

American Bar Association Adopts Three New Rules

BY ROY SIMON

At its February 2002 Mid-Year Meeting, the ABA adopted three brand new ethics rules that are now officially incorporated into the ABA Model Rules of Professional Conduct. New York lawyers should care about these new rules because each rule reflects a situation that was not adequately covered by the ABA Model Rules and - more importantly for our readers - is not adequately covered by the New York Code of Professional Responsibility. This article describes the new rules and the situations that they address. The full text of the new Rules is printed on Page 9.

Prospective clients

One of the ABA's new rules addresses conflicts of interest that arise out of a lawyer's preliminary interview with a prospective client that decides not to hire the lawyer. Under the New York Code of Professional Responsibility and case law, such clients are considered full-fledged former clients, entitled to the full protections of the Code. Under New York's DR 5-108(A), therefore, a lawyer who has interviewed or been consulted by a prospective client has a full-blown duty of confidentiality to that person and may not oppose that person in a substantially related matter without the person's consent.

Moreover, if the person refuses consent (as many will), then the lawyer's entire law firm is vicariously disqualified under DR 5-105(D). Is that fair? Should a one-hour interview with a prospective client by one lawyer in a firm disqualify the entire firm from opposing that person in a substantially related matter, even if the no other lawyer in the firm is privy to whatever confidences and secrets the person reveals during the preliminary interview?

The ABA thinks not. New Model Rule 1.18 explains a lawyer's duties to a prospective client, defined as any person who talks to a lawyer about "the possibility of forming a client-lawyer relationship with respect to a matter." Comment 3 to the new rule rejects any magical minimum-time period by stating that a person who engages in discussions about the possibility of forming an attorney-client relationship is a prospective client "regardless of how brief the initial conference may be."

The definition of a "prospective client" makes a difference. Comment 2 to the new rule provides:

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client"

Thus, a person who approaches a lawyer at a cocktail party and begins blurting out the lurid details of her legal problem is most likely not a "prospective client" and is not owed any duty of confidentiality at all.

Those who do qualify as "prospective clients" are entitled to "some but not all of the protection afforded clients." (*See* Comment 1.) A lawyer who has interviewed a prospective client "shall not use or reveal information learned in the consultation" unless the lawyer would be permitted to use or reveal the information under the rule expressly governing confidentiality duties to former clients (Rule 1.9(c) in the ABA Model Rules, which is almost identical to DR 5-108(A)(2) in the New York Code of Professional Responsibility).

Rule 1.18 does not expressly say so, but it effectively divides prospective clients into two categories - those who decide not to form an attorney-client relationship with the lawyer (I will call these "former prospective clients") and those who are still deciding whether to hire the lawyer or waiting for the law firm to decide whether to take their case (I will call these "active prospective clients"). An active prospective client is essentially a current client, and a lawyer may not oppose a current client in any matter.

Former prospective clients also divide into three categories - (i) those who gave the lawyer information that "could be significantly harmful to that person in the matter," (ii) those who did not give the lawyer any such information, and (iii) those who gave the lawyer such information but agreed with the lawyer in advance, based on informed consent, that "no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." The last category comes from Comment 5, which adds that "[i]f the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client."

Even absent such an agreement, Rule 1.18(c) does not prohibit a lawyer from opposing a former prospective client in a substantially related matter unless "the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." If the lawyer did not receive information that could be significantly harmful to the former prospective client, then the lawyer may oppose the former prospective client even in a substantially related matter. As Comment 6 explains, "the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter."

Comment 4 provides some practical advice: "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose." A lawyer who successfully avoids acquiring "disqualifying information" (meaning information that "could be significantly harmful" to the person) remains as free to oppose that person as if they had never met.

If a lawyer does acquire disqualifying information, however, then the lawyer is personally disqualified from opposing the former prospective client in any substantially related matter unless the lawyer obtains consent (confirmed in writing) from both the current client and the former prospective client. If either does not consent, then the entire law firm is disqualified by imputation unless the law firm meets three separate requirements: (1) "the lawyer who received the information took reasonable measures to avoid

exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client"; (2) "the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom"; and (3) "written notice is promptly given to the prospective client." The written notice, according to Comment 8, should include "a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed" and "generally should be given as soon as practicable after the need for screening becomes apparent."

Thus, under Rule 1.18, a lawyer who interviews a prospective client has some protection against later disqualification provided the lawyer either avoids acquiring any information that could be significantly harmful to the prospective client, or obtains the prospective client's informed agreement that the client either will not disclose any disqualifying information or will not object if such information is later used against her. Some lawyers may decide that it is more important to form a close and useful bond with the prospective client than to worry about later conflicts. However, once a prospective client begins revealing information that could be significantly harmful if used against her, then the lawyer must not elicit (or listen to) any more information than necessary to decide whether to take the case. If the lawyer does not make reasonable efforts to limit the amount of disqualifying information, then the rest of the lawyers in the firm will also be disqualified no matter what screening measures they take.

Short-term limited legal services

A second new ABA rule addresses the dilemma that often confronts lawyers who want to engage in certain kinds of pro bono programs but aren't sure how to deal with potential conflicts of interest. As Comment 1 to new Rule 6.5 explains:

Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal- advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation.

In New York, a lawyer participating in such a program must follow the mandate of DR 5-105(E) to check for conflicts of interest before providing any legal advice. But that is highly impractical because instant conflict checks are often impossible, especially when the lawyer comes from a large law firm with literally thousands of clients and former clients unknown to the individual lawyer. Yet the person seeking advice may find it equally impractical to come back on a different night after the conflicts check is completed, or to wait until then to obtain advice. Moreover, especially when participating lawyers are from large law firms, conflicts checks will often reveal a conflict. What can be done to remove these barriers to effective pro bono programs to enable lawyers to deliver short-term legal advice?

New ABA Model Rule 6.5 has devised a highly practical three-part solution. First, when an individual lawyer acting under the auspices of a program sponsored by a court or nonprofit organization "provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter," then the lawyer is not restricted by the

conflict of interest rules unless the lawyer "knows that the representation of the client involves a conflict of interest."

Second, conflicts are not imputed from other lawyers at the participating lawyer 's firm to the participating lawyer personally unless the lawyer "knows that another lawyer associated with the lawyer in a law firm is disqualified"

Third, as long as the participating lawyer does not know about any personal or imputed conflict, then any conflict that does exist or arise out of the matter will not be imputed to other lawyers at the firm.

These lenient conflict rules recognize, in the words of Comments 3 and 4, that "a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest," and that "the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm." Rule 6.5 also recognizes that clients who use these programs often cannot wait for conflicts checks. The new rule thus serves both lawyers and clients.

When such a program results in a longer term attorney-client relationship, the rule restores the protection of the conflicts rules to the client. As Comment 5 explains: If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter "on an ongoing basis," the rules governing conflicts with current and former clients and the rules governing imputed conflicts once again become applicable.

Lawyers as third-party neutrals

The third new ABA rule, Rule 2.4, addresses lawyers who act as third-party neutrals. Rule 2.4(a) defines a third-party neutral: "A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." (Emphasis added.) Comment 1 to Rule 2.4 further defines a third-party neutral as a person "such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction."

Problems may arise, however, if the parties to a dispute or transaction do not understand the role of the lawyer serving as a third-party neutral. The potential for confusion is especially significant when the parties do not have their own counsel, because they may look to the lawyer-neutral for legal advice and even legal representation.

Rule 2.4 does not attempt to define in detail the ethical obligations on lawyers serving as third-party neutrals, but it does impose disclosure obligations to make sure the parties to the process understand the lawyer-neutral's role. Rule 2.4(b) states:

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client.

The ABA rejected a proposal to prohibit third-party neutrals from giving legal advice, and a proposal to prohibit a neutral from assisting the parties in drafting a settlement document, and other proposals to impose more detailed obligations on third-party neutrals. The ABA declined to do so because courts, bar groups, and various private organizations have already done that. As Comment 2 notes:

[T]he lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

The result is a short and simple rule that simply requires a lawyer serving as a third-party neutral to explain to unrepresented parties that the lawyer is not representing them, and requires the lawyer to clear up any confusion if the unrepresented parties do not understand the difference between an advocate and a neutral.

Conclusion

New York is now in the preliminary stages of considering whether to adopt the ABA Model Rules of Professional Conduct, so those rules should be of greater interest to New York lawyers than they may have been in the past. The three new ABA rules discussed in this article suggest that the ABA Model Rules contain many concepts and formulations that may be useful in New York.

Roy Simon is a Professor of Law at Hofstra University School of Law and annually writes SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED. The 2002 edition is now available from West at www.westgroup.com.