

# The Prospective Client And Proposed Model Rule 1.18

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The ABA's Ethics Commission 2000 has proposed a draft new Model Rule 1.18, titled "Duties to a Prospective Client." The proposed rule, which merits and will probably achieve adoption in the relatively near future, deals with a live and recurring situation: the consequences of a lawyer's encounter with a prospective client in which the possibility of a retainer is explored but not finally consummated. The predictable consequences of the encounter — charges of "malpractice" against the nonretained lawyer and claims involving the mishandling of the prospective client's property and the breach of claimed confidences — have generated many judicial decisions and ethical opinions. These have attempted to apply existing provisions of the Model Rules. The New York cases and opinions have relied on existing provisions of the Model Code. But these provisions, because they speak to a full-fledged lawyer-client relationship, are not a perfect fit in the prospective-client scenario. The Commission is attempting through Rule 1.18 to codify the issues concerning conflicts and use of information in the latter context.

The special issues concerning a prospective client are also treated in Section 15 of the recently published Restatement (Third) of the Law Governing Lawyers ("Restatement"). The conflicts provisions of Section 15 are substantially the same as those in proposed Rule 1.18. Lawyers seeking guidance on prospective client issues are well advised to consult that provision.

This brief article is offered not as an overall critique of the Commission's thoughtful draft, but to identify some open questions and to suggest some measures of prudence with respect to the questions inherent in the lawyer's first encounter with a prospective client. In particular, we will emphasize the importance of (1) a check for conflicts as soon as possible after communicating initially with the prospective client, and (2) limiting the information solicited from the prospective client to the information needed to perform the conflicts check.

The most recent draft of Rule 1.18, issued in November 2000, reads 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.
- b) Even when no client-lawyer relationship ensues, a lawyer who has consulted with a prospective client shall not use or reveal information learned in the consultation, except as Rules 1.6 and 1.9 would permit or require with respect to information of a client or former client.
- 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). 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) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:
- 1) The disqualified lawyer is screened from any participation in the-matter and is apportioned no part of the fee therefrom; and
  - 2) written notice is promptly given to the prospective client.

New York is a Model Code jurisdiction, so Rule 1.18 is not likely to have binding effect here in the near future. But that is not a reason to ignore Rule 1.18. New York's case law is consistent with, though less complete than, proposed Rule 1.18. Moreover, there is no provision concerning prospective clients in the Model Code. This means that New York courts will probably be more willing to look for guidance to a provision in the Model Rules. It is therefore safe to assume that Rule 1.18 will play a role in the continued development of the law in New York concerning prospective clients.

### **Rule 1.18 In Operation**

Disqualification under Rule 1.18 is triggered when the information conveyed by the prospective client has the potential to be "significantly harmful" if later used against the prospective client. The phrase "significantly harmful" has not been tested in the case law, and presumably will be defined on a case-by-case basis. But it does not take a great leap of imagination to predict what information may be deemed "significantly harmful": information that, if revealed to one's adversary, carries the risk of affecting the matter at issue. This is consistent with existing New York law, which requires disqualification for disclosure of information that "embrace[s] substantive issues related to the" action and was "made in confidence" to facilitate the provision of legal services. *Seeley v. Seeley*, 514 N.Y.S.2d 110, 112 (2d Dept. 1987); *see also Leisman v. Leisman*, 617 N.Y.S.2d 807 (2d Dept. 1994) (disqualification for possession of information that "may bear a substantial relationship to the present litigation and which would be subject to the attorney-client privilege").

Under existing New York case law, the burden is on the prospective client to show that the communications with the lawyer were sufficiently extensive to warrant the lawyer's disqualification. *See, e.g., Interpetrol Bermuda, Ltd. v. Rosenwasser*, 1988 WL 140801 (S.D.N.Y. 1988); *New York Univ. v. Simon*, 498 N.Y.S.2d 659 (N.Y.C. Civ. Ct. 1985).

Rule 1.18 does not make clear who carries the burden with respect to "significantly harmful" information. Restatement § 15, comment (c), provides, consistent with the case law, that the burden rests on the prospective client, and the drafters of Rule 1.18 have stated generally that Section 15 "inform[s]" the analysis of the Rule. Accordingly, it is likelier than not that the prospective client will have the burden of proving that the imparted information was "significantly harmful" under Rule 1.18 as well.

Once the prospective client has conveyed "significantly harmful" information, the lawyer who actually received that information is barred from representing an existing client in the same or a substantially similar matter. Under the proposed draft of Rule 1.18(d), however, the lawyer's *firm* may represent the client, (In earlier versions, the firm was also barred if the lawyer failed to take reasonable steps to limit the extent of harmful information conveyed.) To forestall the firm's use of the prohibited information, the

lawyer who received the information would be screened and would be barred from sharing in any fees the firm might receive as a result of the representation.

### **Steps To Avoid Disqualification**

All lawyers will need to be familiar with the terms of Rule 1.18, but it is possible in most cases to avoid becoming entangled in the Rule's screening and disqualification provisions. Two simple steps should accomplish that goal when there is an existing client at the time the prospective client walks in the door or makes his introductory call.

First, when a lawyer communicates initially with a prospective client — or communicates with an existing client about a prospective new matter — the lawyer should inform the prospective client that a discussion of the substance of the matter is off limits. Proposed Rule 1.18, comment [3], provides in essence that the initial conversation should be limited to information necessary to perform a conflicts check or to unearth any other reason for rejecting the representation. All experienced lawyers know, or should know, what this prefatory information consists of, and should be able to limit the discussion accordingly. As soon as the conversation threatens to go beyond that limit, the lawyer must steer it back to permissible subjects.

Second, the lawyer must perform a conflicts check immediately. If a conflict is uncovered, the relationship can be terminated before there is any prejudice to either the prospective or the actual client. If there is no conflict, the lawyer is free to agree to work for the prospective client, and Rule 1.18 ceases to be an issue. In the alternative, if the lawyer declines the representation for a reason other than an existing conflict, he or she will remain free to work for a future client on the same or a substantially similar matter. Our experience is that these two steps have been effective generally in avoiding disqualification based on an encounter with a prospective client. We therefore recommend their use.

### **Precautions When No Adverse Client Exists**

In some cases, there is seemingly no existing adverse client when the lawyer first talks to the prospective client and a conflicts check would be negative. In such cases, the lawyer should still avoid soliciting significantly harmful information from the prospective client prior to accepting the representation. This precaution will preserve the possibility of being retained by an actual client with conflicting interests down the road. Prospective clients can have long memories. In *Interpetrol*, for example, the former prospective client sought to disqualify the law firm four years after the alleged initial consultation. In *Bennett Silvershein Associates v. Furman*, 776 F. Supp. 800 (S.D.N.Y. 1991), the prospective client sought disqualification ten years after the consultation.

Firms may also wish to consider the adoption of an internal policy requiring that notes be taken and retained for every meeting with a prospective client. In *Bennett Silvershein Associates, supra*, a former prospective client sought to disqualify a law firm on the basis of a ten-year-old consultation. The court denied the motion, in part because the partner who attended that meeting was able to show from his notes that there was “no reasonable possibility... that [the firm] retain[ed] useful information from [plaintiff] about” the later pending case. 776 F. Supp. at 805. But there are inherent difficulties in record keeping. For one thing, it is cumbersome and often infeasible. Secondly, a less-than-illuminating record may prove worse than none at all. Thirdly, because Rule 1.18 is likely to place the burden of proving that it conveyed “significantly harmful” information on the prospective client, an affirmative showing by the lawyer or law firm may not be necessary. In some instances and for some lawyers, the practice of

dictating careful if swift notes of meetings with potential clients may serve effectively to ward off unmeritorious claims of disqualification.

### **Waivers By Prospective Clients**

It may prove impossible to avoid hearing significantly harmful information from a prospective client. One possible solution to this risk is to seek a waiver of any actual or potential conflicts. Rule 1.18 contemplates two kinds of waivers. One, addressed by Rule 1.18(d)(1) and comment [7], comes into play only after an actual conflict arises between a client and a prospective client: that is, after the lawyer has gone down the road with a prospective client without realizing there's an existing client with adverse interests. This is analogous to the waiver in cases of conflict between a current client and a former client under DR 5-108. Because DR 5-108 has been the subject of much commentary, we will not discuss it here. We do note, however, that the proposed version of Model Rule 1.18, consistent with New York law, does not require *written* waivers under such circumstances. Oral waivers are permissible under 1.18 if subsequently confirmed in writing. (DR 5-108 does not by its terms require confirmation in writing.)

In contrast to DR 5-108, a waiver of future conflict claims under Rule 1.18 requires only the consent of the prospective client. Rule 1.18 permits a lawyer to "condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." Rule 1.18 cmt. (4). This raises two issues. The first is a practical one: how often will a prospective client be willing to waive such a significant right without first confirming all its potential consequences? In reality, most lawyers may not be in a position to obtain waivers from prospective clients.

Secondly, what are the requirements for a valid waiver? Comment [4] to Rule 1.18 does not say, but the question has been addressed elsewhere. The ABA Ethics Committee has stated that if a "waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when it was given." ABA Formal Ethics Op. 93-372 (1993). A general waiver seeking broad consent to potential conflicts will not be enforceable. Restatement § 202 cmt. (d). *See also Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 227-29 (7th Cir. 1978). It is "unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny." ABA Formal Ethics Op. 93-372 at 3.

The waiver must be informed as well as specific. Generally, informed consent entails significant discussion between the lawyer and prospective client about the substance of the matter in which the conflict may arise. At first glance, that appears to be inconsistent with the goal of limiting communications with prospective clients to a threshold inquiry into conflicts. But there may be no contradiction.

If the initial discussions remain so limited that no potential conflict can be threatened, there is no need to obtain a waiver. A waiver becomes an issue only if the prospective client has been allowed to convey substantial information. In that circumstance, further discussion to explain the implications of a waiver is consistent with the goal of averting an actual conflict down the road.

## **Beauty Contests**

Special questions merit consideration when a prospective client, usually in measures orchestrated by counsel, holds discussions with a number of law-firm candidates on a particular representation of some magnitude; *i.e.*, a “beauty contest.” The result, if “significantly harmful” information is given, may be to disqualify the unsuccessful contestants, a nice accomplishment when the rejected candidates happen to be firms that are specially qualified in the litigated subject — qualified to represent the adversary of the very party running the beauty contest. The degree to which this is or should be acceptable practice is a matter that has thus far received less attention than it merits.

In *Bridge Products, Inc. v. Quantum Chemical Corp.*, 1990 WL 70857 (N.D. Ill. 1990), a distinguished Chicago law firm, having participated unsuccessfully in a beauty contest, was disqualified when it turned up on the other side of the case. Resisting disqualification, the firm took the view that no confidences had been received. The court held, however, that the circumstances raised “an evidentiary inference that actual confidences were disclosed.” Going further, the court held that the focus “must be on what [the prospective client], and not [the law firm], reasonably believed.” And it placed on the law firm the burden of “making clear... that the initial meeting was purely preliminary and that confidences would not necessarily be protected.” *Id.*

In imposing the burden of proof on the law firm rather than the prospective client, the Bridge Products holding is contrary to New York law and probably contrary to Rule 1.18. Moreover, although the Ethics Committee of the New York City Bar Association is on record as approving of Bridge Products (see *Ethical Issues in Legal Beauty Contests*, 48 Rec.1003 (1993)), we were not able to find any subsequent cases taking that position, and we believe the position to be questionable. In fact, a subsequent opinion from the Northern District of Illinois disagreed with Bridge Products in this respect. *Pacific Dunlop Holdings, Inc. v. Barosh*, 1992 WL168535, at \*6 n.10 (N.D. Ill. 1992).

As a matter of policy, we believe the Bridge Products court and the 1993 City Bar article failed to account for the realities of beauty contests. These contests are generally run on behalf of sophisticated companies, often by in-house counsel. The risk that the company will unknowingly reveal significantly harmful information prior to selecting counsel is therefore slight. By initiating and engineering the process, the company should certainly be deemed responsible for its strategy in approaching several law firms.

Because beauty contest “judges” are at a significant advantage with respect to the dissemination of information and because the contests can lead to the mowing down of several firms to the detriment of potential adversaries, it is arguable that an especially heavy burden should be placed upon the prospective client claiming disqualification. At the very least, the normal burden placed on prospective clients under New York law, and probably under Rule 1.18, should apply, Bridge Products not withstanding.

## **Protections Against Sham Prospective Clients**

A prospective litigant may pose as a prospective client in order to disqualify the interviewee firm from representing the adversary. Comment [1] to Rule 1.18 states that a person who provides unilateral information without a reasonable expectation that the lawyer would even consider representing that person is not a prospective client. But the Rule does not address the situation in which the purported prospective client lulls the lawyer into substantive discussions without revealing his true intent. Professor

Hazard says “a sham confidence is not a ‘confidence’ or ‘secret’ as these concepts are used in the confidentiality rules of DR 4-101(A) and Model Rule 1.6.” Geoffrey C. Hazard, Jr., *Protecting Preliminary Discussions*, Nat’l L.J., Oct. 30, 1990, at 13. Similarly, footnote 3 of ABA Formal Opinion 90-358 states that if a would-be client “deliberately consults the firm in an effort to disqualify it,” the lawyer should not be disqualified and would not be required to keep any information conveyed confidential. Comment (c) to Restatement § 15 provides that “a tribunal may consider whether the prospective client disclosed confidential information to the lawyer for the purposes of preventing the lawyer or lawyer’s firm from representing an adverse party rather than in a good faith endeavor to determine whether to retain the lawyer.” Cf. 8 Wigmore, *Evidence* §2304 (McNaughton rev. 1961). These authorities should provide substantial hope that Rule 1.18 will not protect persons with malign intent.

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