CONFLICTS AND PROSPECTIVE CLIENT CONSULTATIONS

BY KENNETH L. JORGENSEN

“Sophisticated conflict systems, including those using modern technology, are sometimes insufficient to capture every conflict.”

Numerous changes to the Minnesota Rules of Professional Conduct are being recommended based upon the Ethics 2000 amendments to the ABA Model Rules of Professional Conduct. One significant change is a new rule designed to limit the disqualifying effect of conflicts created by consultations with prospective clients who do not retain the lawyer.

The confidentiality and conflict of interest issues implicated by initial or prospective client consultations were first addressed in a 1990 ABA Formal Ethics Opinion. The opinion concluded that a lawyer is disqualified only where the information imparted by the prospective client was “critical” to the representation of a new or existing client in the same or a related matter. Despite the ABA’s position, some courts continued to disqualify lawyers on the basis of initial consultations without regard to whether they possessed critical or even relevant information.

Where reasonable efforts are undertaken to vet for conflicts and no significant information is obtained, affording prospective clients the same duty of loyalty as full-fledged former clients results in the needless disqualification of lawyers. Sophisticated conflict systems, including those using modern technology, are sometimes insufficient to capture every conflict. Conflict systems or procedures can be undermined by a number of factors, including corporate mergers and acquisitions, multiparty litigation, and unforeseeable third-party claims.

Even in family law, where representation is often limited to a single client and adversary, the increasing use of maiden names and hyphenated names, as well as serial marriages and blended families, can thwart even the best conflict-detection procedures.

In addition, over the last decade clients have increasingly attempted to use initial consultations strategically to deprive adversaries of access to counsel. Reports about clients who interview multiple law firms, not for the purpose of finding the most qualified counsel but instead to disable these firms from representing opposing parties, are more than just hearsay.

Disqualification of the Lawyer.

Representation against a former client is prohibited if it is materially adverse to the former client and substantially related to the prior representation. This prohibition applies without regard to whether the lawyer possesses confidential information obtained from the former client. See Rule 1.9(a). In contrast, proposed Rule 1.18 would disqualify a lawyer from representation against a prospective client only where the lawyer possesses information obtained during the consultation that could be “significantly harmful” to the prospective client in the same or a substantially related matter. The addition of the “significantly harmful information” requirement increases the likelihood that the lawyer will be able to subsequently represent new or existing clients against the prospective client. It also strikes an appropriate balance when the information possessed by the lawyer is likely to result in prejudice to the prospective client.

Disqualification of the Law Firm.

Proposed Rule 1.18 would establish a standard for disqualifying the law firm of a lawyer who is disqualified because significantly harmful information was obtained from a prospective client. When a lawyer

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PROFESSIONAL RESPONSIBILITY

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Review of law firm websites may also be desirable. Websites inviting new clients to electronically transmit client information could inflate the risk that disqualifying information will be obtained before conflicts are analyzed. New York has already issued an ethics opinion cautioning lawyers that websites inviting client inquiries must contain a disclaimer that “prominently and specifically” warns prospective clients not to send confidential information. It even suggests that the disclaimer appear in a dialogue box that materializes when the viewer of the website clicks the firm’s email address to send a message.

At present the professional duties extending to prospective clients are undefined and unclear. As legal consumers become more sophisticated, the practice of advertising or shopping for lawyers continues to evolve, and creates further need for a rule defining lawyer obligations. Proposed Rule 1.18 would strike the necessary balance between maintaining client confidentiality and prohibiting only those representations in which the prospective client stands to be prejudiced by misuse of client information. If adopted, the rule may also provide an effective roadmap for lawyers in conducting initial client interviews.

NOTES
1. See Proposed Rule 1.18. The report of the MSBA Rules of Professional Conduct Task Force and its proposed changes to the Rules of Professional Conduct are located at http://www2.mnbar.org/committees/taskforce-ABA-rules/subcommittee-reports.htm. If approved by the General Assembly, a petition requesting the Minnesota Supreme Court to adopt the rule amendments is anticipated later this year.


3. See e.g. Richardson v. Griffiths, 560 N.W.2d 430 (Neb. 1997) (lawyer’s disqualification based upon single phone call with prospective client who paid no fee, and about whom lawyer had no records or recollection); Garner v. Somberg, 672 So.2d 852 (Fla. 1996) (lawyer’s disqualification based upon single conversation with prospective client about personal injury action that was never pursued).

4. The proposed rule also states that persons who unilaterally provide information to a lawyer are not entitled to the rule’s protection unless the lawyer responds in a manner that creates a reasonable belief by the client that the lawyer is willing to form an attorney-client relationship.

5. “Substantially related” has been defined as a substantial relevant relationship or overlap between the subject matter facts and legal issues of the two representations. See Jenson v. Touche Ross & Co., 335 N.W.2d 720, 731 (Minn. 1983).

6. See Proposed Rule 1.18(c).

7. See Proposed Rule 1.18(d).

8. See Lennartz v. Anoka-Hennepin Indep. School Dist. No. 11, No. C6-01-1278 slip op. at 4 and 5 (Minn. 06/05/03) for a discussion of “screening.”


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