

## Roy Simon on the New Rules – Part V Rule 1.14 through Rule 1.18

BY ROY SIMON

This month's column, which continues my series of columns on the new New York Rules of Professional Conduct, begins with Rule 1.14 and ends with Rule 1.18, the last rule in Article 1 of the new Rules.

### **Rule 1.14: Clients with Diminished Capacity**

Rule 1.14 governs clients who have diminished legal or mental capacity, primarily minors and mentally impaired clients. This is a special category of clients that the old Code of Professional Responsibility addressed only in two Ethical Considerations, ECs 7-11 and 7-12, which were quite cryptic. The new Rule 1.14, which provides better guidance, provides as follows:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken [,] and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests. (Throughout this article, all emphasis is added.)

I will cover Rule 1.14 relatively quickly because I suspect that most NYPRR readers rarely represent clients covered by Rule 1.14. However, many law firms perform pro bono work representing clients with diminished capacity, and some law firms are performing more pro bono work in this bad economy than they did when lawyers were busy with paying work. Moreover, in a recent decision that vacated a divorce settlement because the wife's pro bono counsel from a large firm was incompetent and inadequately supervised, the court said that when a firm undertakes pro bono representation, the firm "should ensure that counsel taking on pro bono matters receive appropriate support and supervision, so that they can provide pro bono clients with the same careful legal representation that they provide to paying clients." *MC v. GC*, Index

No: 76148/07 (Bronx Supreme Ct., May 22, 2009). Thus, both the lawyers who personally represent clients with diminished mental or legal capacity and the partners who supervise them need to know the basics of Rule 1.14.

Moreover, as more and more people in our society live longer, more clients will fall victim to various stages and forms of dementia, and lawyers will have to be more sensitive to nuances in their clients' capacity. (The federal Administration on Aging estimates that the percentage of people in New York State aged 85 and over will shoot up by about half during the next two decades, from about 2.1% today to 3.2% in 2030.)

Rule 1.14 is therefore likely to assume greater importance for all lawyers in coming years.

Rule 1.14(a) basically says that lawyers should maintain "conventional" attorney-client relationships with clients who have legal or mental impairments to the extent possible. Thus, to the extent that an impaired client is capable of making competent decisions, the lawyer should follow those decisions – *see*, Rule 1.2(a) (a lawyer "shall abide by a client's decisions concerning the objectives of representation").

But what if the client is not capable of making competent decisions? For example, what if an elderly client is allowing a new "friend" to loot her finances or a mentally ill person refuses to seek treatment?

Rule 1.14(b) addresses that situation. If a lawyer "reasonably believes" that a client with diminished capacity is "at risk of substantial physical, financial or other harm" and cannot "adequately act" in her own interest, the lawyer may take "reasonably necessary protective action" – something we would not allow a lawyer to do when representing a normal client (such as a business enterprise or a mentally healthy adult) even if the lawyer thought the client was making foolish decisions. True, the withdrawal rule, in Rule 1.16(c)(4), permits a lawyer to withdraw if a client "insists upon taking action with which the lawyer has a fundamental disagreement," but Rule 1.14(b) goes much further and permits the lawyer to breach confidentiality by "consulting with individuals or entities" who can protect the client and by "seeking the appointment of a guardian ad litem, conservator or guardian."

Rule 1.14(c), however, makes clear that subparagraph (b) authorizes a lawyer to reveal confidential information "only to the extent reasonably necessary to protect the client's interests," meaning only enough to spur protective people or entities (*e.g.*, family members, close friends, social workers) to take the actions necessary or advisable to protect the client, or to allow the lawyer to persuade a court to appoint a guardian. Outside of the narrow circumstances of Rule 1.14(b), the confidentiality obligations imposed by Rule 1.6 fully apply to clients with diminished capacity.

Overall, Rule 1.14 is far from crystal clear. However, clients with diminished capacity are human beings that come in endless variety, and a rule governing such varied circumstances cannot be precise. Rather, the rules must rely chiefly on the good faith and good judgment of the lawyers representing these unusual clients. Rule 1.14 creates a framework for doing so and provides solid authority for taking extraordinary steps to protect them. Lawyers who resort in good faith to the protective measures outlined in Rule 1.14 should therefore be able to help their clients effectively without risking professional discipline.

## **Rule 1.16(c): Permissive Withdrawal**

Taken as a whole, the new rule on withdrawal, Rule 1.16, is substantially similar to the Code withdrawal rule, DR 2-110. Rule 1.16 is too long to quote in full, but a few features deserve mention.

Two notable differences between Rule 1.16 and its Code predecessor are purely cosmetic. First, blanket permission to withdraw if “withdrawal can be accomplished without material adverse effect on the interests of the client,” which was woven into the introductory language of DR 2-110(C), is now set out in a separate subparagraph, Rule 1.16(c)(1). This formatting is easier to grasp and makes clear that a lawyer may withdraw at any time (with court permission, if in litigation) if withdrawal will have no “material adverse effect” on the client, even if the lawyer has no other grounds for withdrawal. Second, Rule 1.16 reorganizes the grounds for permissive withdrawal into thirteen separate, co-equal subparagraphs, jettisoning the old demarcation between grounds focused on “the client,” on the one hand, and all other grounds, on the other. The reorganization makes the rule much easier to read and understand.

Several other differences are substantive. First, under old DR 2-110(C)(1)(e) (didn’t we all detest the Code’s numbering system!), a lawyer could withdraw if the client “insist[ed], in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.” Rule 1.16(c)(4) simplifies and broadens this concept by permitting a lawyer to withdraw if “the client insists upon taking action with which the lawyer has a fundamental disagreement.” This language covers every issue or dispute, whether or not pending before a tribunal.

Second, Rule 1.16(b)(2) mandates withdrawal if “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.” The underlined language was not in the mandatory withdrawal provision of DR 2-110. Rather, DR 2-110(B)(3) *mandated* withdrawal when the “lawyer’s physical or mental condition render[ed] it unreasonably difficult to carry out the employment effectively,” a phrase now found in Rule 1.16(c)(9) as one ground for permissive withdrawal. This makes sense. If a lawyer is willing to suffer in order to keep serving a client, then the lawyer should be allowed to do so unless the difficulty “materially impairs” the lawyer’s ability to represent the client – the situation in which Rule 1.16(b)(2) requires withdrawal. Allowing a lawyer to work through physical or mental conditions that most of us would consider “unreasonably difficult” is consistent with the philosophy of the Americans with Disabilities Act, which seeks to include rather than exclude people with disabilities. In any event, a client who is unhappy with the lawyer’s physical or mental condition can always fire the lawyer even if the lawyer is willing to continue.

Third, Rule 1.16(c)(7) permits withdrawal if “the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively.” The underscored words are new; the rest of subparagraph (c)(7) was in the Code.

Fourth, Rule 1.16(c)(11) provides that a lawyer may withdraw when “withdrawal is permitted by Rule 1.13(c) or other law.” The reference to Rule 1.13(c) reminds lawyers of their right to withdraw when an organization client refuses to cease or remedy conduct that is “clearly in violation of law and is likely to result in substantial injury to the organization” – a right that was expressly recognized in old DR 5-109(C) but was not cross-referenced in DR 2-110. The cross-reference to Rule 1.13(c) in Rule 1.16(c)(11) helps bring all of the provisions for withdrawal under one roof. But the reference to “other law” is new – it had

no equivalent in the Code. The “other law” language might permit a lawyer to withdraw under the Sarbanes-Oxley Act (or similar regulatory laws that Congress or the states may pass in the future) even if the situation does not meet the somewhat stiffer threshold of Rule 1.13.

Finally, Rule 1.16(d) continues the Code requirement that a lawyer must not withdraw from representing a client before a tribunal if the tribunal’s rules require its permission. But what happens if the tribunal denies permission even though the lawyer is convinced that continued representation will violate the Rules of Professional Conduct (*e.g.*, a conflict of interest, or assisting in client perjury)? Will the court’s order that the lawyer continue shield the lawyer from discipline? We all assumed that a court order would protect the lawyer, but the Code was silent on the question. New Rule 1.16(d) solves the riddle explicitly, stating: “When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”

### **Rule 1.18: Prospective Clients**

One of the most useful new Rules is Rule 1.18, which governs “prospective clients,” meaning people who are not current clients but who have talked with you about hiring your firm and who either (1) await your decision whether to represent them (a category I call “pending” prospective clients) or (2) did not and will not hire your firm for the matter in question, whether because of your decision or theirs (a category I call “past” or “former” prospective clients). The Code ignored the issue of prospective clients except for the first sentence of EC 4-1, which stated: “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.” The Disciplinary Rules on conflicts of interest did not address prospective clients at all. Accordingly, prospective clients under the Code were left entirely to case law, which prompted me to write two articles on the subject in these pages. *See, When Prospective Clients Raise Conflicts of Interest* (NYPRR, May 2003) and *Prospective Clients – Can the Puzzle Be Solved?* (NYPRR, January 2005). The new Rules, fortunately, tackle the subject of prospective clients head-on.

### **Rules 1.18(a) and (e): Who Is a “Prospective Client”?**

Rule 1.18(a), which sets out a general definition of a prospective client, provides as follows:

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a “prospective client.”

This definition lumps into a single rubric both pending and past prospective clients (*i.e.*, those still considering your firm or awaiting your firm’s decision, and those where a negative decision has already been made). This is fine as long as we keep in mind that the definition encompasses both categories.

Rule 1.18(a), however, must be read in conjunction with Rule 1.18(e), which carves out two situations in which a person is excluded from Rule 1.18(a)'s definition of a prospective client. Rule 1.18(e) provides as follows:

(e) A person who:

- (1) 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; or
- (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of paragraph (a).

The whole of Rule 1.18(e) was added by the Courts, *sua sponte*. It is one of the best provisions added by the Courts. I wish COSAC had thought of it. Rule 1.18(e)(1) protects lawyers against unsolicited and unwanted e-mails, letters, or phone calls from people asking the lawyers to represent them. Otherwise, lawyers would be vulnerable to mass e-mails from people on a fishing expedition for a lawyer.

Yet we have to be slightly cautious here. Suppose, on one hand, that a person with limited financial resources writes a letter to Cravath, Case & Cromwell (a huge Wall Street firm) seeking representation in a small matter that a law firm on such a high floor would never accept as a paying matter. Does the person have a "reasonable expectation" that the firm is willing to discuss the possibility of forming a client-lawyer relationship, or not? If not, then Rule 1.18(e)(1) takes the person outside the scope of a prospective client. To me, the reasonableness of the person's expectation depends on all the circumstances.

If the case is a routine workers compensation case that literally thousands of personal injury lawyers might accept on a contingent fee, or if it is an individual tax return that H & R Block could handle, then I see no chance (no "reasonable expectation") that Cravath, Case & Cromwell would accept the matter, and I would not grant the person prospective client status.

But if the matter is a civil rights case or an employment discrimination matter that the person of limited financial means hopes the big firm will handle on a pro bono basis, I don't think we should summarily discount the person's aspirations, especially if the firm's website touts the firm's pro bono work in those practice areas. Also, if the big firm spends a lot of time studying the person's letter (and any accompanying documents) about a matter before throwing the letter in the wastebasket, the firm will be hard-pressed to argue that the person was "without any reasonable expectation" that the firm would consider forming an attorney-client relationship.

If the firm somehow ends up on the other side of the same matter or a substantially related matter (the only occasions on which "prospective client" status is likely to become an issue), the firm will have difficulty avoiding disqualification. But I think most firms will spend little or no time examining communications proposing representations obviously outside the firm's practice parameters, and will either send a prompt routine rejection letter, file the communication with other similar communications, or simply throw the communication away without responding.

Rule 1.18(e)(2) is the yin to Rule 1.18's yang. The overall goal of Rule 1.18 is to protect prospective clients against exploitation and betrayal by lawyers whom prospective clients consult in good faith and trust with sensitive confidential information. Lawyers should be severely restricted in their right to oppose such prospective clients or to take advantage of their confidential information. But some clients know how to game the system – *e.g.*, wealthy husbands who interview every well-known divorce lawyer in town to make sure those lawyers cannot ethically represent the wife, or savvy corporations that conduct specious “beauty contests” to disqualify top firms from representing their adversaries. Those people are too clever by half and do not deserve the protections of the prospective client rule. Indeed, lawyers need protection from them. Providing that protection is the office of Rule 1.18(e)(2), which denies prospective client status to people who communicate with a lawyer “for the purpose of disqualifying the lawyer” from representing an adversary in that matter, or any substantially related matter. That is a good rule, and I commend the Courts for adding it.

### **Rules 1.18(b): Confidentiality Consequences of Prospective Client Status**

What difference does it make if someone fits the definition of a “prospective client”? Rule 1.18(b)-(d) set out both confidentiality consequences and conflict of interest consequences of labeling a person a “prospective client.” The confidentiality consequences are set out in Rule 1.18(b):

(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.

This rule is clear enough: with respect to confidentiality, former prospective clients have the same rights as former real clients (*i.e.*, clients that the lawyer actually represented). In essence, Rule 1.9(c) provides that a lawyer may not use or reveal a former client's confidential information unless Rule 1.6 or other rules would permit or require the lawyer's use or revelation. Rule 1.18(b) makes clear that Rule 1.9(c) applies to past prospective clients. This essentially codifies New York case law and echoes EC 4-1, which (as mentioned earlier) said that fiduciary duties and the legal system “require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer.”

However, Rule 1.18(b) leaves out one detail that is important (if perhaps obvious). The Rule should say explicitly that during the waiting period when the lawyer and client are in limbo – they have not decided whether to form an attorney-client relationship, but the lawyer has not rejected the client and the client has not rejected the lawyer – the lawyer may not use or disclose a prospective client's confidential information. If an attorney-client relationship does ensue, then the lawyer obviously has the full panoply of confidentiality duties to clients.

If an attorney-client relationship does not ensue, Rule 1.18(b) governs. In between these two poles, a prospective client is, in my view, entitled to the full confidentiality protections afforded by Rule 1.6.

## Rules 1.18(c): Conflict Consequences of Prospective Client Status

The conflict of interest implications of labeling a person a “prospective client” are set forth in Rules 1.18(c) and (d). These give a former (*i.e.*, past) prospective client significantly less protection than a former actual client. I’ll start with Rule 1.18(c), which provides, in relevant part, as follows:

(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). ...

This is a variant on Rule 1.9(a)’s restrictions on opposing a former client, but with a radical twist. Whereas a lawyer must not oppose an actual former client in a substantially related matter without obtaining the former client’s informed consent, a lawyer may oppose a former prospective client in a substantially related matter without even seeking the former client’s consent as long as the lawyer did not receive information from the prospective client that “could be significantly harmful to that person in the matter.”

Let’s illustrate. Suppose, after an exchange of e-mails containing minimal confidential information, a corporation retains a lawyer to represent it on an appeal from a summary judgment issued in the corporation’s favor in a case about the Turtle Point superfund site. The client is an *actual* client, not just a prospective client. The lawyer never meets with this actual client – she only reads the summary judgment papers, prepares the appellee’s brief, presents the oral argument, and wins the case. The matter ends and the client becomes a former client. If a new client now wants to hire the same lawyer to oppose the former client in a matter substantially related to the Turtle Point site, the lawyer is prohibited from undertaking the representation without the former client’s consent, even though the lawyer has minimal confidential information that would “materially advance the [new] client’s position” against the former client – see Rule 1.9, Comment 3.

Contrast that with a former *prospective* client named Jones who was interviewed by a lawyer for two hours and revealed a lot of confidential information. The lawyer turns down the case, but another client soon hires the firm to sue Jones in a substantially related matter. If the lawyer who interviewed Jones can show under Rule 1.18(c) that he did not receive information that “could be significantly harmful” to Jones in the new matter, then the firm may personally represent the new client against Jones without even seeking consent from Jones – and even if Jones vehemently objects. With actual former clients, in contrast, we presume that a lawyer who represented the former client obtained confidential information that could be used against the former client in any substantially related matter (unless the once-confidential information has become “generally known” and is no longer confidential). Yet with former prospective clients, we do not presume that confidential information could be harmful. And even if we decide that the confidential information could be *somewhat* harmful, that is not disqualifying unless the prospective client shows that the information could be “significantly” harmful. What a difference!

### **Rule 1.18(d)(1): Consent to Conflicts with Former Prospective Clients**

Even if the lawyer did receive information that could be significantly harmful to Jones, and is therefore disqualified under Rule 1.18(c), the lawyer may overcome the disqualification if the lawyer and the lawyer's firm comply with Rule 1.18(d)(1), which provides as follows:

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing ....

Thus, as with a lawyer who wishes to oppose an actual former client in the same or a substantially related matter, the lawyer may do so with informed consent, confirmed in writing. That is nothing new. I do not know why a former prospective client would ever consent – after all, the premise is that the personally disqualified lawyer “received information from the prospective client that could be significantly harmful to that person in the matter” – but nothing in Rule 1.18(d)(1) requires that the former prospective client's consent be reasonable.

However, the former prospective client has the right to condition his consent on the lawyer's agreement not to use the significantly harmful information on behalf of the new client. If he does place conditions on its use, then his consent may prove to be meaningless. Why? Because Rule 1.18(d)(1) also requires consent from “the affected client” (meaning the client who will be opposing the former prospective client), and Rule 1.18(d)(3) requires that “a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter,” a standard essentially equivalent to the consentability standard in Rule 1.7(b)(1). If the information in question could be “significantly harmful” to the former prospective client, then it could be significantly helpful to the new client. Arguably, if a lawyer has pledged to the adversary not to use certain information that could be significantly helpful to his new client, he cannot reasonably conclude that he can provide competent and diligent representation to the new client – and if the situation fails the test of Rule 1.18(d)(3), then the lawyer cannot even ask the new client for consent.

Even if the former prospective client will not consent to let the personally disqualified lawyer oppose him in the same or a substantially related matter, the former prospective client may consent to let other lawyers in the firm do so, a situation covered by Rule 1.18(d), which I will now address.

### **Rule 1.18(d)(2): Screening and Conflicts with Former Prospective Clients**

Even if the former prospective client will not consent, however, the second sentence of Rule 1.18(c) combines with Rule 1.18(d) to allow the remaining lawyers in the firm to oppose the former prospective client in a substantially related matter if they satisfy certain conditions. Those provisions state as follows:

(c) ... If a lawyer is disqualified from representation under this paragraph, 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).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing ....

(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 firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

Thus, the second sentence of Rule 1.18(c) says that if the lawyer who interviewed the former prospective client is personally disqualified and does not obtain the former prospective client's consent, the other lawyers in the firm may nevertheless oppose the former prospective client in the same matter or a substantially related matter if they abide by the conditions set out in Rule 1.18(d), which sets out two avenues, one bilateral and one unilateral.

Rule 1.18(d)(1) states the bilateral avenue: the informed consent of both the new client and the former prospective client, confirmed in writing. We have already discussed that option above in connection with the personally disqualified lawyer. The elements of informed consent would be about the same regarding the other lawyers in the firm, but a savvy former prospective client might condition consent on screening measures.

If the former prospective client will not consent (or if the firm does not want to ask for consent), Rule 1.18(d)(2) maps out a unilateral avenue: screening. But a law firm must surmount a high hurdle before it is eligible to set up a screen – the lawyer who received the information must have taken “reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client.” What does this mean? How much information does a law firm need to decide whether or not to accept a case?

In part, this is a conflict of interest question. A prudent law firm should take “reasonable measures” to check for conflicts at or near the start of an interview. If a law firm currently represents Mad Magazine and a prospective client says at the outset of an interview, “I would like to retain you to sue Mad Magazine for fraud,” that’s a clear conflict and there’s no reason for the interviewing lawyer to ask for any more information. But if the law firm used to represent Mad Magazine and a prospective client wants to sue Mad, the interviewing lawyer should be entitled to obtain enough information to determine whether the new suit is substantially related to the lawyer’s former representation of Mad. If the lawyer determines that representing the prospective client will not create any conflicts, the lawyer should be entitled to listen further.

What if the prospective client then starts to relate facts that raise legal issues outside the law firm’s usual range of services (*e.g.*, a person seeking a criminal defense from a firm that handles only civil matters)? The lawyer should not be disqualified simply because he listened long enough to determine that the prospective client’s legal matter was *outside* the firm’s expertise, and therefore one that the firm would not accept even if meritorious.

More difficult situations will arise when the prospective client creates no conflicts and has a matter *within* the law firm’s practice areas, but the firm has to decide whether the matter would be frivolous or fraudulent, or whether it has sufficient merit to warrant the firm’s time and effort on a contingent fee basis, or whether the client has sufficient financial resources to pay the firm by the hour. It may be reasonably necessary to seek substantial information before the firm can decide whether or not to accept a matter. A firm that screens out most new matters (such as a high-end personal injury or medical malpractice firm) or that handles complex transactions and commercial litigation (such as a typical Wall Street firm) probably needs a lot more information than a general practice firm that accepts just about any matter. Custom and practice in the profession will play a role in deciding whether the interviewing lawyer persisted in asking questions or listening to the prospective client after the prospective client had already divulged enough information for the lawyer to know that his firm would turn down the case.

Therefore, whether the interviewing lawyer “took reasonable measures to avoid exposure to more disqualifying information than reasonably necessary to determine whether to represent the prospective client” will sometimes be a difficult inquiry. The goal is to ensure that law firms do not deliberately milk a prospective client for information after it is plain that the firm will not take the case – especially if the firm is likely to be retained by a party adverse to the prospective client. Consequently, courts should put the burden on law firms to show that they did not take advantage of the prospective client, and should resolve doubts in favor of the prospective client.

Once the firm qualifies for screening, the firm must still satisfy the four screening criteria set out in Rule 1.18(d)(2) (i)-(iv). These requirements are straightforward and are taken directly from Rule 1.11(b)(1)-(4), which was discussed in my July column.

Rule 1.18(d)(3), erects a final hurdle to opposing a former prospective client – “a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.” (The Courts added this factor on their own. Why didn’t they use the phrase “a lawyer reasonably believes” as in Rule 1.7(b)(1) instead of “a reasonable lawyer would conclude”? I don’t know, but I doubt that the Courts intended any difference.) The thrust of subparagraph (d)(3) is to ensure that the firm can

competently and diligently represent its new client against its former prospective client. How does this factor play out?

Any lawyer who personally interviewed the prospective client probably cannot meet the test of Rule 1.18(d)(3). As the lead-in language of Rule 1.18(d) makes plain, the whole premise of Rule 1.18(d) is that the personally disqualified lawyer “received disqualifying information as defined in paragraph (c),” meaning information that “could be significantly harmful” to the former prospective client. The lawyer could not competently represent the new client without using that information, yet Rule 1.18(b) prohibits the lawyer from using it. Rule 1.18(d)(3) likewise disqualifies all other lawyers in the firm who have acquired the significantly harmful information (for example, when debating whether the matter had merit, or when determining whether the firm had a disqualifying conflict). However, lawyers in the firm who have no knowledge of the harmful information should be able to pass the test of Rule 1.18(d)(3) as long as they are promptly screened off from all lawyers who have received the significantly harmful information. Thus, the more effort the firm makes to limit the migration of a prospective client’s information within the firm, the greater the number of lawyers in the firm who will be eligible to oppose the former prospective client under Rule 1.18(d).

This concludes my discussion of the eighteen rules in Article 1 of the new New York Rules of Professional Conduct. Next month I will move on to Article 2 and beyond.

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