



**ABA Issues New Guidance on Lawyers'
Ethical Duties to Prospective Clients**

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The ABA Standing Committee on Ethics and Professional Responsibility (the “Committee”) recently issued Formal Opinion 492 (the “Opinion”), in which the Committee offers helpful guidance on navigating the duties to prospective clients under Model Rule 1.18. Attorneys and conflict-avoidance software alike tend to focus on conflicts of interest with current and former clients, and may disregard the risks associated with prospective clients with whom an attorney-client relationship is ultimately never formed. The Opinion serves as an important reminder to attorneys that prospective clients are indeed owed certain duties – and that even a short consultation that does not lead to a retention could disqualify the lawyer – and even the lawyer’s entire firm – from undertaking a future representation of a different person or entity.

The duties described in Rule 1.18 apply to prospective clients. A prospective client is a “person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.” The comments clarify what does – and what does not – constitute a consultation. Comment [2] explains that “a consultation is likely to have occurred if a lawyer ... specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response.” On the other hand, a consultation has *not* occurred within the meaning of the Rule if a person unilaterally provides information to an attorney, such as through an unsolicited email seeking legal help.¹ To be accorded prospective client status, a person must have consulted with the attorney in good faith about the possibility of forming an attorney-client relationship.² So under the current Model

¹ See Model Rule 1.18, cmt. [2].

² Model Rule 1.18, cmt. [2] (stating “a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a ‘prospective client.’”); see also Pa. R. Prof’l. Cond. 1.18, cmt. [2] (“A person who participates in an initial consultation, or communicates information, with the intent to disqualify a lawyer from representing a client with materially adverse interests is not entitled to the protections of paragraphs (b) or (c) of this Rule. A person’s intent to disqualify may be inferred from the circumstances.”).

Rule, Tony Soprano’s efforts to conflict out every high-powered divorce attorney in the community by disclosing information during multiple consultations would have fallen short. Tony was not consulting with the attorneys in good faith.³

During an initial consultation, it is necessary for the prospective client to disclose certain information to the attorney so that the attorney can determine whether she can competently represent the client in the particular matter, and whether there are any conflicts of interest that may preclude the representation. Any such information obtained by the attorney during the consultation must be kept confidential to the same extent as information obtained from a former client under Rule 1.9.⁴ However, as noted in Comment [1], while prospective clients receive *some* of the protections afforded to clients, they are not entitled to *all* of the protections. Rule 1.18(c) illustrates this most clearly by introducing a new standard for what is loosely considered the duty of loyalty.

Pursuant to Rule 1.18(c), an attorney is prohibited from representing someone with materially adverse interests in a substantially related matter only if the prospective client revealed information that could be *significantly harmful* to the prospective client in that matter. Like its counterparts, the Rule 1.18(c) prohibition on future representations is imputed to the lawyer’s entire firm; however, this is “less exacting than the corresponding restriction on representations that are materially adverse to a former client,” for which the prohibition against representing another party in a substantially related matter is “automatic.”⁵ The Opinion offers

³ A lawyer who advises a client to contact other lawyers on a pretextual basis to disqualify them from representation of an adversary may be deemed to engage in prohibited conduct prejudicial to the administration of justice under Model Rule 8.4(d). *O Builders & Assocs., Inc. v. Yuna Corp.*, 19 A.3d 966 (N.J. 2011).

⁴ Model Rule 1.18(b).

⁵ N.Y. City Ethics Op. 2013-1 (2013).

several examples, pooled from various sources, of the type of information that is typically viewed as “significantly harmful” within the meaning of the Rule:

“[F]or instance, views on various settlement issues including price and timing; personal accounts of each relevant event and prospective client’s strategic thinking concerning how to manage the situation; ... a presentation by a corporation seeking to bring an action of the underlying facts and legal theories about its proposed lawsuit[;] ... sensitive personal information in a divorce case; premature possession of the prospective client’s financial information; knowledge of settlement position; [and] a prospective client’s personal thoughts and impressions regarding facts of the case and possible litigation strategies[.]”⁶

Notably, “significantly harmful” information “cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a determination that is exquisitely fact-sensitive.”⁷

Even if an attorney obtains disqualifying information during a consultation with a prospective client, Rule 1.18(d) provides exceptions that, if satisfied, will permit the attorney – or other attorneys in his or her firm – to undertake a subsequent adverse representation. The attorney who obtained disqualifying information is free to undertake the representation of another party in that matter if both the affected client and the prospective client provide informed consent, confirmed in writing.⁸ Comment [5] notes that a lawyer may condition a consultation upon the prospective client’s informed consent that nothing “disclosed during the consultation will prohibit the lawyer from representing a different client in the matter,” and that “[i]f the

⁶ ABA Formal Op. 2020-492 (2020) (internal citations omitted); see *Sershen v. Cholish*, 2009 U.S. Dist. LEXIS 96223 at 4 (M.D. Pa. Oct. 15, 2009) (stating that “[s]ignificantly harmful information is a necessary pre-requisite to disqualification under Rule 1.18[.]” and denying motion to disqualify because movant failed to specify any such significantly harmful information).

⁷ *Id.* (citing *O Builders & Assocs., Inc. v. Yuna Corp.*, 19 A.3d 966 (N.J. 2011) (denying motion to disqualify)).

⁸ Model Rule 1.18(d)(1).

agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client." Unlike in analogous situations involving a former client, a prospective client cannot prevent other lawyers in the firm from undertaking a subsequent adverse representation so long as the attorney minimized the disclosures provided in the initial consultation, the attorney is timely screened, and notice is timely provided to the prospective client.⁹ In other words, the prospective client's consent is *not* required.¹⁰

Although prospective clients are not afforded protection to the same extent as "full-fledged" clients, attorneys should be mindful that even minimal consultations with prospective clients who provide information in good faith for the purpose of potentially forming an attorney-client relationship impose certain duties and requirements. Lawyers would be wise to minimize the amount of confidential information obtained during such consultations and, where practicable, seek the prospective client's agreement that the attorney will not be precluded from the subsequent representation of other clients with potentially conflicting interests. In the event that disqualifying information is obtained, the lawyer should promptly implement effective screening to ensure that the lawyer's personal disqualification will not be imputed to the rest of the law firm.

⁹ Model Rule 1.18(d)(2); *see* Model Rule 1.18, cmt. [8].

¹⁰ *See* N.C. Ethics Op. 2003-8 (2003).