

# Disclaimers, Good Faith and the Prospective Client

It's only my opinion, mind you, but I think the addition of ER 1.18 (Duties to Prospective Client) to Arizona's Rule of Professional Conduct[1] was one of the more significant stress relievers for lawyers that has happened in many years. ER 1.18 is, of course, the ethical rule that expands the definition of those folks who discuss with us what we can do for them as their lawyers but who, for a variety of reasons, do not ultimately become clients. The rule then provides for less-harsh consequences for the lawyer than existed under the law prior to Dec. 1, 2003, which was when ER 1.18 became effective.[2]

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With all the burdens placed on us as fiduciaries, it's nice to see that occasionally something more is expected of a prospective client than just showing up on time for the first appointment. A recent ethics opinion from Wisconsin[3] has recognized a requirement of good faith on the part of a prospective client. The thought here is that in order to take advantage of the benefits of ER 1.18, the contact by the prospective client must be made in a sincere attempt to determine whether to retain the lawyer. Thus, the person who discusses a case with a lawyer for the purpose of disqualifying the lawyer from representation of an adversary is not a "prospective client" entitled to the protection of ER 1.18. While this was the general consensus before ER 1.18,[4] it's nice to see the notion of good faith confirmed and applied to the present rule.[5]

**Ethics Opinions are on p. 63. Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics**

The Wisconsin opinion doesn't stop there, however, and adds an additional requirement that the person making the contact have a reasonable expectation that the lawyer is willing to discuss forming a lawyer–client relationship. The opinion states that a person does not become a prospective client merely by transmitting information to a lawyer, as in an unsolicited email communication that a lawyer receives from a stranger in search of counsel, so long as the lawyer did not do or publish anything that would lead a reasonable person to believe that she could share private confidential information with the lawyer without first meeting the lawyer and establishing a professional relationship.[6] The opinion then closes by giving six examples of lawyer website disclaimers that can be used to prevent such a misunderstanding in the lawyer website context.

It is important to remember that even if a person ends up qualifying as a "prospective client," in order to disqualify the lawyer from representing the other side, or in some other conflicting capacity, she must show[7] that the information she gave the lawyer she seeks to disqualify will be "significantly harmful" if used in the matter. This term was defined recently in a New Jersey case as "prejudicial in fact."[8] This is a higher standard for the person to meet than is found in ER 1.9 (Duties to Former Clients), making it harder for the prospective client to disqualify the once-prospective lawyer. AZAT

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## endnotes

1. Rule 42, ARIZ.R.S.CT.
2. *See The Prospective Client*, ARIZ. ATT'Y (March 2006), at 8.
3. Wisconsin Formal Ethics Op. EF-11-03, *Who is a Prospective Client, Lawyer Websites and Unilateral or Unsolicited E-mail Communications* (July 29, 2011).
4. Virginia Ethics Op. No. 1794 (June 30, 2004) (husband could not, by interviewing every divorce lawyer in community, thereby disqualify them from representing his wife); and North Carolina Ethics Op. No. 244 (1997) (lawyer may not encourage client to try to disqualify other lawyers from representing client's adversaries by arranging series of initial consultations during which client reveals confidential information to them).
5. *See* comment [4] to ER 1.18.
6. Arizona is in agreement. *See* Arizona Ethics Op. 02-04 (2002).
7. A former prospective client has the burden of persuasion and proof in seeking the disqualification of the lawyer. *State ex rel. Thompson v. Dueker*, No. ED 96570 (Mo. Ct. App., Aug. 9, 2011).
8. In *O Builders & Associates. Inc. v. Yuma Corp.*, 19 A.3d 966 (N.J. 2011), the court held:

   > [I]n order for information to be deemed "significantly harmful" within the context of [ER 1.18], disclosure of that 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 disqualification is sought, a determination that is exquisitely fact-sensitive and -specific.