to proceed with representation and protect itself from disqualification when (1) the law firm cannot avoid the conflict; (2) the matter involving the conflict is unrelated to the work performed by the law firm for the client; and (3) the engagement letter states the circumstances under which the law firm can withdraw if the client unreasonably withholds a conflict waiver.

Even with such language in the engagement letter, however, the lesson for lawyers from *Hasbro* is clear: When it comes to taking on representation directly adverse to current clients, don't unfairly turn Mr. Potato Head into a hot potato. **RILW**

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