

# NEW HAMPSHIRE BAR ASSOCIATION

## Duties to Prospective Clients

### Ethics Committee Advisory Opinion #2009-10/01

#### **ABSTRACT:**

A lawyer must be careful when exposed to confidential information from a prospective client. If a lawyer is exposed to such confidential information, it may disqualify the lawyer from later representing an opposing party. This opinion outlines certain steps to avoid disqualifying the entire law firm from representing others with materially adverse interests in the matter.

#### **ANNOTATIONS:**

New Hampshire's Rules of Professional Conduct generally prohibit an attorney from using or revealing confidential information received from a prospective client, even if the lawyer declines to represent the party who contacted him. If a lawyer reviews information relayed in an electronic message that could be significantly harmful to its sender, he or she may be disqualified from later representing an opposing party. Further, unless the steps described in this article are followed, the entire law firm could be disqualified from representing others with materially adverse interests in the matter.

The internet has changed the practice of law in many ways, including the way people find lawyers to represent them. Law firms have employed different means to leverage these changes into more business, but the Ethics Committee advises lawyers and law firms in the State to consider carefully the implications of using their websites to invite members of the public to email the firms' attorneys.

#### **INTRODUCTION:**

Among the new and revised ethical rules adopted by the New Hampshire Supreme Court in 2007 is Rule 1.18, Duties to Prospective Clients.

#### **Rule 1.18. Duties to Prospective Clients**

- a. A person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- b. Even when no client-lawyer relationship ensues, a lawyer who has received and reviewed information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.

- c. A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received and reviewed information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- d. When the lawyer has received and reviewed disqualifying information as defined in paragraph (c), representation is permissible if:
  - 1. both the affected client and the prospective client have given informed consent, confirmed in writing, or:
  - 2. the lawyer who received and reviewed the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
    - a. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
    - b. written notice is promptly given to the prospective client.

This rule clarifies the status of persons who seek representation but do not become firm clients. It recognizes that the confidential information they share with a lawyer, under certain circumstances, should be protected from disclosure by the consulted lawyer. Similarly, the prospective relationship, under the right circumstances, should preclude the lawyer, and perhaps the other lawyers in his or her law firm, from representing others with adverse interests. At the same time, Rule 1.18 seeks to protect current clients' right to counsel of their choice and avoid unnecessary firm disqualifications by permitting a law firm to screen a lawyer who has reviewed otherwise disqualifying confidential information.

When a law firm's website invites the public to send an email to one of the firm's lawyers, it is opening itself to potential obligations to prospective clients. Careful compliance with the requirements of Rule 1.18 can help law firms avoid any adverse consequences, but compliance efforts should begin well before a firm's attorney considers whether to open the email.

## **DISCUSSION:**

### **I. Recognizing the Prospective Client**

Prior to the adoption of Rule 1.18, the Rules of Professional Conduct did not explicitly address pre-representation communications. However, ethics opinions recognized that, even if the representation was never undertaken, communications by a prospective client seeking legal representation could be protected from disclosure if the prospect's expectation of confidentiality was reasonable. ABA Formal Ethics Op. 90-358 (1990). Before the advent of the information superhighway, law firms had an easier time controlling the flow of potentially disqualifying

information. Initial interviews with prospective clients were conducted in person or over the phone. Lawyers could more easily set the ground rules. They could control the prospective clients' expectations that the lawyer would or could maintain the confidentiality of any information disclosed during the initial consultation, and discourage the unilateral disclosure of compromising confidences by limiting disclosure to information needed to complete a conflicts check and confirm the lawyer's subject matter competence. The lawyer's control was compromised when communication came in the form of unsolicited mail, so pre-1.18 ethics opinions also recognized that a person shouldn't have the power to unilaterally bind a lawyer to maintain confidentiality. A willingness on the part of the lawyer to at least discuss the prospects for representation was an essential prerequisite to the obligation to protect the prospective client's confidences. A person's unilateral disclosure, without a reasonable expectation of confidentiality and a willingness on the part of the lawyer to consider representation, was unprotected. This is codified in Rule 1.18(a) and the accompanying comments where the Rule's drafters sought to prevent exploitation of Rule 1.18 to disqualify an adverse party's counsel of choice. The ABA's comments continue the "reasonable expectation" standard from the pre-Rule 1.18 regime. See ABA Model Rule 1.18, Comment 2 ("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, is not a 'prospective client' within the meaning of paragraph (a)."). It also strips "prospective client" status from those individuals who make disclosures for the purpose of disqualifying an attorney from participation in the matter, and those conducting a so-called "beauty contest" by making contemporaneous contact with numerous attorneys or law firms. Id. Sending an unsolicited email is a unilateral act. The information that a person puts into an unsolicited email should not trigger confidentiality obligations if a lawyer, with no expectation that the sender is seeking legal representation or disclosing confidences, opens the email. When the law firm's website invites a member of the public to contact one of the firm's lawyers in an email, however, any disclosure made in the email looks less unilateral. Current technology restricts the attorney's ability to manage expectations and the flow of information. The ABA's Model Rule 1.18 applies only to persons who have made disclosures in "discussions" and "consultation" with a lawyer and does not explicitly address the status of persons who send emails to a law firm via its website. New Hampshire's Rule 1.18 does not specifically address emails either, but it is broader than the ABA's model rule and covers any disclosure made in a good faith pursuit of legal representation. Moreover, the New Hampshire comments accompanying the Rule address this explicitly.

In its version of these provisions, New Hampshire's rule eliminates the terminology of 'discussion' or 'consultation' and extends the protections of the rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms,

and in the process disclose confidential information that warrants protection.

Rule 1.18, New Hampshire Comment 1. Thus, a “prospective client” can be the person who merely “provides information to a lawyer . . .,” with or without discussion or consultation, and the lawyer who “has received and reviewed information from a prospective client . . .” is subject to confidentiality obligations and may be disqualified from representing an adverse party in the same or any substantially related matter.

Under Rule 1.18(b), a lawyer effectively demonstrates a willingness to consider representation, and thereby triggers prospective client obligations, by reviewing the information received from the prospective client.

## **II. Confidentiality Obligations Owed to the “Prospective Client”**

A person who discloses information in an email sent to an attorney – in a good faith search for representation and with a reasonable expectation that the attorney is willing to discuss that possibility – becomes a “prospective client” under New Hampshire’s Rule 1.18. Whether or not the attorney ultimately agrees to represent the prospective client, or even intended to consider it, confidentiality obligations attach once the attorney receives and reviews the information in the email. The attorney must treat the information received and reviewed as if the prospective client were a former client and in accordance with the permissions and proscriptions contained in Rule 1.9. Rule 1.18(b). Thus, a lawyer shall not use information relating to the prospective representation, “to the disadvantage of the former [or prospective] client,” and shall not disclose such information, unless such disclosure or disadvantageous use is required or permitted under other Rules of Professional Conduct or when the information is “generally known.” In short, once an attorney receives and reviews confidential information in a prospective client’s email, that information must be protected from disclosure as if it had been disclosed by any other client or former client.

## **III. Disqualification and Screening to Avoid Imputed Disqualification**

Receipt and review of the confidential information disclosed in an email received from a prospective client can also create conflicts of interest with a lawyer’s current and future clients. Prior to the adoption of Rule 1.18, there was no clear limitation on the consulting lawyer’s ability to represent parties with interests adverse to the prospective client and could only be inferred. Thus, depending on how the rules were interpreted, the attorney as well as the rest of the attorneys in the firm, might be disqualified from representing the adverse party, even if the disqualifying communication was made to only one of the firm’s members. Rule 1.18 clarifies the circumstances under which an attorney who has reviewed information disclosed by a prospective client is disqualified from representing other parties with materially adverse interests. In many ways, the lawyer’s duty to avoid conflicts of interest with a prospective client is similar to the duty owed to former clients. The lawyer cannot represent someone else in the same or substantially related

matter if that person's interests are materially adverse to the prospective client's. In addition, any conflict can be waived by the prospective client. There are important distinctions, however, that take into account the prospective nature of the relationship formalized in Rule 1.18. Since there is no prior representation to trigger the duty, the conflict arises only if the lawyer received and reviewed information that could be significantly harmful to the prospective client. Knowledge of disqualifying information is not presumed from the prior prospective relationship the way it is from the relationship between a lawyer and a former client. In addition, because the lawyer's review of a prospective client's confidential information may have been fleeting and superficial, as compared to the lawyer's familiarity with the confidences of a current or former client, Rule 1.18(d) endorses reliance on screening procedures, in appropriate circumstances, to avoid imputed disqualification of the entire firm. This is a major departure from existing New Hampshire law on conflicts which recognized the effectiveness of a screen against imputed disqualification only when conflicts arose from the firm's association with lawyers formerly employed by the government. (Rule 1.11). Though the opportunity to screen an otherwise disqualified attorney helps protect clients' freedom to choose their own counsel, law firms cannot casually rely on after-the-fact screening procedures to limit their obligations to good faith prospective clients. Screening is available to avoid imputed disqualification only if the lawyer took reasonable measures to limit his review of information from the prospective client to that which was reasonably necessary to determine whether to offer representation. The firm, therefore, should maintain and reinforce clear procedures to be followed during initial interactions with potential clients so that its lawyers gather only that information needed to rule out any conflict with existing clients and determine whether the matter is one that the firm is willing to undertake. The firm's lawyers should obviously know to stop reviewing materials as soon as they discern that the information contained in them exceed these limits. Rule 1.0(k) defines "screening" as:

the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

To be effective against imputed disqualification, in the context of the prospective client or the former government lawyer for that matter, any screen must be implemented in a timely fashion, or "as soon as practical after a lawyer or firm knows or reasonably should know that there is a need for screening." ABA Model Rule 1.0, Comment 10. The comments to Rule 1.0 provide further guidance to ensure implementation of an effective screen, including acknowledgment by the disqualified lawyer of the obligation not to communicate with respect to the matter, notice to the lawyers and staff working on the matter about the existence of the screen, denial of access by the screened lawyer to files or materials in the firm's possession that are related to the matter, and periodic reminders to all concerned. Furthermore, it is a precondition of any effective screening program that the disqualified lawyer may not be apportioned any part of the fee from the

engagement. Rule 1.18(d)(2)a. See also ABA Model Rule 1.18, Comment 7 (“Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.”).

Finally, the firm must promptly provide written notice to the prospective client of the firm’s representation of the adverse party. Rule 1.18(d)(2)b. The Rule is silent as to the content of the written notice to be provided. The commentary accompanying the Rule provides that the notice should include a general description of the subject matter about which the lawyer was consulted, and the screening procedures employed. See ABA Model Rule 1.18, comment 8.

To protect its clients’ rights to counsel of their choice, law firms should be alert to the risks posed by the messages in their lawyers’ email inboxes. By exercising due care, lawyers can avoid exposure to disqualifying information. Momentary lapses, and even unavoidable contamination, are still correctable if the lawyer stops his or her review as soon as can be reasonably expected under the circumstances and alerts the other lawyers in the firm of the need to implement a timely screen.

#### **IV. Informed Consent**

Screening of a lawyer tainted by exposure to disqualifying information is not the only way Rule 1.18 balances the interests of prospective clients against the interests of others to retain their counsel of choice. The prospective client that never engages the lawyer is treated as a former client. Like any former client, a prospective client under Rule 1.18(d)(1) can grant effective consent to the representation of another by the attorney or law firm, even in the same (or a substantially related) matter about which the prospective client sought representation, and even if the information received and reviewed by the attorney could be significantly harmful. This consent must be “informed,” as that term is defined in Rule 1.0(e), as to the material risks of and reasonably available alternatives to the proposed representation in order to be effective. Clearly, consent is not the favored method for accommodating the confidentiality and choice of counsel interests implicated by communications from prospective clients. However, the ABA comments to the Model Rule 1.18 provide that a lawyer may obtain a prospective client’s prior written and informed consent as a precondition to consulting about potential representation.

A lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. . . . If the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.

ABA Model Rule 1.18, comment 5. The Ethics Committee of the Massachusetts Bar Association has also suggested that a lawyer could obtain informed consent electronically, and thereby avoid the loyalty and confidentiality obligations that would otherwise be owed to a prospective client who utilized a link found on the law firm's website to send an otherwise unsolicited email seeking legal representation.<sup>1</sup>

Using readily available technology, the firm may require a prospective client to review and "click" his assent to terms of use before using an e-mail link. Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter.

Massachusetts Opinion 2007-1, p. 5.<sup>1</sup> In theory, this reasserts the lawyer's ability to set conditions on the flow of information the way a lawyer can when talking to a potential client in person or over the telephone. In practice, however, a waiver of confidentiality designed to prevent disqualification may jeopardize the subsequent assertion of privilege over matters communicated by a prospective client.

In this context, consideration should be given to the decision in *Barton v. United States Dist. Ct.* for the Cent. Dist. of Cal., 410 F.3d 1104 (9th Cir. 2005). In that case, the law firm had posted a questionnaire on the internet to gather information about potential class members who might have claims arising from the use of a prescription medication. The plaintiffs had answered the questions before retaining the law firm to represent them in a class action. The district court ordered production of their answers in discovery. The appellate court blocked the disclosure, finding that, while the law firm carefully designed the questionnaire to avoid forming attorney-client relationships upon mere submission of answers, the disclaimer accompanying the questionnaire did not discuss confidentiality. The people who answered the questionnaire were treated as prospective clients whose disclosures were covered by the attorney-client privilege. The result in *Barton* may well have been different had the law firm used the kind of "clicked" waiver endorsed in the Massachusetts opinion to avoid imputed disqualification resulting from unilateral disclosures of confidential information by a prospective client.

New Hampshire, for its part, is a bit more skeptical of the effectiveness of consent to conflicts of interest that is sought and obtained before the actual consultation. Comment #3 to Rule 1.18 expresses concern about lawyers and law firms relying on this kind of prior informed consent. New Hampshire perceives a distinction between the detailed analysis contemplated by the Rules and commentary when informed consent to a conflict is sought from a current client, see Rule 1.7,

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<sup>1</sup> The Supreme Judicial Court of Massachusetts has not adopted Model Rule 1.18, so the Massachusetts opinion concerning confidentiality obligations owed to prospective clients is derived from Rule 1.6 and the potential client's reasonable expectation of confidentiality. See Massachusetts Opinion 2007-1, pp. 3, 5.

comment 22, and the prior consent obtained from a prospective client that likely will be less deliberate, and less informed as to its potential adverse consequences. These concerns are only heightened when the prior consent is informed only by an electronic disclaimer on the website, which may or may not be read and considered carefully before consent is “clicked.”

Rule 1.18 unequivocally permits law firms to avoid disqualification by seeking and obtaining from the prospective client a waiver of confidentiality or consent to conflicts of interest that would be unwaivable in the current client context. Keep in mind, however, that all clients were prospective clients at one time. Before relying on automated methods of securing waivers of confidentiality and/or consent to conflicts of interest before the prospective clients make their disclosures, law firms must consider the effect such prior consent and waiver may have on the prospective client’s attorney-client privilege.

## **CONCLUSION:**

When people or entities seek legal representation, the interest in protecting confidences can conflict with the interest in choosing one’s counsel. In accommodating these conflicting interests, Rule 1.18 provides important clarification regarding the status of prospective clients, the protection that must be given to information received from them, and the circumstances under which such information can disqualify a lawyer or law firm from representing another client with adverse interests.

Rule 1.18 encourages law firms to limit the exchange of information during initial consultations with those seeking legal representation. This minimizes the risk of exposure to the kind of significantly harmful information that results in disqualification. At the same time, it maximizes the chance that efforts to screen the lawyer who might inadvertently review disqualifying information will be effective to ward off imputed disqualification of the rest of the firm. Disqualification is best avoided, then, by having procedures in place that are reasonably designed to limit the prospective client to disclosing only that information that is necessary to determine whether to offer representation.

The ability to effectively limit unwanted, disqualifying disclosure, however, is compromised when a law firm’s website invites any web surfer to click on a link to email a lawyer in the firm. The firm will have to prove that prior consent – which the prospective client indicated by “clicking” acceptance of the terms of a website disclaimer purporting to waive confidentiality and potential conflicts of interest – was sufficiently “informed” to be effective. After one of the firm’s lawyers has received and reviewed the prospective client’s confidential information, informed consent to representation of an adverse party will not be easily obtained. The firm’s ability to continue to represent even a longstanding client, if it has interests adverse to the prospective client, will likely depend on the reasonableness of the measures taken to avoid disqualifying disclosures, and the effectiveness and timeliness of any screening procedures.



**NH RULES OF PROFESSIONAL CONDUCT:**

Rule 1.0(k)

Rule 1.7

Rule 1.9

Rule 1.11

Rule 1.18

**NH ETHICS COMMITTEE OPINIONS AND ARTICLES:**

**SUBJECTS:**

Definition – screening

Conflicts of Interest

Duties to Former Clients

Special Conflicts of Interest for Former and Current Government Officers and Employees

Duties to Prospective Client

- **By the NHBA Ethics Committee**

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