

When Prospective Clients Raise Conflicts of Interest

BY ROY SIMON

When you interview a prospective client (“Prospect”) but the Prospect does not hire you or you turn down the engagement, may you later oppose the Prospect in a substantially related matter? If you personally may not oppose the Prospect, may another lawyer in your firm do so?

Last year, the ABA added a new Rule 1.18 to the ABA Model Rules of Professional Conduct to address those questions. The essence of the new ABA rule is to permit a lawyer personally to oppose a Prospect unless that lawyer received information from the Prospect that could be “significantly harmful” to him in the matter – and even then, other lawyers in the personally disqualified lawyer’s firm may oppose the Prospect if the current clients and the Prospect consent, or if the firm meets three conditions: (1) the disqualified lawyer took “reasonable measures” to avoid exposure to more disqualifying information than was “reasonably necessary” to decide whether to represent the Prospect; and (2) the disqualified lawyer is timely screened and given no part of the fee; and (3) the law firm promptly gives “written notice” to the Prospect.

The New York Code of Professional Responsibility has no Disciplinary Rule equivalent to ABA Rule 1.18, but New York does require lawyers to preserve the confidences and secrets of Prospects — The first sentence of Ethical Consideration 4-1 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.) Moreover, New York courts have discussed duties to Prospects for nearly two decades. This article surveys the guidance available to New York lawyers on the subject of conflicts of interests with Prospects, and explores the ABA’s new rule.

New York Case Law

The first New York case to address the issue of Prospects was *New York University v. Simon*, 130 Misc.2d 1019, 498 N.Y.S.2d 659 (N.Y. City Civil Ct. 1985). The underlying action was a holdover proceeding based on landlord-N.Y.U.’s claim that the apartment was not the tenant’s primary residence. The tenant (who was an attorney himself) claimed that after he had been served with eviction papers, he called several attorneys regarding possible representation and had two telephone conversations with attorney Gary Rosenberg. The tenant decided to retain another attorney, but after a few months N.Y.U. replaced its original counsel with Rosenberg’s law firm. The tenant then brought a motion to disqualify Rosenberg’s firm on the basis of the preliminary calls, testifying at a hearing that he had given Rosenberg “important confidential information about his tenancy.” On cross examination, however, the tenant refused to specify any of the information he had given to Rosenberg, claiming that to do so would give N.Y.U. an unfair advantage. The court told the tenant that refusing to answer might prevent the court from obtaining the very evidence it needed to grant his motion, but the tenant’s counsel continued to object, so

all the court could find out was that the tenant discussed the case with Rosenberg and considered the discussions important and confidential.

The court refused to disqualify Rosenberg's firm. The court agreed that the tenant was not required to reveal the facts he transmitted to Rosenberg, but he "should at least have stated the nature of the information revealed." If a court could remove a party's chosen attorney "solely upon proof that the other party had a preliminary discussion with that attorney, without evidence as to the nature of the matters disclosed," disqualification would be too easily obtainable. Therefore, the most fundamental question was "whether the Prospect had a reasonable expectation of confidentiality at the time the disclosure was made." Thus, if the tenant had testified that he told Rosenberg about "other residences, where his tax returns were filed, where his automobile was registered," or other factors that go into the resolution of a primary residence controversy (without necessarily stating the specific facts revealed on the issue), then the court might have reached a "different result" because the testimony "might have established that the preliminary discussions were substantive and progressed to a point where it was reasonably considered by movant to be a representation." Here, however, the tenant "failed to establish that a relationship existed between him and Rosenberg that warrants disqualification on any ground."

The first New York appellate decision regarding conflicts arising from Prospect interviews reached a different outcome. In *Seeley v. Seeley*, 129 A.D.2d 625, 514 N.Y.S.2d 110 (2d Dep't 1987), an action arising out of a family feud concerning title to some property in Westhampton, the title insurance company selected attorney Edgar Hills to defend the action. The plaintiff moved to disqualify Hills and his law firm because the plaintiff had met twice with Hills regarding the same feud and the same land before litigation commenced. In 1983, plaintiff had visited Hills' office seeking advice about a possible partition action. He spoke to Hills for more than an hour, revealing "in intimate detail the ownership interests of the respective parties," including information relating to Robert Seeley's interest in the property and "confidential information" about "direct evidence relating to this instant action". In 1984, plaintiff met a second time with Hills, again seeking advice about a partition action, discussing in greater detail "the facts and circumstances surrounding this action as well as other facts and sources of evidence, which directly bear on the case at bar." Ultimately, the plaintiff did not retain Hills and never commenced the proposed partition action. In his affidavit opposing the plaintiff's motion to disqualify, Hills conceded that the two conferences had occurred, but "denied any recollection that confidential secrets had been revealed to him."

Like the court in *New York University v. Simon*, *supra*, the lower court in *Seeley* put the burden on the moving party to prove that the preliminary conferences had "progressed to a point where it was reasonably considered by movant to be a representation". The lower court in *Seeley* concluded that the plaintiff had failed to establish that he had revealed "anything of substance" at the conferences and denied the motion to disqualify.

The Second Department reversed. Apparently not finding any case on point except *Simon*, the Second Department addressed the issue by invoking a series of maxims: "It is an undeniable maxim of the legal profession that an attorney must avoid even the appearance of impropriety"; "it is well settled that doubts as to the existence of a conflict of interest must be resolved in favor of disqualification."; and "with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship."

Turning to substance, the court quoted the Seventh Circuit's famous opinion in *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978)), for the proposition that the "fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view toward retention of the lawyer, although actual employment does not result." The court also cited EC 4-1 and *New York University v. Simon*, *supra*. The record in *Seeley* supported the plaintiff's contention that his disclosures to Edgar Hills "embraced substantive issues related to the proposed partition action and... were made in confidence in order to facilitate the provision of legal services by him." Although no formal attorney-client relationship resulted, "a fiduciary obligation nevertheless arose with respect to the matters discussed at the conferences," and "the disclosures made during the meetings bore a substantial relation to the issues presented at bar." In light of the similarity of issues and "the settled principle that doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety," the Second Department disqualified Hills and his law firm from any further participation in the litigation.

The Second Department's prospective client cases have uniformly followed *Seeley*. See, e.g., *Leisman v. Leisman*, 208 A.D.2d 688, 617 N.Y.S.2d 807 (2d Dep't 1994) (disqualifying wife's attorney in divorce proceedings where husband had preliminarily consulted with wife's attorney in a prior matrimonial action that might be substantially related to the present litigation); *Rose Ocko Foundation, Inc. v. Liebovitz*, 547 N.Y.S.2d 89 (2d Dep't 1989) (plaintiff alleged that a preliminary communication with defendant's counsel disclosed the type of information that could provide a "strategic advantage" to defendant; although defendant's counsel disputed what was actually disclosed, "any doubt must be resolved in favor of disqualification," and disqualification was "necessary to avoid the appearance of impropriety").

In contrast, the First Department permitted a lawyer to represent the wife in a divorce action even though the husband had briefly consulted with a different lawyer in the same firm about a possible divorce action six years earlier. *Cummin v. Cummin*, 1999 WL 747252 (1st Dep't 1999). 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 had been screened off from the rest of the firm with respect to the new matter.

Federal courts less likely to disqualify

The federal courts in New York appear highly skeptical of motions to disqualify opposing counsel based on a preliminary Prospect interview. A good example is *Interpetrol Bermuda, Ltd. v. Rosenwasser*, 1988 WL 140801 (S.D.N.Y. 1988). In 1984, Henri Lehner, Interpetrol's General Manager, met or spoke several times with Gary Naftalis, a partner at Kramer Levin, to discuss Interpetrol's desire to sue a lawyer named Rosenwasser for legal malpractice. Interpetrol did not ultimately retain Kramer Levin, but the company did sue Rosenwasser for malpractice.

Initially, there was no conflict. But a few years later, Rosenwasser changed attorneys and retained Kramer, Levin. When Lehner realized that Kramer Levin was the law firm he had contacted several years earlier, Interpetrol's counsel moved to disqualify Kramer Levin. In his affidavit, Lehner claimed that during his preliminary conversations with Kramer Levin in 1984 he had revealed confidential information about the malpractice action. However, Lehner could not specify the dates or duration of any of these discussions, and Naftalis had "no recollection or record" of ever meeting with Lehner. More

importantly, Lehner did not “reveal even the general nature of the purportedly confidential material revealed.”

In deciding the motion, the court referred to “the high standard of proof a party moving for disqualification must shoulder,” and set down standards for deciding a disqualification motion brought by a former Prospect: To begin with:

[A] person need not actually retain an attorney for the confidential attorney-client relationship to attach. If during pre-retention consultations confidences are divulged with an expectation that they remain secret, the attorney-client relationship is implicated....

Lehner’s “bald allegations” that he had revealed confidential information to Naftalis did not meet this burden. Neither of the affidavits submitted by plaintiff “shed any light on the nature of the allegedly confidential information furnished to Naftalis.” The court said it was not required to “assume that confidences were divulged where no actual attorney-client relationship is proven.” Conversely, “[i]f during pre-retention consultations confidences are divulged with an expectation that they remain secret, the attorney-client relationship is implicated.” But plaintiff completely failed to satisfy this “essential prong.”

To satisfy this part of the standard, plaintiff must demonstrate not merely that information was furnished to Naftalis, but that the information was privileged and confidential—i.e., that it was information not already available to Rosenwasser and to Kramer, Levin in January, 1988 when the firm was retained—and that it was information that could somehow be used to plaintiff’s detriment. [Citations omitted.]

The court said that a movant could not meet this “substantial burden” through “bald, conclusory allegations of confidentiality and prejudice.” Interpetrol, however, had not offered any evidence that Naftalis had “access” to confidential information. “In a pre-retention situation such as here,” the court said, “this failure of proof is necessarily fatal to the disqualification motion.”

Even though this ground alone was sufficient to deny Interpetrol’s disqualification motion, the court pointed to two other relevant facts to “underscore the degree to which Interpetrol has not met its burden.” First, Rosenwasser had not retained Kramer, Levin until long after the litigation had started. By that time, the parties had exchanged numerous documents and Lehner had been deposed for five days. Second, by suing for legal malpractice, Interpetrol had waived the attorney-client privilege with respect to all matters raised in its complaint. Consequently, Interpetrol had produced numerous documents in the litigation “revealing communications that in a typical lawsuit would have been guarded by the privilege.”

In addition, Kramer Levin had rebutted any presumption that Naftalis had received confidential communications in the course of his “representation” of Interpetrol during the preliminary conversations in 1984. Specifically, the affidavits of Gary Naftalis (the lawyer who had spoken with Interpetrol years before but was not working on Rosenwasser’s defense) and Ellen Nadler (the Kramer Levin lawyer who was handling Rosenwasser’s defense) successfully rebutted any presumption that Naftalis had ever received any confidential information from Interpetrol, or that Naftalis had transmitted

any confidential information to Ms. Nadler. The Court was further satisfied by Kramer, Levin's sworn statements promising that a Chinese Wall would be erected to screen Naftalis from the case.

Finally, the court refused to disqualify Kramer, Levin on the basis of Canon 9's command that lawyers must avoid even "the appearance of impropriety." The court noted that the Second Circuit "disfavored" disqualification under Canon 9 and had cautioned that Canon 9 "should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules." The appearance of impropriety was "simply too slender a reed on which to rest a disqualification order except in the rarest of cases." Because this was not such a case, the court concluded that disqualifying Kramer Levin was not "necessary to preserve the integrity of the adversary process."

Is screening a defense?

Perhaps the most important feature of the *Interpetrol* case is the court's approval, almost as an afterthought, of a Chinese Wall within Kramer Levin to avoid any transmission of confidential information from the lawyer (Naftalis) who conducted the preliminary conversations with the Prospect (Interpetrol) to the lawyer (Nadler) now representing the Prospect's adversary (Rosenwasser). In approving the screen, the Interpetrol court cited a significant Pennsylvania case, *INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp.1 (E.D. Pa. 1983), that had approved an internal screen in slightly different circumstances. On May 4, 1982, INA Underwriters ("INAU") filed a complaint against Eugene Rubin, a builder, seeking money INAU had expended to repair defects in homes at Tannerie Woods, a development that Rubin had built. After the complaint was filed but before it was served on Rubin, the F.B.I. contacted Rubin in connection with an investigation of Tannerie Woods. Rubin, perhaps unaware that INAU had sued him, met with Gregory Magarity, a criminal defense lawyer at the law firm of Wolf Block Shor & Solis-Cohn, to discuss the F.B.I.'s investigation of Tannerie Woods. Rubin gave Magarity a \$1,000 retainer check, but Magarity said he would hold the check until he found out whether Wolf Block had a conflict of interest. Immediately after meeting with Rubin, Magarity circulated a standard memorandum asking whether anyone in the firm knew of a conflict. A Wolf Block attorney named Boote, who was representing INAU in its suit against Rubin, promptly notified Magarity that a conflict existed. Magarity then notified Rubin by phone that a conflict existed and that he could not take the case. Magarity then confirmed in writing that he could not represent Rubin and returned Rubin's retainer check. Rubin nevertheless moved to disqualify Wolf Block. Magarity and Boote responded with affidavits stating that they had never discussed the substance of Magarity's meeting with Rubin. Rubin did not controvert the affidavits, but he contended that Wolf Block must be disqualified to avoid the "appearance of impropriety."

The court found the issue to be perplexing. Initially, the court observed, "it would have been more prudent for Mr. Magarity to speak only briefly with Rubin before checking with the rest of the firm for a conflict of interest" but "[u]nfortunately, by the time he refused to accept Rubin's employment, Magarity had knowledge of Rubin's confidences and secrets" – and Magarity conceded that these confidences and secrets were "substantially related" to INAU's case against Rubin. If Magarity had come to Wolf Block from another law firm after acquiring those confidences and secrets, Third Circuit precedent and DR 5 105(D) (the imputed conflicts rule) would have required that Magarity's entire firm be disqualified from representing INAU. The court sought to avoid this result by noting that Magarity "never represented and never attempted to represent the plaintiff" (INAU) in this case. But the question remained whether

the Third Circuit had adopted an “irrebuttable presumption” that one lawyer’s knowledge of an adversary’s confidences must be imputed to all other lawyers at the firm. If such an irrebuttable presumption existed, the court would be “compelled to disqualify Wolf Block without even considering Magarity and Boote’s affidavits” – and even if the presumption could be rebutted and Wolf Block rebutted it, the court would still have to consider whether Wolf Block must be disqualified based on the appearance of impropriety under Canon 9.

The court wrestled with these problems at length. In the end, the court decided that while automatic imputation of knowledge may be the preferred rule for most cases, “when the costs of that rule (in terms of attorney mobility and other values) become too high, the alternative prophylaxis provided by the Chinese wall may serve as a convenient—and generally effective—safeguard.” Since other courts had permitted screening to avoid a firm’s imputed disqualification, the court concluded that the presumption of shared confidences was rebuttable. Moreover, Wolf Block had rebutted the presumption by submitting (a) the uncontroverted affidavit of Magarity swearing that he had neither discussed the substance of his meeting with Rubin with anyone inside or outside Wolf Block, nor made his notes of that meeting available to anyone. In addition, both Magarity and Boote (the Wolf Block attorney representing INAU) swore that they would not discuss the content of the Rubin meeting in the future. This satisfied the court, which said:

If ever a screening mechanism can be effective, this is the case. Wolf Block is a very large law firm, and only one of its members, Magarity, needs to be screened. Magarity’s involvement in Rubin’s case is not an ongoing affair: it consisted of one meeting with Rubin only. Only one document must be screened: Magarity’s notes of the meeting. Although a “Chinese Wall” may be impracticable in most situations, the facts here make its use appropriate and practical. As a condition of my finding the “Chinese Wall” workable, I will require that Magarity destroy his notes of the meeting with Rubin and furnish proof of destruction to this court.

Finally, the court refused to disqualify Wolf Block on the basis of Canon 9’s injunction to avoid the appearance of impropriety, because refusing to disqualify Wolf Block would promote “not only the purposes of Canon 9 to maintain the public confidence in the integrity of the legal system, but also the policies of respecting a litigant’s right to retain counsel of choice and of enabling attorneys to practice without excessive restrictions.” Conversely, if the court did disqualify Wolf Block, the public might lose its confidence in the integrity and efficiency of the legal process. Then, turning the tables on Rubin, the court said: “Although I am not questioning Mr. Rubin’s good faith in approaching Magarity to discuss his case, it may appear to the public that Rubin was aware that INAU had already hired Wolf Block and that a lawsuit would be filed against him soon. Thus, it could appear to the public that Rubin approached Magarity in order to disqualify Wolf Block as a tactic to delay the lawsuit.” The plaintiff’s right to retain counsel of its choice, although “not absolute,” should be respected. Because Rubin would not be prejudiced by refusing to disqualify Wolf Block, and because the public might perceive disqualification as “manifestly unjust and improper,” the court denied the motion to disqualify.

Federal courts in the Eastern District of Pennsylvania continue to follow INA Underwriting and its screening solution in Prospect cases. See, e.g., *Clark Capital Management Group, Inc. v. Annuity Investors Life Insurance Company*, 149 F.Supp.2d 193, 198 n.4 (E.D. Pa. 2001) (citing INA and holding that even if the defendant had disclosed confidential information to a partner of the 100-lawyer Dilworth firm in a preliminary interview, disqualification was an “inappropriate remedy” because the partner had “no

recollection” of any confidential information, so screening “will appropriately balance the interests of all parties.”).

The ABA and Restatement adopt the screening approach

As mentioned above, in 2002 the ABA added a new Rule 1.18 of the ABA Model Rules of Professional Conduct that combines the approaches taken in *Interpetrol Bermuda, Ltd. v. Rosenwasser, Cummin v. Cummin*, and *New York University v. Simon, supra*. Rule 1.18, entitled “Duties to Prospective Client,” provides in subparagraph (b) that even when no lawyer-client relationship ensues, a lawyer who has held preliminary discussions with a Prospect shall not use or reveal information learned in the consultation except as the rules would permit with respect to a former client. Subparagraph (c) of Rule 1.18 then prohibits the lawyer who interviewed the Prospect from opposing that Prospect in “the same or a substantially related matter” if – and only if – the Prospect gave the lawyer information that “could be significantly harmful” to the Prospect.

If any lawyer in a firm is disqualified from opposing a former Prospect on the “significantly harmful” ground, then (absent the Prospect’s consent) the entire law firm is disqualified unless:

- (d)(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 from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

Thus, under the ABA approach, if a lawyer strictly limits a preliminary interview to avoid learning any information that could be “significantly harmful” to the former Prospect in that matter or a substantially related matter, then the lawyer may oppose the Prospect in the matter on which he was consulted or any other matter, related or not.

If the lawyer goes further and elicits just enough information during the preliminary interview to determine whether to accept or reject the case (including information that could be “significantly harmful” if the lawyer ever opposed the Prospect), then the lawyer is personally disqualified. However, despite the “significantly harmful” information, other lawyers in the firm may oppose the Prospect as long as (i) the lawyer who interviewed the Prospect is effectively screened, and (ii) the law firm notifies the Prospect in writing (presumably so the Prospect can determine whether the screen is effective).

However, if the lawyer who interviews the Prospect elicits more information than is needed to decide whether to take the case, then both the lawyer and the lawyer’s entire firm are disqualified unless the Prospect consents.

The ABA approach follows almost verbatim the approach taken in § 15 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, which the American Law Institute adopted in 2000. The ABA clearly based its new rule on the Restatement.

Conclusion

The approaches to Prospect conflicts taken by the ABA Model Rules and the Restatement, and by the courts in *Cummin v. Cummin*, *New York University v. Simon*, and *Interpetrol v. Bermuda, Ltd. v. Rosenwasser*, are sensible approaches. A client's right to choice of counsel is an important right that should be given substantial weight. Reflexively disqualifying both a lawyer who interviews a Prospect and her entire law firm, without inquiring whether the lawyer who interviewed the Prospect learned anything significant or, if so, whether screening can effectively prevent the use of that information by other lawyers in the firm, is a harsh remedy. It gives too much leverage to those who would use preliminary interviews and "beauty contests" as tactical maneuvers to disqualify potential opposing counsel. If a law firm acts in a prudent manner to interview new clients without learning more information than is necessary to evaluate each potential new matter, and if the lawyer who conducted the interview is screened to prevent other lawyers at the firm from learning any information that could significantly harm the Prospect, then the law firm should be allowed to continue representing its client. That solution serves the right of each client to choose its preferred counsel without jeopardizing the Prospect's right to preserve the confidentiality of information disclosed in a preliminary interview.

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