Ethical Duties to Prospective Clients

By David Kluft, Assistant Bar Counsel

Not every individual who consults with a lawyer becomes a client. A variety of factors may prevent the formation of an attorney-client relationship, including cost, conflicts of interest, or a simple lack of chemistry. But even when an attorney-client relationship is not formed, a lawyer has certain obligations to "prospective clients" under the Massachusetts Rules of Professional Conduct. These obligations include a duty of confidentiality and a duty to avoid certain disqualifying conflicts of interest, which are set forth in Mass. R. Prof. C. 1.18.

What is a "Prospective Client"?

Pursuant to Rule 1.18(a), 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." Whether an individual who consults with a lawyer becomes a "prospective client" or not will depend on the circumstances. As a practical matter, the language of the rule will encompass most interactions in which a lawyer requests, invites or willingly accepts information in order to evaluate a potential representation.

However, there are circumstances in which an interaction with an attorney does not create a prospective client relationship under Rule 1.18. Two such circumstances are set forth in Comment 2. First, a person who enters into an interaction with a lawyer for the purpose of disqualifying the lawyer from a case, sometimes known as "taint shopping," is not a prospective client for purposes of the rule. Second, a person who does nothing more than communicate uninvited confidential information unilaterally to a lawyer (e.g., in an unsolicited voicemail), without any reasonable expectation that the lawyer is willing to discuss forming an attorney-client relationship, is not a prospective client.

What happens when an individual sends a communication to an attorney in response to the attorney's website or other advertisement? Could the advertisement be considered an invitation to submit confidential information, such that the person becomes a prospective client? Probably not. According to Comment 2, if the website or advertising "merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest," then a communication in response to such advertising that contains confidential information does not constitute a "consultation" under the rule and the individual has not become a prospective client on that basis alone.[1]

[1] Prior to the adoption of Rule 1.18 in 2015, the Massachusetts Bar Association Committee on Professional Ethics opined that, in the absence of an effective disclaimer, an individual could become a prospective client by unilaterally emailing an attorney who publishes a biography and email address on a firm website. MBA Opinion 07-01. Rule 1.18 and the comments thereto appear to supersede this reasoning. Nevertheless, it is still a best practice to publish website disclaimers making it clear that individuals should not unilaterally submit confidential information, and that no attorney-client relationship is created by such submission.

Receipt of Confidential Information from Prospective Clients

Mass. R. Prof. C. 1.6(a) defines confidential information as "information gained during or relating to the representation of a client, whatever its source." It includes information that is subject to the attorney client privilege, but also non-privileged information that is likely to be embarrassing or detrimental to a client if disclosed, or that the attorney has agreed to keep confidential. The exchange of such information is often necessary during initial consultations with a prospective client, in order to allow the lawyer to decide whether to undertake the representation. Such information may include facts about the strengths and weaknesses of the client's case, legal strategy, acceptable settlement parameters, and the client's ability to pay for legal services.

Rule 1.18(b) provides that a lawyer who learns confidential information from a prospective client shall not use or reveal that information, even if no client-lawyer relationship ensues, unless an exception allows the disclosure (e.g., disclosure in order to prevent reasonably certain death or substantial bodily harm pursuant to Rule 1.6(b)(1)). This duty of confidentiality exists regardless of how brief the initial consultation may be.[2]

As further discussed below, a practical consequence of the duty of confidentiality to prospective clients is that the receipt of confidential information during a consultation may cause a conflict of interest and disqualify the lawyer from subsequently taking on a representation adverse to the prospective client. The comments to the rule suggest two strategies that a lawyer may employ during the consultation to potentially avoid this outcome. First, a lawyer may limit the initial consultation to only such information as reasonably appears necessary for considering the representation. This might be accomplished by expressly limiting the subject matter of the consultation, warning the prospective client to avoid disclosing certain information, and staying away from open-ended questions. For example, the lawyer may initially request only the information necessary to perform a conflict check. [3]

---

[2] Even before the adoption of Rule 1.18, lawyers who disclosed or used confidential information from prospective clients could be subject to discipline for violating Rules 1.6 and 1.9. *E.g.,* Admonition 06-24 ("the requirements of Rule 1.6 apply to confidential information imparted by a prospective client … even if the lawyer is never retained").

[3] There may be circumstances in which a lawyer learns that a prospective client intends to sue or other information that would negatively impact a current client. In such cases, the lawyer's duty to protect the prospective client's confidential information may clash with the lawyer's competing duty, under Mass. R. Prof. C. 1.4, to inform current clients of material information. Although we are not aware of Massachusetts law on point, ethics committees in other states have opined that in such situations, the lawyer must maintain the confidentiality of the prospective client's information, because there are no exceptions to Rule 1.6 that permit such disclosure. *See* N.Y. Ethics Opinion 1067 (2015); State Bar of CA Standing Committee. on Prof. Resp. and Conduct, Formal Opinion No. 2021-205. Whether and in what circumstances the mere possession of and inability to disclose a prospective client's confidential information may create

Second, a lawyer may condition the consultation on the prospective client giving informed consent that information disclosed during the consultation will not prohibit the lawyer from later representing a different client in the matter. The lawyer may also seek informed consent to the lawyer's subsequent use of any confidential information received. Pursuant to Mass. R. Prof. C. 1.0(g), "informed consent" requires the prospective client's agreement "after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed conduct." Such advanced waivers may or may not be enforceable, depending in part on whether the lawyer's communication to the prospective client adequately explained the material risks and available alternatives.

Conflicts with Prospective Clients

Rule 1.18(c) addresses the conflicts of interest that can flow from a consultation with a prospective client. Absent a waiver, if the lawyer received confidential information the disclosure of which "could be significantly harmful" to the prospective client, the lawyer is not permitted to later undertake a representation that is materially adverse to the prospective client in the same or a substantially related matter. [4] The requirement that the information be "significantly harmful" is unique to Rule 1.18. By contrast, under Mass. R. Prof. C. 1.9, lawyers cannot be adverse to former clients in the same or a substantially related matter, irrespective of whether they learned "significantly harmful" confidential information from the former client.

ABA Formal Opinion 492 opines that whether information is "significantly harmful" to a prospective client's case may depend on the facts and circumstances, but there are certain types of information that are typically viewed as "significantly harmful," including settlement parameters, litigation strategy, sensitive personal information and financial information. The ABA Opinion emphasizes that the rule's use of the qualifying words "could be" focuses on the potential use of the information, not actual use. In other words, a prospective client seeking to show a Rule 1.18 conflict need not show that the lawyer is going to use the information or that harm is certain to occur, but only that confidential information in the lawyer's possession "could be significantly harmful" to the prospective client's case.[5]

---

a conflict of interest under Mass. R. Prof. C. 1.7(b), and require withdrawal from representation of the current client, will depend on the circumstances, including the materiality of the information. A further discussion of this issue is beyond the scope of this article but is addressed under New York law by New York City Bar Formal Opinion 2005-2.

[4] *See, e.g., O Builders & Associates v. Yuna Corp of NJ*, 19 A.3d 966 (N.J. 2011) (where lawyer filed suit on behalf of current client against former prospective client, he was not disqualified because prospective client was unable to demonstrate that the matters discussed during the consultation were the same or substantially related to the litigation, or that information was significantly harmful to the prospective client in the present suit).

[5] ABA Formal Opinion 492 addresses Model Rule 1.18, which is for the most part identical to Mass. R. Prof. C. 1.18.

Imputation of Prospective Client Conflicts

As with other conflicts of interest, when a lawyer is disqualified due to a conflict between a prospective client and current client, the disqualification is imputed to other members of the lawyer's firm. Rule 1.18(c). There are two exceptions set forth in Rule 1.18(d) that will prevent imputation of the conflict. First, the imputed conflict can be waived if both the prospective client and the current client (to whom the prospective client is adverse) give informed consent in writing. Second, a prospective client conflict will not be imputed if the following requirements are met:

(a) The lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. As noted above, this may include warning prospective clients against disclosure of detailed information, written disclaimers, avoiding open ended questions, and expressly limiting the consultation to certain topics.

(b) The disqualified lawyer is screened from the representation pursuant to Rule 1.10(e) and is apportioned no fee from the matter. Screening will include isolating the information possessed by the disqualified lawyer; preventing contact between the current client and the disqualified lawyer; and prohibiting the disqualified lawyer from discussing the matter with other firm lawyers.

(c) Written notice is promptly given to the prospective client. Comment 8 to Rule 1.18 advises that the notice should be given as soon as practicable after the need for screening becomes apparent, and should include a general description of the subject matter of the consultation and the screening procedures employed. Rule 1.10(e) also requires that the notice include an affidavit from the disqualified lawyer.

Other Duties to Prospective Clients

Comment 9 to Rule 1.18 notes that a lawyer has additional duties to prospective clients, including a duty of competence, pursuant to Mass. R. Prof. C. 1.1 (Competence), with regard to any assistance or advice that a lawyer provides to a prospective client. Additionally, if a prospective client entrusts valuables or papers to the lawyer's care, the lawyer is obliged to comply with Mass. R. Prof. C. 1.15 (Safekeeping Property). Other rules may also pertain to prospective client relationships. For example, Comment 9 to Mass. R. Prof. C. 1.14 (Client with Diminished Capacity) envisions emergency situations in which a lawyer may take legal action on behalf of a person with diminished capacity "even though the person is unable to establish a client-lawyer relationship."

**

Lawyers with questions about their ethical duties to prospective clients, or questions about other ethical duties, are encouraged to call bar counsel's Ethics Helpline for guidance on locating and interpreting the rules that may help resolve an ethical dilemma. The Helpline is

open on Mondays, Wednesdays, and Fridays from 2:00 to 4:00 p.m. Call us during those hours at (617) 728-8750.