

NEW RULES REGARDING PROSPECTIVE AND LIMITED SERVICE PRO BONO CLIENTS

by

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Two new rules adopted as a part of the recent amendments to the Minnesota Rules of Professional Conduct (MRPC) are intended to address the issue of conflicts of interest and imputation of those conflicts in situations where the lawyer's contact with the client is limited in nature.

Rule 1.18 of the MRPC applies to dealings with prospective clients who do not ultimately retain the lawyer; Rule 6.5 applies to lawyers providing short-term limited legal services to clients under the auspices of a pro bono program.

Prospective clients

Rule 1.18 starts out by creating a new category of persons called prospective clients. A prospective client is someone who discusses with the lawyer the possibility of forming a client-lawyer relationship. Not everyone who communicates information to a lawyer will be deemed a prospective client.

The comment to Rule 1.18 establishes a good faith test, providing: "A person who 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, is not a 'prospective client' within the meaning of [the rule]."

Thus, persons who, without invitation, e-mail, mail or simply blurt out information to a lawyer will not be considered prospective clients.

When a lawyer discusses a matter with a prospective client, even if no client-lawyer relationship ensues, the information conveyed to the lawyer will be considered confidential. The rule prohibits use of that information to the detriment of the prospective client except where the MRPC would otherwise require or permit or where the information has become generally known. It also prohibits the revelation of that information except where the MRPC would require or permit.

Generally, after having met with the prospective client, the lawyer may not represent a client with interests materially adverse to the prospective client in the same or a substantially related matter. This prohibition on subsequent adverse representation will only apply if, during the meeting with the prospective client, the lawyer received information that could be significantly harmful to the prospective client in the matter. The lawyer, even if he or she did receive such information, may proceed with the adverse representation if both

the affected client and the prospective client give their informed consent confirmed in writing.

Other lawyers in the firm will, with two exceptions, similarly be prohibited from representing someone adverse to the prospective client. Again, if both the affected client and the prospective client give their informed consent confirmed in writing, the adverse representation may proceed.

Even absent such consent, other lawyers in the firm of the lawyer who met with the prospective client may represent someone adverse to the prospective client in the same or substantially related matter if the lawyer who met with the prospective client: (1) took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (2) the lawyer who met with the prospective client is timely screened from participation in the matter and is apportioned no part of the fee in the matter.

Thus, it would be wise for firms to develop policies for dealing with prospective clients that limit the amount of information initially obtained until such time as it is determined that the firm will, in fact, undertake the representation.

Such information should be limited to obtaining the identity of the parties and likely witnesses to the matter for the purpose of checking conflicts and only enough of the underlying facts to determine whether it is a case the firm would wish to undertake. It would also be wise to advise the prospective client that, for the purposes of the initial meeting, no attorney-client relationship is intended and that the client ought not to disclose any information that might be significantly harmful to them.

Limited services

Rule 6.5 is intended to address the difficulty faced by lawyers providing limited, usually advice-only, pro bono services to clients in situations where it is not practical to check for conflicts prior to meeting with the client.

The application of the rule is intended to apply only in those situations where the pro bono services are rendered under the auspices of a program offering pro bono legal services and where there is no expectation by either the client or the lawyer that the lawyer will provide continuing representation. The types of programs contemplated by the rule include legal-advice hotlines, advice-only clinics and pro se counseling programs.

The rule provides that the lawyer may not meet with the pro bono client if the lawyer *knows* that he or she or anyone else in his or her firm either currently represents someone with interests adverse to the pro bono client or previously represented someone whose interests are now adverse to the pro bono client in the same or a substantially related matter.

The lawyer who meets with the pro bono client will be disqualified from subsequently undertaking the representation of someone adverse to that client in the same or substantially related matters. However, the

lawyer's meeting with the pro bono client will not disqualify the lawyer's partners or associates from representing or continuing to represent someone adverse to the pro bono client. Any information obtained from the pro bono client must, in any event, be held confidential.