

## Dealing with prospective clients

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Your partner met with a man two years ago about a possible marital dissolution and custody matter. The lawyer determined that your firm did not have a conflict, then gathered complete information about the matter, discussed the dissolution process and quoted an advance fee. The man left without retaining your firm.[Ftn 1](#)

Now a new client has come to you for representation. She is looking for an attorney for a marital dissolution. It turns out that she is the spouse of the man your partner met with previously. The dissolution discussed by the husband two years ago never occurred. Fortunately, because you enter such prospective clients into your conflicts system, it reveals the prior contact with the husband. Was that one meeting enough to now disqualify you from representing this woman even though your firm never was formally retained?

The answer long has been “probably.” But now the duties owed to prospective clients have been codified more clearly, first in the Restatement of the Law Governing Lawyers[Ftn 2](#) and more recently in ABA Model Rule 1.18 (Duties to Prospective Clients). The ABA Model Rule is also part of the MSBA’s proposed changes to the Minnesota Rules of Professional Conduct.

The proposed rule defines a prospective client as a person who discusses with a lawyer the possibility of forming a client-lawyer relationship where no client-lawyer relationship ensues.

In such situations, the lawyer may not represent a client with interests materially adverse to those of the prospective client in the same or a substantially related matter, although the prohibition applies only if the information gained by the lawyer could be significantly harmful. Any conflict is imputed to all lawyers within the firm.

The rule provides an exception if both clients have given consent. More significantly, the conflict is not imputed to the entire firm if the lawyer:

- took steps to avoid being exposed to additional client information after the initial consultation,

- was promptly screened from participation in the new matter, and
- notice was given to the former prospective client.

### Second opinions

One unique situation also involving prospective clients involves a different rule. A potential client comes to you with a fairly large file in hand. This person tells you he is dissatisfied with his current attorney and wants you to look at the file and give him your opinion whether the current attorney is or is not doing a good job, or possibly to advise him whether you will agree to take over the case.

You know the person is currently represented in the case. May you review the file and the current attorney's work without the lawyer's consent?

There is often some confusion as to the breadth of Rule 4.2 of the Minnesota Rules of Professional Conduct, which generally prohibits contact with a person known to be represented in a matter about the substance of the matter.

Isn't that the situation here? No.

As the Restatement sec. 99, Comment C, states: A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation.

Perhaps the simplest way to understand this position is to recall that Rule 4.2 begins by stating that it applies to a lawyer "in representing a client." At the time the contact is made with this prospective client, the attorney is not in fact yet representing anyone in the matter.

Another explanation could be that a client voluntarily seeking a second opinion and who is initiating the contact is not a person intended to be protected by the no-contact rule.

Or just consider this to be a recognized exception to the rule. Whichever way, the result is the same.

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<sup>1</sup> For malpractice purposes, as opposed to conflicts of interest as discussed in this article, and especially in personal injury or malpractice matters on which you gave a legal opinion to the person about the merits of their cause of action, it is wise practice to also write a letter to the prospective client clarifying that you are not representing the person and reminding them of any applicable statutes of limitation. Such letters are commonly referred to in Minnesota as "Togstad letters." See *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

<sup>2</sup> American Law Institute, Restatement (Third) of the Law Governing Lawyers (2000), sec. 15 (A Lawyer's Duties to a Prospective Client).