

# Prospective Client Conflicts-Can the Puzzle Be Solved?

BY ROY SIMON

Should New York adopt a Disciplinary Rule to govern conflicts with prospective clients? If so, what should the rule say? These turn out to be surprisingly complicated questions. This article seeks to illuminate the problem.

## Two Scenarios

I will begin by setting out two scenarios that a rule governing conflicts with prospective clients would need to address.

*Scenario # 1:* A lawyer receives a call from an officer of a prospective client, Acquisition Corp., who says, "I would like you to represent my company in a possible acquisition of Target Co." The lawyer quickly checks and finds that Target Co. is not a current or former client, so the lawyer interviews the prospective client (Acquisition Corp.) at length and learns all of the relevant facts, including the top price that Acquisition Corp. is willing to pay for Target Co. For some reason, however, Acquisition Corp. does not retain the lawyer, and no full-blown attorney-client relationship is formed. (Or perhaps the lawyer decides not to accept the matter – that would not change my analysis.)

A month later, an officer of the acquisition target (Target Co.) calls the same lawyer and says, "Target Co. would like to retain you to help get us the best terms when we sell the company." The lawyer immediately realizes that the acquiring company is Acquisition Corp., the very same company that the lawyer interviewed the previous month.

This scenario raises two main questions: (1) May the lawyer who interviewed Acquisition Corp. personally accept the matter? And (2) if not, may other lawyers at the lawyer's firm accept the matter?

*Scenario # 2:* Same facts, but this time Target Co. is already a client of the lawyer when Acquisition Corp. contacts the lawyer. When the officer for Acquisition Corp. says that it wants to retain the lawyer to acquire Target, the lawyer immediately declines the proposed representation due to a conflict with a current client.

This scenario raises twice as many issues as the first one: (1) May the lawyer continue to represent his client, Target Co., without obtaining the consent of Acquisition Corp. pursuant to DR 5-108(B) (just as if Acquisition Corp. were a former client in a substantially related matter)? (2) If the lawyer may continue to represent Target without Acquisition's consent, may the lawyer use or reveal the information acquired from Acquisition Corp. (e.g., may the lawyer warn Target Co. of the impending acquisition bid so that Target can take steps to thwart the acquisition, or seek out alternative suitors to bid up Target's value)? (3) If the lawyer may not use the information acquired from Acquisition Corp., does the lawyer have a conflict under DR 5-105(B) that prohibits him from continuing to represent Target Co. unless Target Co. gives its informed consent to continued representation? And, finally, (4) If the lawyer may not personally

represent Target Co. without the consent of Acquisition Corp., may other lawyers at the firm accept the matter?

The puzzle is to strike the right balance between two powerful competing forces, as if we were trying to suspend a metal ball in the air between two strong magnets. On one hand, a prospective client is ordinarily entitled to considerable confidentiality in conversations exploring whether or not to form an attorney-client relationship with a given lawyer. Absent that confidentiality, a prospective client may not wish to give a lawyer enough information to enable him to evaluate a matter accurately. On the other hand, a current client is entitled to great loyalty, and his lawyer should not automatically be disqualified just because an indiscreet prospective client has blurted out “nuclear information” (i.e., sensitive confidential information that could be used to the prospective client’s significant disadvantage) during an initial interview with the lawyer. Moreover, when a prospective client has decided not to hire a lawyer, the lawyer (and the lawyer’s firm) should not automatically be disqualified from accepting future business from every new client that may want to hire the lawyer in a matter substantially related to the matter on which the prospective client consulted the lawyer. (Similarly, other potential clients should not automatically be deprived of the right to choose that particular lawyer). Thus, we are working with a delicate balance in which prospective clients, current clients, future clients, lawyers, and their law firms all have much at stake.

### **What Is New York Law Today?**

Currently, the New York Code of Professional Responsibility has no specific Disciplinary Rule governing conflicts with prospective clients, but there are enough cases and Ethical Considerations to divine a working rule. I have previously analyzed this law – see *When Prospective Clients Raise Conflicts of Interest* (NYPRR May 2003) – but I will briefly summarize that law here.

A good starting point is the first sentence of EC 4-1, which states: “Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or *sought to employ* the lawyer.” (Emphasis added.) Thus, the duty of confidentiality plainly applies to information gained from prospective clients.

To protect the confidences and secrets of prospective clients who have sought to employ a lawyer, courts will sometimes disqualify the lawyer from opposing the prospective client. A good example of this principle is *Seeley v. Seeley*, 129 A.D.2d 625, 514 N.Y.S.2d 110 (2d Dep’t 1987), in which the Second Department disqualified a lawyer named Edgar Hills who had twice interviewed a prospective client who later became the plaintiff in a land dispute. During the initial consultations, Hills had learned “in intimate detail” about the ownership interests of the parties and other confidential information that bore directly on the action. The court disqualified Hills from representing the defendant even though Hills could not recall any of the confidential information that had allegedly been revealed to him.

However, at least one case suggests that prompt and effective screening may solve the problem with respect to other lawyers at the firm. In *Cummin v. Cummin*, 1999 WL 747252 (1st Dep’t 1999), the First Department permitted a lawyer to represent the wife in a divorce action even though another lawyer at the same firm had interviewed the husband about a possible divorce action six years earlier. In denying the husband’s motion to disqualify, the First Department noted that the lawyer who had consulted with the husband had no recollection of the interview, had not kept any notes, and – perhaps most importantly – had promptly been screened off from the rest of the firm with respect to the wife’s matter.

Thus, we know from the EC's and the case law that a lawyer who actually receives confidential information from a prospective client is vulnerable to disqualification if the lawyer later seeks to oppose the prospective client in the same or a substantially related matter without the prospective client's consent. This is almost like the test under DR 5-108(A)(1), which provides that a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure, thereafter "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." But there is one big difference: in the case of a former client (i.e., a person the lawyer actually represented), we presume that the former client divulged confidences and secrets to the lawyer, and that those confidences and secrets could be used to the disadvantage of the former client in any substantially related matter. In the case of a prospective client, the courts do not make that presumption. Instead, the courts in New York have put the burden on the prospective client to show that he divulged confidences and secrets that the lawyer could use to his disadvantage in the new matter.

### **ABA Model Rule 1.18**

In 2002, the ABA adopted a new Model Rule 1.18 to address the problem of prospective clients. The New York State Bar Association Committee on Standards of Attorney Conduct ("COSAC") is currently considering whether to recommend adoption of ABA Model Rule 1.18, so I will discuss the rule in some detail.

Rule 1.18(a) begins with a brief definition: "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." The definition is more complex than it initially appears, because it encompasses situations where the prospective client has already decided not to hire the lawyer (or where the lawyer has decided not to accept the matter) as well as situations where the lawyer and client are still considering whether to form an attorney-client relationship. In other words, the rule encompasses both former prospective clients and current prospective clients.

Rule 1.18(b) states the general rule regarding the duty of confidentiality to prospective clients:

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or *reveal* information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client. [Emphasis added.]

Thus, Rule 1.18(b) essentially applies ABA Rule 1.9(c) to prospective clients. Rule 1.9(c) provides:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. [Emphasis added.]

We need not concern ourselves now with what the rules “would permit or require with respect to a client.” The important point is that Rule 1.18(b) applies the same duty of confidentiality to prospective clients as to former clients. There is no real difference between the two standards, except that Rule 1.18(b) collapses the “use” and “reveal” prohibitions into a single paragraph.

But there the similarity between prospective clients and true former clients ends. When the subject turns to conflicts of interest rather than confidentiality, Rule 1.18 gives prospective clients considerably less protection than full- fledged former clients. Rule 1.18(c) begins by providing:

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d).... [Emphasis added.]

Paragraph (d)(1) includes a consent exception to the general rule stated in paragraph (c). It permits a lawyer to oppose a prospective client in the same or a substantially related matter if the prospective client has given consent, confirmed in writing. But the prospective client’s consent is not even required unless the lawyer believes that the information received from the prospective client “could be significantly harmful” to the prospective client. A lawyer who doesn’t believe that the information could be significantly harmful is thus free to oppose the prospective client in a substantially related matter – or in the same matter – without even seeking the prospective client’s consent. If the lawyer has forgotten some of the significant information that the prospective client told the lawyer, or if the significantly harmful nature of the information is not yet clear to the lawyer, then the lawyer will not be restrained from representing an opposing client unless the prospective client brings a motion to disqualify and shows that the information imparted to the lawyer could be significantly harmful.

Compare that to the way the rules would treat a former client. To ensure that a lawyer who has formerly represented a client is not even tempted to use the former client’s confidential information against him, ABA Model Rule 1.9(a)– like New York’s DR 5-108(A) – provides that a lawyer who has formerly represented a client in a matter “shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” That’s quite a difference. With former clients, we don’t ask whether the information the lawyer received “could be significantly harmful to the person” – we just assume that it could be significantly harmful as long as the matters are substantially related.

Moreover, Rule 1.18 apparently puts the burden on the prospective client to show that the information could be significantly harmful, rather than on the lawyer to show that it could not be. The drafters could have said that a lawyer shall not oppose a prospective client in a substantially related matter “unless the lawyer reasonably believes that the information received from the prospective client could not be significantly harmful to the prospective client in the matter.” They didn’t. As a practical matter, Rule 1.18’s silence about the burden will shift it to the prospective client.

### Exceptions to the Lawyer's Personal Disqualification

Rule 1.18(d) contains two exceptions to disqualification – a consent provision, and a screening provision. Let's look first at the consent provision. It provides that when the lawyer has received disqualifying information that could be significantly harmful to the prospective client, the lawyer will not personally be disqualified in a matter against the prospective client if "(1) both the affected client and the prospective client have given informed consent, confirmed in writing." The first question is: why would a prospective client consent to being opposed by a lawyer with significantly harmful information? We might speculate that some prospective clients would not realize that the information they gave to the lawyer could be significantly harmful to them, but that can't be the answer. It can't be the answer because then the prospective client's consent would not be "informed." To obtain "informed consent," the lawyer must say to the prospective client, "I would like to oppose you on behalf of another client even though you gave me information that could be significantly harmful to you in the matter." Maybe the answer is just that P.T. Barnum was right – there really is a sucker born every minute.

Now let's move to the other side of the consent equation – the client who wants to oppose the prospective client. Once the prospective client has given consent, Rule 1.18(d)(1) provides that representation adverse to the prospective client is permissible if the putative opposing client (which the rule calls "the affected client") has also "given informed consent, confirmed in writing." This formulation presents some serious problems.

First, how would the lawyer obtain "informed consent" from the client who wants to oppose the prospective client? What will that conversation sound like? Let's go back to our hostile takeover scenario. The lawyer would say to Target Co something like this: "Before I can agree to represent Target in getting the best terms from Acquisition Corp., there's something I have to tell you. Acquisition Corp. actually approached me first about this deal, and told me some of the terms the company wanted, including the top price it was willing to pay to buy Target ." "Wow, that's great," replies the Target executive who is listening to this disclosure, "I sure guess we came to the right lawyer!" But the lawyer must immediately dampen the client's enthusiasm by saying something like, "Well, yes, but I can't use or reveal any of the information I received from Acquisition Corp. The rules prohibit me from using it. Do you still want me to represent you in the negotiations with Acquisition?" Is this sufficient disclosure? Perhaps not. The client has no idea what information the lawyer is prohibited from using or revealing – but if the lawyer tries to give the client a better sense of the nature of the information, the lawyer may violate Rule 1.18(b). Thus, the lawyer may be in the position envisioned by the second paragraph of EC 5-16, which notes that "there may be circumstances in which it is impossible to make the disclosure necessary to obtain consent ...." In other words, a lawyer who has received information that could be "significantly harmful" to a prospective client may not be able to obtain valid consent to oppose the prospective client in any substantially related matter. In small towns where few lawyers are available, that may have a devastating impact on the number of local lawyers available to handle a given matter.

Second, even if the lawyer may ethically make full disclosure and the client consents, how will the lawyer satisfy the "disinterested lawyer" test of New York's DR 5-105(C)? That provision requires not only that the lawyer obtain a client's consent to a conflict after full disclosure, but also prohibits the lawyer from accepting that consent unless "a disinterested lawyer would believe that the lawyer can competently represent the interests of each" client. And according to EC 5-16: "If a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances,

the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent."

The disinterested lawyer test may be hard to satisfy. In Scenario # 1, for example, Acquisition will eventually offer to buy Target for a certain amount of money, and Target will ask the lawyer to recommend whether to accept or reject the offer. How can the lawyer recommend whether to accept or reject the offer without using the confidential information that Acquisition gave the lawyer during the initial consultation? If Acquisition offers \$50 million but the lawyer knows from the initial consultation that Acquisition's real bottom line is \$75 million, the lawyer should not recommend that Target accept the offer. But if the lawyer is not permitted to use Acquisition's confidential information, what basis will the lawyer have for recommending that Target reject the offer? The lawyer is in a tight dilemma: either uses the information and violate Rule 1.18(b), or don't use the information and violate the duty of zealous representation. Would a disinterested lawyer believe that a lawyer caught in that dilemma could "competently represent" the interests of a client opposing a prospective client?

As we continue to examine Rule 1.18(d), the news for prospective clients just gets worse. When a lawyer has a conflict with a former client, New York's DR 5-105(D) imputes that conflict to the lawyer's entire firm, disqualifying the entire firm unless the former client consents after full disclosure. A "screen" or "ethics wall" will not overcome a former client's refusal to consent. ABA Model Rule 1.10(a) has taken the same approach with respect to conflicts with former clients. Indeed, when the ABA Ethics 2000 Commission recommended that the ABA adopt a provision permitting a timely screen to overcome a former client's objection, the ABA House of Delegates voted it down. In the case of a prospective client, however, Rules 1.18(c) and (d), do permit a timely screen to overcome the prospective client's objection to being opposed in the same or a substantially related matter. Rule 1.18(c) concludes by stating that if a lawyer is disqualified from representation under Rule 1.18(c) because the lawyer received information from the prospective client that could be significantly harmful to the prospective client in the matter, "no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)." Rule 1.18(d) (2) then states:

(d) When the lawyer has received disqualifying information ... representation is permitted if: ...

(2) 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; and

(i) the disqualified lawyer is timely screened and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Let's take those pieces apart. First of all, what are "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client"? Again, let's imagine the likely conversation between lawyer and client. In our Scenario # 1, for example, when the lawyer sits down for an initial consultation with Acquisition Corp., may the lawyer conduct a full-scale interview of the client and still claim that he took "reasonable measures to avoid exposure to more disqualifying information" than he needed to decide whether to take on the matter? May the lawyer follow up on the interview with additional investigation before deciding

whether to take the matter? If so, the restriction doesn't have much meaning. If not, what measures must the lawyer take to avoid excessive exposure to the prospective client's confidential information? Must the lawyer caution the prospective client not to reveal confidential information? That would be a terrible way to start an attorney-client relationship, which is based on trust and confidence.

If we get past that hurdle, subparagraph (d) (2)(i) demands that the disqualified lawyer be "timely screened" and apportioned no part of the fee from the matter. Erecting screens is a routine practice at large law firms, but that may not work at small firms – *see., e.g., Mitchell v. Metropolitan Life Insurance Co.*, 2002 WL 441194 (S.D.N.Y. 2002) (questioning whether a screen can be effective in a twelve-lawyer office where the screened lawyer works on other matters with the lawyer handling the matter creating the conflict) – and will be impossible for solo practitioners to meet. Thus, the screening provisions of ABA Model Rule 1.18 are likely to be useful to large law firms, but of little or no use to small firms and solo practitioners.

If the screening condition is satisfied, subparagraph (d) (2)(ii) imposes one final condition: written notice must be promptly given to the prospective client. Comment [8] to Rule 1.18 says that the notice should include "a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed," and should be given "as soon as practicable after the need for screening becomes apparent." Unfortunately, some prospective clients will view this notice as an invitation to file a motion to disqualify the lawyer. After all, if the prospective client had been willing to consent to the representation, per Rule 1.18(d) (1), the law firm would not have needed to resort to screening.

#### **Overall Evaluation of Rule 1.18**

Any rule governing conflicts with prospective client must carefully balance weighty competing policies. On one hand, the rule should uphold the ethical duty of confidentiality to prospective clients. If it does not, then prospective clients will not give lawyers enough information to evaluate cases properly. On the other hand, the rule should not enable prospective clients to deprive a lawyer's existing clients of their choice of counsel. Otherwise, the rule will be disruptive. And the rule should likewise allow future clients the broadest possible choice of counsel. Otherwise, a prospective client with a lot of time or money (or with a sinister plan) could disqualify all of the best lawyers and law firms by successively interviewing one after another in search of the ideal lawyer for the matter.

Rule 1.18 seeks to strike the right balance, but some of its protections for prospective clients may go too far. A lawyer who receives information that could be "significantly harmful" to the prospective client will seldom be permitted to oppose that prospective client in the same or a substantially related matter. And though Rule 1.18(d)(2) permits other lawyers in the disqualified lawyer's firm to oppose the prospective client under certain conditions, those conditions are so difficult to meet that they will often prohibit any lawyer in the firm from opposing the prospective client. Moreover, prospective clients who want to disqualify as many local lawyers as possible will find it relatively easy to do so. The rule could attempt to withhold the duty of confidentiality from prospective clients who interview multiple lawyers in bad faith simply to lay the seeds for later disqualification motions, but it will be difficult to prove that a prospective client's motive was to establish the basis for disqualification rather than simply to pick the best lawyer for the situation.

Yet tilting the balance away from prospective clients may poison many initial consultations. Lawyers typically like to tell prospective clients to tell them everything about the situation so that they can have as

much information as possible on which to base advice, but if we weaken the duty of confidentiality to prospective clients, encouraging prospective clients to tell the lawyer “everything” would put their interests in danger and enable lawyers to take advantage of unsophisticated prospective clients.

The result is a conundrum that has no easy solution. Perhaps ABA Model Rule 1.18 is the best we can do. But after studying it carefully, I have a feeling we can do better.

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