

An Intellectual Property and Technology Law Update

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Twin Challenges in Drafting a Viable Patent Legal Malpractice Complaint

Drafting a short and plain statement of a patent legal malpractice claim used to be a relatively straightforward matter under the now discredited *Conley v. Gibson* "no set of facts" standard. That pleading landscape dramatically changed in 2007.

In the wake of the Supreme Court's *Twombly* and *Iqbal* decisions, federal court judges are now routinely called upon to apply their judicial experience and common sense in determining whether patent infringement complaint allegations cross a line separating merely "conceivable" claims from actually "plausible" ones.

Parties that cannot "nudge" their patent claims across this *conceivable vs. plausible* pleading line will find themselves on the losing side of a dismissal motion.

Patent legal malpractice claims pose a peculiar twin burden under the relatively new *Twombly/Iqbal* pleading paradigm. The federal court's exclusive jurisdiction over these "case-within-a-case" state law claims adds another layer of pleading complexity. While sometimes overlooked, Federal Rule of Civil Procedure 8(a)(1) also requires a short and plain statement of the grounds for a federal court's limited jurisdiction.

A federal court's dismissal of a patent legal malpractice claim in the *Rockwood Retaining Walls* case neatly exposes these twin pleading challenges.

Like many patent legal malpractice cases nowadays, the *Rockwood* complaint focuses on defense counsel's alleged negligent representation of its former client in a long-running patent infringement matter.

Rockwood paid its law firm \$3.8 million in attorneys' fees and costs for failed defense efforts that ended with a \$24 million adverse judgment. Suffice to say, losing an expensive patent litigation case inspires "coulda, woulda, shoulda" hand-wringing and Monday-morning quarterbacking.

Served with Rockwood's three-page spartan complaint, its former law firm moved to dismiss the legal malpractice claim based on the *Twombly/Iqbal* "plausibility" standard of review.

The three-page (amended) complaint described the law firm's alleged negligent acts in the underlying patent lawsuit as:

- failing to comply with applicable discovery rules, leading to a limitation on evidence that could be offered at trial;
- failing to properly defend against an inducement of infringement claim;
- failing to supply competent litigation counsel to replace a departing partner;
- failing to adequately prepare witnesses for trial; and
- failing to offer evidence to counter the plaintiff's damages claim, notwithstanding express instructions to do so.

Before analyzing Rockwood's dismissal motion, the judge had to determine whether the federal court had subject matter jurisdiction over the state law malpractice claim in light of Rockwood's remand motion (the case was removed from state court).

The federal court tentatively ruled in favor of retaining jurisdiction. In order for the malpractice plaintiff to prove it would have had a more favorable result in the patent litigation but for the law firm's alleged negligence, the judge opined that such "alternative outcomes would still require the hypothetical retrial of a patent infringement and validity action."

The judge further observed that a patent legal malpractice plaintiff "cannot avoid federal jurisdiction by framing the malpractice issue as one simply of state-law issues of alleged errors in counsel's advice and strategy" in the underlying litigation.

Having denied the remand motion, the sparse allegations of the amended complaint did not pass muster as a Rule 8 notice pleading. The judge characterized the foregoing "examples" of alleged negligent representation as more in the nature of topical categories rather than as allegations of facts. While they conceivably supported a malpractice claim, they did not plausibly do so without more factual development.

In point of fact, the underlying patent litigation docket had 843 entries. The law firm argued that "it should not have to wade through such a voluminous record to speculate on what particular actions it took (or did not take) that could then fall into these general categories of alleged malpractice." The court agreed and dismissed the amended complaint without prejudice.

Jurisdictional fencing is not over.

The judge gave Rockwood a month to file a second amended complaint. If the amended allegations "could somehow be stated in such a fashion that this Court would not have to address substantial issues of patent law in the hypothetical 'retrial' of the underlying infringement litigation," the court invited a renewed remand motion.

Rockwood has until January 21 to file its second amended complaint, so stay tuned for the next chapter in this unfolding saga.

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