NEW HAMPSHIRE BAR ASSOCIATION

The Prospective Client: Confidentiality and Withdrawal Considerations

Ethics Committee Opinion #2019-20/02

ABSTRACT

When a lawyer receives information from a prospective client which is materially adverse to the interests of the lawyer's current client, is the lawyer authorized to reveal any information regarding the prospective client to his/her current client, and/or is the lawyer required to withdraw from representing the current client?

ANNOTATIONS

In short, a lawyer is not authorized to reveal information from a prospective client to a current client, unless the prospective client provides the lawyer with informed consent, confirmed in writing, to disclose the information. N.H. R. Prof. Conduct 1.18(b). Moreover, unless one of the exceptions in Rule 1.18 is satisfied, a lawyer may be required to withdraw from representing the current client with interests materially adverse to a prospective client if the information received from the prospective client could be significantly harmful to the prospective client in the same or substantially related matter. N.H. R. Prof. Conduct 1.18(c). As a result, lawyers must be mindful of how they conduct the initial interviews with prospective clients to avoid conflicts which could be fatal to an existing client-lawyer relationship.

DISCUSSION

A. Protecting Prospective Client Information

In 2007, New Hampshire adopted New Hampshire Rule of Professional Conduct 1.18, entitled "Duties to Prospective Clients," following the American Bar Association's ("ABA") adoption of Model Rule 1.18 in 2002.[1] Under New Hampshire Rule 1.18 (a), a "prospective

[1]New Hampshire Rule 1.18, provides as follows:
(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).

client" is a "person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter. . . ."[2] When a lawyer consults with a prospective client, the lawyer is required to protect the information that the lawyer receives or reviews from the prospective client under the same protections that are afforded to a former client of the lawyer under Rule 1.9. Consistent with this premise, Rule 1.18(b) creates the protection for the prospective client, and states as follows:

> 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.

Under Rule 1.9(c), a lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

As set forth in Rule 1.18(b), this Rule applies to a lawyer's consultation with a prospective client. Thus, when a lawyer receives or reviews information from a prospective client, the lawyer is not authorized to use or reveal this information with the current client, unless the prospective client gives informed consent for such use, *see* N.H. R. Prof. Conduct 1.6(a)[3], or the information has "become generally known." N.H. R. Prof. Conduct 1.9 (c). This of course, creates a significant problem for the lawyer with respect to their duty to disclose information to their current client under Rule 1.4 and their duty to competently represent the current client as required under Rule 1.1. Depending on the nature of the protected information from the prospective client, a lawyer may be required to withdraw from continuing to represent the current client.

(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.

[2] By way of reference, this Rule is consistent with New Hampshire Rule of Evidence 502(a)(1) which defines "client" as one "who consults a lawyer with a view to obtaining professional legal services from him."

[3] Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."

Lawyers should note that the term "information" in Rule 1.18(b) and Rule 1.9(c) is not limited to "confidential" information, but to information "relating to the representation of a client." N.H. R. Prof. Conduct 1.6(a). Thus, the term information should be broadly construed as it is rooted in the principle of the client-lawyer relationship, which is "given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics." ABA Model Rule 1.6 comt 3. Significantly, the confidentiality of information rule is the same for prospective clients as it is for current and former clients and "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Id*.

B. When the Prospective Client-Lawyer Relationship Triggers the Duty to Withdraw from Representing A Current Client

Rule 1.18(c) requires withdrawal of representing a current client when the lawyer's current client's interests are "materially adverse to those of a prospective client in the same or a substantially related matter [and] the lawyer received and reviewed information from the prospective client that could be 'significantly harmful' to that person in the matter," unless the exceptions in Rule 1.18(d) are satisfied. The "significantly harmful" element is unique to prospective clients under Rule 1.18 and does not apply to former clients under Rule 1.9. Thus, the protections afforded to former clients under Rule 1.9 are broader than the protections afforded to prospective clients under Rule 1.18.

To highlight the distinction between Rule 1.9 and Rule 1.18, it is appropriate to review the New Hampshire Supreme Court's interpretation of disqualification under Rule 1.9. In *Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth*, 141 N.H. 479, 482 (1996), the Court reversed and remanded the trial court's holding that because the lawyer did not actually receive any confidential information in his representation of the former client that could be used to the former client's disadvantage, the lawyer need not be disqualified. *Id*. The Supreme Court disagreed, stating that the trial court's approach was in error, as it "would require the former client, in order to show prejudice, to disclose the very confidences Rule 1.9 was intended to shelter." *Id*. (citation omitted). The Court reasoned that a Rule 1.9 violation requires proof of the following four elements: (1) a valid attorney-client relationship between the attorney and the former client; (2) the interests of the present and former clients must be materially adverse; (3) the former client must not have consented, in an informed manner, to the new representation; and (4) the current matter and the former matter must be the same or substantially related. *Id.* at 482-83. The Court held that a "former client need never prove that the attorney actually misused confidences." *Id*. at 483 (citation omitted). Instead, the Court concluded that "upon a finding that all of the elements of Rule 1.9 have been satisfied, a court must irrebuttably presume that the attorney acquired confidential information in the former representation." *Id*. When this occurs, the Court concluded, "disqualification is required." *Id*.

Unlike the former client in *Sullivan County*, the prospective client under Rule 1.18 would be required to show that the lawyer actually received information that could be "significantly harmful" to the prospective client. This fundamental difference between Rule 1.9 and Rule 1.18 is that representation is not barred under Rule 1.18 "unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter." ABA Model Rule 1.18 comment 6. Accordingly, disqualification under Rule 1.18 would require the prospective client to show that: (1) a prospective client-lawyer relationship existed; (2) the current representation is materially adverse to the prospective client, (3) the current matter and the prospective client matter are the same or substantially related; and (4) the lawyer received information from the prospective client that could be "significantly harmful" to the prospective client.[4]

Although the New Hampshire Supreme Court has not addressed disqualification under Rule 1.18, other jurisdictions have found that disqualification is required when a prospective client consults a lawyer who ultimately represents a party adverse to the prospective client in matters that are substantially related to the consultation, and the information related in the consultation "could be significantly harmful" to the prospective client in the same or substantially similar matter. *Richman v. Eight Judicial Dist. Court of State ex rel. County of Clark*, 2013 WL 3357115 (Nevada, May 31, 2013) (disqualification required as information lawyer received from prospective client could be significantly harmful to prospective client if used in substantially related matter); *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark. 2006) (meeting with prospective client about child custody matter gave lawyer information that potentially was "significantly harmful" and thus warranted disqualification of lawyer and his firm from representing adverse party in same matter); *In re Carpenter*, 863 N.W.2d 223 (N.D. 2015) (disqualification warranted when prospective client provided significantly harmful information to lawyer in former consultation in substantially related matter); *compare with Mayers v. Stone Castle Partners, LLC*, 126 A.D. 3d 1 (N.Y App. 2015) (disqualification not warranted because the conveyed information did not have the potential to be significantly harmful to prospective client in the substantially related matter); *Bernacki v. Bernacki,* 1 N.Y.S. 3d 761 (New York Supreme Court, 2015) (plaintiff's conclusory statements are insufficient to show that he conveyed information that had the potential to be significantly harmful to him in the matter from which he seeks to disqualify counsel).

The crux of these decisions rests on whether the lawyer received information from the prospective client that could be "significantly harmful" to the prospective client in the substantially related matter. ABA Model Rule 1.18 comment 6 states that "a lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or substantially related matter unless the lawyer has received from the prospective client information that could be 'significantly harmful' if used in the matter."

[4] For purposes of this analysis, it is assumed that neither consent nor screening to the current representation has been provided or is otherwise applicable to the current representation.

It is important however, for lawyers to be mindful that notwithstanding this Rule, they are prohibited from disclosing information obtained from a prospective client to their current clients, as that information remains protected.

In an action to disqualify a lawyer under Rule 1.18, the prospective client may request the significantly harmful information be provided to the court under seal, *ex parte* and/or *in camera*. This would avoid disclosure of this confidential information.

C. Recommendations for Communicating with Prospective Clients

In practice, lawyers should have sufficient safeguards in place relative to their initial communications and interview procedures with prospective clients (both electronic and in-person) to avoid reviewing and/or receiving confidential information from the client which could be significantly harmful to the prospective client in a subsequent adverse matter. A lawyer receiving this type of information could create conflicts for the lawyer which could undue an existing or future client-lawyer relationship. In addition, ABA Model Rule 1.18 comment 4 recommends as follows:

> In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

ABA Model Rule 1.18 comment 5 further recommends that the lawyer may have an agreement with the prospective client that conditions the consultation "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." The agreement could further require that the prospective client "consent to the lawyer's subsequent use of information received from the prospective client." *Id*.

Rule 1.18 should also be construed with some reasonably applied limitations concerning the protections afforded to prospective clients, which are not all encompassing. The Ethics Committee comment 2 to Rule 1.18 explains the scope of these limitations as follows:

> Not all persons who communicate information to an attorney unilaterally 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 (*see* ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a "prospective client" within the meaning of paragraph (a).

In addition, lawyers should review New Hampshire Ethics Committee Opinion #2009-10-01, entitled, *Duties to Prospective Clients*, for further guidance on a lawyers ethical obligations to prospective clients and specifically the disqualification and screening procedures to avoid imputed disqualification.

N.H. RULES OF PROFESSIONAL CONDUCT

N.H. R. Prof. Conduct 1.18
N.H. R. Prof. Conduct 1.9
N.H. R. Prof. Conduct 1.6
N.H. R. Prof. Conduct 1.4
N.H. R. Prof. Conduct 1.1

NH ETHICS COMMITTEE OPINIONS AND ARTICLES

"Duties to Prospective Clients," Formal Opinion #2009-10-01.

SUBJECTS

Duties to Prospective Clients

Duties to Former Clients

Conflict of Interest

Confidentiality

BY THE NHBA ETHICS COMMITTEE

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