ETHICS WATCH

Disqualification Risks with Prospective Clients

By Nathan M. Crystal

Quick reaction: Is having a prospective client a good thing? Answer: It depends. A prospective client may become an actual revenue producing client. In fact, all clients of a firm were at one time prospective clients. However, firms face serious risks in dealing with prospective clients. In this column I will focus on one of those risks: disqualifying conflicts of interest.

Most lawyers are familiar with the basic rules governing conflicts of interest. Rule 1.7 deals with current clients and provides that a lawyer may not undertake representation that is "directly adverse" to another current client or represent a client when a substantial risk exists that the lawyer's representation will be materially limited by another interest. With regard to former clients, Rule 1.9 provides that a lawyer may not undertake representation against a former client on behalf of a new client when the representation involves the same matter or one that is substantially related to the lawyer's representation of the former client. Both rules apply to representation against "clients." But what are the conflict rules when the adverse party never became a client? Rule 1.18 deals with lawyers' obligations to prospective clients.

Prospective clients: basic principles

Rule 1.18 applies if a person is a "prospective client." However, a person does not become a prospective client merely by seeking a lawyer's services. Comment 2 to Rule 1.18 states:

> Not all persons who communicate information to a lawyer are entitled to protection under this Rule. 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, therefore is not a "prospective client" within the meaning of paragraph (a).

For example, if a person sends an unsolicited e-mail to a lawyer with confidential information or leaves a voice mail message with the lawyer containing such information, the person has probably not become a prospective client. However, such situations pose risks, and lawyers can take steps to minimize the possibility that a person would be treated as a prospective client.

It is important for lawyers to understand that Rule 1.18 treats prospective clients more like former clients than nonclients. Under Rule 1.18(b) a lawyer may not use or reveal information learned from a prospective client except to the extent permitted by Rule 1.9, the rule dealing with former clients.

However, because a former client has a more significant relationship with the lawyer than a prospective client, Rule 1.18 provides more generous treatment to the lawyer in undertaking representation against a former prospective client. See Rule 1.18, comment 1.

First, unlike Rule 1.9, Rule 1.18 does not contain a substantial relationship test. Instead, for the lawyer to be disqualified under Rule 1.18 the lawyer must have received information from the prospective client that would be "significantly harmful" to the prospective client. Rule 1.18(c).

Second, while Rule 1.9 does not permit screening of a disqualified lawyer, Rule 1.18(d)(2) provides for screening when a lawyer is disqualified from undertaking representation against a former prospective client. However, screening is only allowed if the lawyer who received disqualifying information "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client." Rule 1.18(d)(2). In addition, the firm must erect a screen promptly, Rule 1.18(d)(2)(i), and must give prompt written notice of screening to the prospective client, Rule 1.18(d)(2)(ii). On the requirements for screening, see Rule 1.0(n) and comments 8-10.

For recent cases discussing many of the basic principles that apply to prospective clients, see *Jimenez v. Rivermark Cmty. Credit Union,* 2015 U.S. Dist. LEXIS 61745 (D. Or. 2015); *Disciplinary Bd. of the Supreme Court v. Carpenter,* 863 N.W.2d 223 (N.D. 2015). See also ABA Ethics Tip, *The Once and Future Client* (March 2015) (on the Internet).

Avoiding a person becoming a prospective client: when and how?

If a person becomes a prospective client, a lawyer will be disqualified from representing a client against the former prospective client when the lawyer has

acquired information that could be significantly harmful. In addition, screening of a disqualified lawyer will not prevent disqualification of the lawyer's firm if the lawyer acquired more information than was reasonably necessary to determine whether to represent the prospective client. On the other hand, lawyers and firms seeking to expand their clientele often want to encourage people to consider retaining their services. How does a firm decide whether to encourage or discourage people from becoming prospective clients?

In some types of practice the risk that a firm will be asked to undertake representation against a former prospective client is remote. Examples of such types of practice are plaintiffs' personal injury, immigration, and consumer bankruptcy. In these areas firms are often concerned about inadvertently establishing an actual attorney-client relationship because the unintended existence of the relationship can lead to malpractice liability (missed deadlines) or disciplinary complaints (failure to communicate). On the other hand, in these areas firms may want to encourage prospective clients to contact the firm so that the firm can decide if the client has a "good case" that the firm is interested in handling. Call these firms "PCE Firms," i.e. "prospective client encouraging firms."

PCE Firms will want to take steps to prevent the inadvertent creation of an attorney-client relationship while at the same time facilitating contact by people with the firm. In these and many other areas of practice, the initial contact between a person and the firm will often come through the Internet. PCE firms can encourage prospective clients by making contact with the firm simple: easy-to-use ways to send e-mail inquiries and chat availability are two methods. At the same time firms can protect against inadvertent creation of attorney-client relationships by appropriate disclaimers that make it clear that an attorney-client relationship can be formed only through a signed engagement letter. Note that in using disclaimers firms must consider the advertising rules of the jurisdictions from which they obtain clients. For example, South Carolina has a quite restrictive rule on the ethical effectiveness of disclaimers. Rule 7.2(i) provides in part:

> (i) In addition to any specific requirements under these rules, any disclosures or disclaimers required by these rules to appear in an advertisement … must be of sufficient size to be clearly legible and prominently placed so as to be conspicuous to the viewer … If the statement is made on a website, online profile, Internet advertisement, or other electronic communication, the required words or statements shall appear on the same page as the statement requiring the disclosure or disclaimer.

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Other states are likely to have different disclaimer rules.

On the other hand, in many types of practice firms should be cautious about a person or entity becoming a prospective client because the firm may be disqualified from representing a regular client or another more lucrative client against the prospective client. Call these firms "PCD Firms," prospective client discouraging firms. Some examples include large firms with diverse practice areas engaging in beauty contests or other RFQ procedures, primarily defense firms that take on some plaintiff matters, small firms with boutique practices, high-level divorce firms, and firms specializing in commercial or corporate litigation. What steps can PCD Firms take to limit the risk that a person or entity will become a prospective client?

Adoption of risk reduction procedures (RRP) requires analysis of the ways in which the firm obtains clients. RRPs must be tailored to the specific form of intake. For example, a boutique high-level divorce firm may want to avoid an intake procedure in which a firm lawyer has the initial meeting with the potential client. In such a meeting it would be highly likely that the lawyer would obtain more information than is necessary to decide whether to accept the case, some of which may be "significantly harmful" to the prospective client. As a result, if the lawyer is not engaged by the prospective client, the lawyer would be personally disqualified from representing the opposing spouse if that spouse were to contact the firm. In addition, use of screening might not be possible. If the lawyer is a solo, screening is inapplicable. Even if the lawyer has a partner, screening might not be available because the lawyer may have acquired more information than was "reasonably necessary to determine whether to represent the prospective client." Rule 1.18(d)(2). Instead, perhaps the firm should use a questionnaire completed by the potential client before the person has a meeting with the lawyer. The questionnaire should warn the potential client not to share more confidential information than is required by the questionnaire.

Large firms participating in "beauty contests" will want to review carefully the requirements for the beauty contest. To avoid future disqualification problems, the firm may want to condition its participation on consent by the person or entity seeking professional services to the firm's ability to represent adverse parties if the firm is not retained by the person or entity. New York City Bar Opinion 2013-1 suggested that sophisticated entities with in-house counsel could be asked to agree to a statement like the following: "As a condition to Law Firm's participation in this RFQ, [name of entity] agrees that Law Firm would be free to use or reveal information received in the consultation or to represent others with materially adverse interests in the same or any related matter, as applicable, in the event that [name of entity] does not retain the firm." Of course, some entities may reject such a condition, in which case the firm must make a business decision whether to proceed with the RFQ process, recognizing the disqualification risks, or withdraw from the process.

Large firms should consider carefully whether they want to encourage e-mail inquiries from their websites; if they do, they will want to have specific disclaimers and limitations about information that inquirers send to avoid the possibility that the inquirer will become a prospective client. See Texas Ethics Op. #651 (2015) (strong click-through warning to prospective clients on website that firm will have the right to use any confidential information submitted to the firm eliminates duty of confidentiality to prospective clients).

Strategic misuse of the prospective client rule

Because lawyers owe prospective clients certain ethical obligations, a risk exists that a person or entity may attempt to use the prospective client rule strategically to disqualify a lawyer or firm that the person or entity does not want to have on the other side. Such a strategic use of the ethics rules can occur in any area of practice, but divorce is a field that may be particularly prone to such conduct. A lawyer should not be disqualified if the lawyer can establish that a person sought the lawyer's services for the primary purpose of disqualifying the lawyer or his firm. Cf. *S.C. Bar Ethics Adv. Op.* #04-07 (improper for lawyer to advise client to consult with an attorney for the purpose of disqualifying that attorney.)

Malpractice and prospective clients

Conflicts of interest are not the only risk associated with prospective clients. Comment 9 to Rule 1.18 refers to the duty of competency that a lawyer owes to a prospective client. In addition, for many years it has been well established that a lawyer may be liable to a prospective client for malpractice if the lawyer fails to comply with the standard of care expected of lawyers in declining representation. The standard of care requires a lawyer when declining representation not to (1) lead the prospective client to believe that the lawyer is analyzing or investigating the case when the lawyer is not doing so, (2) give advice about the merits of the client's case without having a reasonable basis for such advice, and (3) fail to inform the prospective client of the need to seek any second opinion promptly because of the possible loss of a claim due to the expiration of an applicable statute of limitations. The leading case on malpractice liability to prospective clients is *Togstad v. Vesely, Otto, Miller & Keefe,* 291 N.W. 2d 686 (Minn. 1980). Good practice calls for lawyers to use well-drafted "nonengagement letters" when declining representation from prospective clients.