Rule 1.18 "Significantly Harmful" Guidance

Ethics Corner Article

Dear Ethics Committee:

I am a rural practitioner with two partners. I handle mostly estate planning matters; one of my partners focuses on civil litigation, and the other on marital and bankruptcy work.

A few months ago, I received a phone call from a prospective client asking for help with administration of an estate. We spoke by phone for about 15 minutes, and I obtained the names and other relevant information about the interested parties to check for conflicts. Also, due to recent health issues, I was trying to take only cases that appear unlikely to have contentious and lengthy litigation.

In order to make this determination, I asked a few targeted questions about the family dynamics. The caller described a very dysfunctional family and suggested one of her brothers might very well contest the will. She then quickly and without any questioning from me added that she would actually be happy if she received only the small lakefront property, which is much less valuable than that to which she would be entitled under the will. I decided that this was not a case I should take at this time and politely declined.

Last week, after recovering significantly from my illness, another of the caller's family sought to retain me in the same estate dispute. This person owns a large company in our area and suggested that if we took the case, she would bring her other business to us. I would like to accept the case. I have reviewed your prior opinion on prospective clients (EC #2019-20/02, June 23, 2020) and still am not sure if I can accept the case. Despite the potential for further client work, neither of my partners feels able to accept the matter, even if I am screened, as is suggested in your opinion.

Thanks for any help on this.

ANALYSIS

Representation of a party with adverse interests to a prospective client is governed by NHRPC 1.18. That rule provides that:

> (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.

It appears that there is no question relating to whether this is the same matter about which you were consulted or that the positions of the prospective clients are adverse. Also since your partners are not interested in taking the case even if, pursuant to Rule 1.18(d) above you can properly be screened in an office of your size, it appears your concern turns on whether the information you obtained from the first call is "significantly harmful" within the meaning of the rule.

Our prior opinion provides a complete analysis of the rule, including a number of case cites giving guidance on what types of information would be significantly harmful in the matter.

Significant harm is obviously a fact-specific inquiry, turning on the length of the consultation and the nature of the topics discussed. *See e.g., O Builders & Assoc. v. Yuna Corp*, 19 A.3d 966, 978 (N.J. 2011)(finding "significantly harmful" information under Rule 1.18 "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 and specific.").

Fortunately, the ABA's Ethics Committee recently provided additional information on the meaning of significant harm in this rule, which is useful in this inquiry. In Formal Opinion 492, June 9, 2020, the Committee made clear that Information disclosed by the person invoking the protection of Model Rule 1.18 need not demonstrate that the harm is certain to occur in order to demonstrate a conflict. Instead, the Model Rule addresses information that "could be significantly harmful," a standard that "focuses on the potential use of the information." In addition, a lawyer's post hoc promise not to use the information does not change the standard from one of potential use or harm to a standard that requires actual use or harm.

The Committee provided the following examples as typically viewed as significantly harmful:

- views on various settlement issues including price and timing;
- personal accounts of each relevant event [and the prospective client's] strategic thinking concerning how to manage the situation;

- an 18-minute phone call with a prospective client-plaintiff during which a firm had outlined potential claims against defendant and discussed specifics as to amount of money needed to settle the case;
- 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;
- prospective client's personal thoughts and impressions regarding the facts of the case and possible litigation strategies; and
- the possible terms and structure of a proposed bid by one corporation to acquire another.

Id. at p. 6 (footnotes omitted).

Based on this description, the information provided to you by the first caller on her settlement considerations would certainly qualify as information that could be "significantly harmful" within the meaning of the rule. In light of this, you would not be able to accept the case.

This Ethics Corner Article was submitted for publication to the NHBA Board of Governors at its January 21, 2021 Meeting. The Ethics Committee provides general guidance on the New Hampshire Rules of Professional Conduct and publishes brief commentaries in the Bar News and other NHBA media outlets. *New Hampshire lawyers may contact the Committee for confidential and informal guidance on their own prospective conduct or to suggest topics for Ethics Corner commentaries by emailing: Robin E. Knippers at* reknippers@nhba.org.