# PARRYING THE "THRUST UPON" CONFLICTS THAT RESULT FROM CLIENT MERGERS: THE ETHICS RULES CATCH UP WITH CORPORATE REALITY

Your company has been in a bet-the-company case against its primary competitor. You are happy with your outside counsel, who has been doing a great job for the past several years. Unfortunately, your competitor has just been acquired by another company, which is one of the primary clients of the law firm that represents you. The word comes back that your competitor will *not* consent to the conflict. Will this change in circumstance result in your trial counsel being forced to withdraw after years of work and on the eve of trial? This situation is not your or your outside counsel's fault. Can you keep your lawyer over the competitors' objection? The answer is that ethics jurisprudence has been working toward a solution to this problem, and the Model Rules now suggest a more flexible approach that does not necessarily require disqualification of counsel in these "thrust upon" conflict situations.

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Nothing is easy. Even lawyers and clients who take all reasonable steps to comply with the ethical rules governing conflicts may increasingly find that they are the victims of corporate consolidation. These consolidations can present stark conflict problems if analyzed under traditional conflicts rules. When a merger has resulted in a conflict of interest and the "new" client refuses to consent to the conflict, is the outside law firm required to withdraw from its conflicted representation? Although the immediate effect of the withdrawal may be upon the law firm in question, the prejudice to the client that loses its counsel may be even worse. The answer depends upon the court and its application of the governing rules, but an increasing number of courts would permit continued representation. The recent commentary to Rule 1.7 also suggests increasing flexibility.

Rule 1.7(a) of the *Model Rules of Professional Conduct* generally prohibits a lawyer from undertaking the representation of a client in cases in which the representation of one client will be directly adverse to another client or in which a significant risk exists that the representation will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.[1] Subsection (b), however, permits continued representation if (1) the lawyer reasonably believes that he or she will be able to provide competent and 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 litigation or other proceeding before a tribunal, and (4) each client provides consent after consultation, confirmed in writing.[2]

John K. Villa, "Parrying the 'Thrust Upon' Conflicts That Result from Client Mergers: The Ethics Rules Catch Up with Corporate Reality," *ACCA Docket* 21, no. 2 (February 2003): 92–94.

Although Rule 1.7 prohibits certain nonconsentable conflicts, including those involving clients who are opponents in the same litigation, the commentary suggests that, in cases in which such a conflict arises during the course of a representation, created by "unforeseeable developments, such as changes in corporate and organizational affiliations,"[3] withdrawal from one of the representations is not necessarily required in every situation. Instead, whether the lawyer has a duty to withdraw in order to avoid the conflict depends upon the circumstances.[4]

Although the commentary to Model Rule 1.7(b) does not describe the circumstances that would not require withdrawal, a number of decisions have applied a balancing test to determine whether a lawyer should be disqualified or forced to withdraw if facing an unanticipated conflict in the midst of the representation. The court in *Gould Inc. v. Mistui Mining Corp.*[5] explained the need for this type of approach, rather than a rule of per se disqualification followed by some courts:

> The explosion of merger activity by corporations during the past fifteen years, and the corresponding increase in the possibility that attorney conflicts of interest may arise unexpectedly, make it appropriate for a court to adopt a perspective about the disqualification of counsel in ongoing litigation that conforms to the problem. This means taking a less mechanical approach to the problem, balancing the various interests. The result is that the courts are less likely to order disqualification and more likely to use other, more tailored measures to protect the interests of the public and the parties.[6]

*Gould* illustrates this problem. After the initiation of a lawsuit, a merger occurred that resulted in the law firm representing a subsidiary corporation in one matter while it represented the plaintiff in a suit against the subsidiary's parent. On the motion of the parent to disqualify the plaintiff's firm, the court held that disqualification was not required.[7] In reaching its decision, the court applied the balancing test and considered the following factors: the absence of prejudice to the moving party; the fact that no confidential information had been exchanged with respect to the firm's representation of the subsidiary on an unrelated matter; the cost to the plaintiff, in terms of time and money, for retaining new counsel; the extent of the delay in the progress of the case due to the complexity of the issues and the time required to familiarize new counsel with the case; and the fact that the conflict was not caused by any affirmative act of the plaintiff's firm, but by a merger that had occurred after the commencement of the firm's representation of the plaintiff.[8] Other courts, relying on *Gould*, have applied the balancing test to reach the same conclusion.[9]

Although not involving direct adversity in which one law firm both sues and defends the same suit, which would seem unacceptable, *Gould* and its progeny provide a framework for determining when continued representation is permitted under Model Rule 1.7 because of "thrust upon" conflicts.[10] At least one jurisdiction has adopted this approach in its conflict of interest rules. Rule 1.7 of the *District of Columbia Rules of Professional Conduct* provides, in pertinent part:

> b. Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
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> 1. That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;
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> . . .
>
> *d. If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4)* [emphasis supplied].[11]

As explained in the District of Columbia's commentary to the Rule, "[w]here a conflict is not foreseeable at the outset of representation and arises only under Rule 1.7(b)(1), a lawyer should seek consent to the conflict at the time that the conflict becomes evident, but if such consent is not given by the opposing party in the matter, the lawyer need not withdraw."[12] In applying this provision to a conflict created by the unforeseeable merger of one client with parties adverse to two existing clients of a firm, the D.C. ethics panel has held that the firm could continue to represent all three clients, even though it did not have the consent of all of the clients, and that its representation could include a subsequent proceeding before the FCC to review the merger:

> . . . Rule 1.7(d)'s "thrust-upon" conflict provision permits continued representation of all parties in this matter too, even though it is a new proceeding and the conflict exists at the outset of it. For purposes of applying Rule 1.7(d), the concept of "representation" encompasses more than a single proceeding and the "onset of the representation" will be deemed to occur when the lawyer first begins to provide legal services that involve the same facts, legal theories, claims, defenses, and parties; if the conflict was not reasonably foreseeable at that time, the rule permits the firm to continue the representation of all parties without client consent even if a conflict with another client is triggered by a subsequent legal proceeding.[13]

So there may be light at the end of this tunnel, if the District of Columbia is seen as a guiding light. If your company and the law firm that represents your company have this situation thrust upon them, you need to convince your company's law firm to take the following steps to improve the chances of avoiding disqualification:

- Act promptly upon receiving notice of the possible problem. Erect internal barriers that prevent the lawyers working for the original client from dealing in any way with the "thrust upon" client.
- Seek consent from both clients and, in the consultation, explain carefully the nature of the conflict and the consequences of the waiver.
- Consider suspending all work on the conflicted matters until the issue is resolved and seek its resolution with dispatch. If this suspension of work would interfere with court deadlines or expectations, notify the court of the issues (in camera, if necessary).

Keep in mind that the ethical rules described above have shown some flexibility for the "thrust upon" conflict in cases in which the cause was a client-driven merger or reorganization. A conflict resulting from the merger of law firms may not receive the same lenient treatment.[14]

## Notes

1. Model Rules of Professional Conduct Rule 1.7(a) (2002).
2. *Id.*, Rule 1.7(b). Before its revision in 2002, Rule 1.7(a) prohibited the representation of clients having directly adverse interests unless "(1) the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation."
3. *Id.*, cmt. 5.
4. *Id.*, stating that "depending upon the circumstances, the lawyer may have the duty to withdraw from one of the representations in order to avoid the conflict."
5. *See* Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188, 195–196 (D.N.J. 1989).
6. Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1126 (N.D. Ohio 1990); *see also* Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 269 (D. Del. 1979) (rejecting a per se rule and adopting a "mode of analysis" that focuses on all of the facts and circumstances).
7. Although disqualification was not required, the court held that the firm had to withdraw from its representation of one of the clients and left the choice of which one up to the firm. *Id.* at 1127.
8. *Id.* at 1126–1127.
9. *See* University of Rochester v. G.D. Searle & Co., Inc., No. 00-CIV-6161L B, 2000 WL 1922271 (Dec. 11, 2000); Carlyle Towers Condominium Ass'n, Inc. v. Crossland Savings, FSB, 944 F. Supp. 341 (D.N.J. 1996); *see also* AmSouth Bank v. Drummond Co., Inc.,589 So. 2d 715, 722 (Ala. 1991) (applying a "common sense" approach and holding that, in a case in which the firm had not created the conflict and in which prejudice to a longstanding client would be great, the firm did not act improperly in withdrawing from its representation of conflicted client and continuing its representation of original client).
10. Under the Restatement, a lawyer may withdraw from an existing representation in order to continue an adverse representation against the prior representation in cases in which the prior client is the cause of the conflict, such as cases in which the prior client acquires an interest in an enterprise against which the lawyer has been proceeding on behalf of another client. *See* Restatement (Third) of the Law Governing Lawyers § 132 cmt. j (2000).
11. D.C. Rule (b)(2) covers a representation that is likely to be adversely affected by representation of another client; (b)(3) covers the representation of another client that will likely be adversely affected by representation of an existing client in a matter; and (b)(4) covers the situation in which the lawyer's professional judgment will be or may reasonably be adversely affected by his or her responsibilities to or interests in a third party or some personal interest.
12. D.C. Rules of Professional Conduct Rule 1.7 cmt. 22 (2002).
13. D.C. Ethics Op. 292 (June 5, 1999).
14. *See* Picker Int'l, Inc. v. Varian Associates, Inc., 869 F.2d 578 (Fed. Cir. 1989); Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981). In a case in which the representation of directly adverse interests caused by the merger of two firms is inadvertent and of short duration because of the new firm's withdrawal from one of the representations, one court has refused to apply a rule of automatic disqualification with respect to the other representation. *See* Research Corp. Technologies, Inc. v. Hewlett-Packard Co., 936 F. Supp. 697, 701 (D. Ariz. 1996).