

Prospective clients and the ethics rules

You have a conversation with someone who is considering hiring you for a legal matter. You decide not to undertake the representation. Because no fee agreement was signed, the conversation does not have any future implications for you, right? Well, not exactly. Understanding your ethical obligations to prospective clients is an important part of ensuring an ethical practice.

Rule 1.18, Minnesota Rules of Professional Conduct, addresses duties to “prospective clients:” individuals who consult with a lawyer about the possibility of forming an attorney-client relationship. In 2005, Minnesota adopted the ABA model rule on prospective clients, and on June 9, 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 492 addressing this rule. The opinion provides a good look at this little-discussed rule (you might not even know it exists if you went to law school more than 15 years ago), and it’s worth your time to review this rule and the opinion to make sure you are handling such encounters in accordance with the rules.

Client, prospective client, or neither

Let’s start with definitions. “Prospective client” is “[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.”¹ The consultation must be more than a unilateral outreach to the lawyer for someone to become a prospective client. Where “a person 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,” the person is not a prospective client.² What if you invite the contact, though? The comments to the rule indicate that if

you invite the submission of information without a clear warning about terms, that may be sufficient to constitute a consultation.³ The comments also provided this helpful caveat: “a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a ‘prospective client.’”⁴ This is the case because that individual does not fit the definition of a prospective client, which specifically incorporates the purpose of the consultation—to form a client-lawyer relationship.

On the other hand, we all know who is a client, right? Certainly when you have entered into an agreement for representation, someone is a client. But don’t forget that in Minnesota, you can also form a client-lawyer relationship under circumstances in which a lawyer gives advice and the individual reasonably relies upon the same.⁵ Known as the “tort” theory of attorney-client formation, it means you don’t need to have been paid or executed a

written fee agreement for a client relationship that imposes ethical obligations to arise. Such obligations go beyond those listed in Rule 1.18 toward prospective clients, so it is important to watch for those inadvertent relationships.

Prospective client obligations

What ethical duty is owed to a prospective client? There are two. The first relates to confidentiality: You must keep the confidences of the prospective client just as you would those of a former client, irrespective of whether a relationship is formed.⁶ Remember too that as with keeping former client confidences, the proscription is that you must not “use or reveal” the information; including the term “use” means the obligation is broader than just nondisclosure.

The second obligation is one of conflict: You may not represent someone else with interests materially adverse to those of the prospective client in the same or a substantially related matter if you received significantly harmful information from the prospective client.⁷ A lot is happening in this sentence, which is largely the focus of ABA Opinion 492, so let’s pull it apart. Before we start, however, the comments provide an additional option for consideration: You might consider conditioning any consultation with a prospective client on the person’s informed consent that no information disclosed during the representation will prohibit the lawyer from representing a different client in a matter. This is expressly discussed in comment 5 to Rule 1.18, but a strong caution is noted to this approach. Informed consent is a defined term in the rules (Rule 1.0(f), MRPC), and depending on the facts and circumstances—including the sophistication of the consulting party—it might not be obtainable.

Assuming a lack of informed consent, let’s further discuss conflict and disqualification. Remember that representation against a former client is always prohibited if the representation involves the same or a substantially related matter.⁸ This is true regardless of the confidential information available to the lawyer. Rule 1.18 does not provide the same degree of protection to a prospective client but rather focuses on the nature of the information obtained. A disqualifying conflict exists where the lawyer receives information that “could be significantly harmful” to the prospective client. “Significantly harmful” is not a defined term and must be determined on a case-by-case basis in light of the specific facts of the matter. Much of ABA Opinion 492 describes what “significantly harmful” might look like, but a non-exhaustive list includes information such as views on settlement, personal accounts of relevant events, strategic thinking on how to manage a situation, discussion of potential claims and the value of such claims, or premature receipt of information that might affect strategy or settlement.⁹

If you receive information from a prospective client that “could be significantly harmful” to that prospective client, you are prohibited from accepting representation of another whose interests are adverse to the prospective client in the same or a substantially related matter. In my experience answering calls on the ethics hotline, lawyers often take an over-cautious approach to such situations, meaning they decline representation because they had a preliminary consult with the opposing party, irrespec-



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tive of the information provided. That is certainly the lawyer's prerogative, but it's not dictated by the ethics rules. Rather, the inquiry turns on the type of information obtained and the potential for significant harm to the prospective client.

For those in a firm, Rule 1.18 also provides protection against imputation of a conflict to the firm even if the consulting lawyer has a conflict due to receipt of potentially significantly harmful information. While the lawyer who received the information may have a disqualifying conflict, if the lawyer receiving the information (1) took "reasonable measures to avoid exposure to disqualifying information than was reasonably necessary to determine whether to represent the prospective client," (2) is timely screened, (2) is apportioned no part of the fee, and (4) notice is provided to the prospective client, the firm can nevertheless undertake representation adverse to the prospective client.¹⁰ As is often the case, if both the affected client and prospective client provide informed consent confirmed in writing, the intake lawyer can proceed notwithstanding the receipt of potentially harmful information.¹¹

Lessons

There are several lessons here. First, have a disciplined approach to limit intake calls to only information necessary to determine if you can or want to accept the engagement, such as limiting information collection to identifying all parties (including entities if relevant) involved in the representation, the general nature of the representation, and fees for the work you would undertake. Train all lawyers in the firm on this approach. Advise potential clients that it is important to refrain from sharing sensitive or potentially adverse information until both parties decide to go forward with a representation. Don't be afraid to stop someone when they start telling you the whole backstory; wait until you have determined there is no conflict and they can afford your fees. Understand that the more information you gather before making a determination on the engagement, the more likely you may be disqualified from undertaking representation of others in a substantially related matter. Keep

a record of prospective clients and the information obtained, but keep access to that information limited so you can quickly implement a screen if needed.

Rule 1.18, MRPC, strikes a nice balance in affording prospective clients some protections under the rules but not all of the protections afforded to clients, and is clear that contact made simply to disqualify counsel does not afford that individual even the subset of protections afforded prospective clients. The rule also affords to those who take care the ability to avoid imputation to the rest of the firm. As always, if you have a specific question regarding the application of the ethics rules to your practice, please call our ethics line at 651-296-3952, or send an email through our website at lprb@mncourts.gov. ▲

Notes

¹ Rule 1.18(a), MRPC.

² Rule 1.18, cmt. [2].

³ *Id.*

⁴ *Id.*

⁵ See *In re Severson*, 860 N.W.2d 658 (Minn. 2015).

⁶ Rule 1.18(b), MRPC ("Even when no client-lawyer relationship ensues, a lawyer who has consulted with a prospective client shall not use or reveal information obtained in the consultation, except as Rule 1.9 would permit with respect to information of a former client.").

⁷ Rule 1.18(c), MRPC.

⁸ Rule 1.9(a), MRPC.

⁹ ABA Formal Opinion 492 at 4-8.

¹⁰ Rule 1.18(d)(2), MRPC.

¹¹ Rule 1.18(d)(1), MRPC.