CONFLICTS AND PROSPECTIVE CLIENT CONSULTATIONS

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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.Ftn 1

The confidentiality and conflict of interest issues implicated by initial or prospective client consultations were first addressed in a 1990 ABA Formal Ethics Opinion.Ftn 2 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.Ftn 3

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. Stories about wily clients who interview all the divorce lawyers within a 50-mile radius simply to frustrate a spouse's ability to retain counsel are veritable. Although the potential for success with this scheme in the Twin Cities is limited, in greater Minnesota, where lawyers are fewer and farther between, the strategic benefit of forcing an adversary to retain a lawyer who is hours from the courthouse can be significant. Clients who conduct these bad faith "beauty contests" are merely laying the groundwork for future disqualification motions and are not deserving of protection by the professional rules.

Proposed Rule 1.18, which the MSBA Task Force recommended for adoption at the Convention in June, represents a codification of the principles embodied in the ABA opinion. It defines a prospective client as a person who discusses forming an attorney-client relationship with a lawyer concerning a specific matter.Ftn 4 Like the ABA opinion, it attempts to balance the confidentiality obligation owed to prospective clients with the lawyer's ability to represent new or existing clients against the prospective client.

Proposed Rule 1.18 would impose an identical confidentiality obligation upon information imparted by prospective clients and former clients. A lawyer could not use or reveal information learned during an initial consultation unless the prospective client consents, the information has become generally known, or one of the recognized confidentiality exceptions applies (*e.g.*, intent to commit a crime, required by court order, to defend against a client accusation of wrongful conduct). *See* Rule 1.9(b) of the existing Minnesota Rules of Professional Conduct. At the same time, the disqualification standards for prospective clients and former clients would be markedly different.

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.Ftn 5 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.Ftn 6 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 also 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 has received significantly harmful information during an initial consultation, the firm would be permitted to accept representation against the prospective client in the same or a substantially related matter if the lawyer who consulted with the prospective client took "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client."Ftn 7 In addition, the lawyer possessing the significantly harmful information must be screenedFtn 8 and apportioned no part of the fee from the representation. Notice would also have to be given to the prospective client.

If adopted by the Court, the new rule will properly limit disqualifications arising out of prospective client consultations. It will not, however, relieve the need for lawyer vigilance in conflict scrutiny when consulting with new clients. In fact, adoption of Rule 1.18 will likely necessitate review of client intake procedures.

Initial client interviews should be structured to obtain conflict-identifying information on a step-by-step basis. All parties involved in the representation should be identified before substantive client information is obtained. Where entities are involved, this may require identifying parent, subsidiary and affiliated organizations as well as officers, directors or other principals. A general description of the nature of the problem as well as the legal issues involved may be necessary to determine the existence of "issue" conflicts. Where conflicts are identified, policies should be in place to immediately isolate the lawyer(s) who conducted the interview and any related documents or notes. Other law firm lawyers and employees should be directed to refrain from discussing the conflicting representation with the disqualified lawyer(s).

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.Ftn 9 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 auditioning 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/task-force-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.*

2 *ABA Formal Opinion 90-358 (Sept. 13, 1990) entitled* Protection of Information Imparted by Prospective Client.

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 Lennartson 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."*

9 *New York State Bar Formal Opinion 2001-01 (March 2001).*