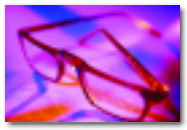

The Prospective Client

In most cases, it is easy to recognize the existence of a lawyer–client relationship, as well as a former lawyer–client relationship. But what about those who counsel with us, tell us things and show us documents so we can understand the legal issues involved and then, at our option or theirs, do not become clients? Does the fact that a potential client decides to hire another lawyer relieve us of our fiduciary obligations?

Until December 1, 2003, when the Arizona Supreme Court adopted new ER 1.18 (Duties to Prospective Clients),[1] these questions were analyzed by determining whether a lawyer–client relationship had been formed and, if so, whether the lawyer's continuing obligations passed muster under former ER 1.9 (Duties to Former Clients).[2] If a lawyer–client relationship had not been formed, the former rules (as do the present rules) still acknowledged that there were some duties, such as the duty of confidentiality under ER 1.6 (Confidentiality of Information), which apply whenever a lawyer agrees to consider whether to take a prospective client's case.[3]

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Now, new ER 1.18 undertakes to describe what a prospective client is and to define a lawyer's continuing obligations to that prospective client once it has been determined that no formal lawyer–client relationship was established.

The net result of new ER 1.18 is to provide a reduced level of protection for the prospective client, but protection nevertheless.

The new rule provides prospective clients with some but not all of the protection provided to traditional current and former clients. It defines a prospective client as someone who "discusses with a lawyer the possibility of forming a client–lawyer relationship with respect to a matter." This definition is not going to answer every situation that comes up, but it does eliminate from "prospective client" status anyone who unilaterally e-mails or voice-mails unsolicited information to a lawyer. It is assumed that the sender of such information does not have a reasonable expectation of confidentiality in such situations.[4] This assumption might not apply, on the other hand, if the e-mail is sent as instructed on a law firm Web site and the site does not include a disclaimer making it clear that e-mail communications from prospective clients will not be treated as confidential.[5] The definition of prospective client also does not include someone who consults a lawyer for the purpose of disqualifying that lawyer from representing a potential opponent.[6] It is also improper for a lawyer to encourage such conduct.[7]

Let's say you have seen a prospective client in your office for the purpose of determining whether you are interested in taking her case against her employer. During your consultation, after you have reviewed documents and heard her version of the facts, you realize she is contemplating suit against Company A, a longstanding client of yours. You then break off the consultation and tell the prospective client you cannot represent her. Shortly after she leaves your office, Company A asks you to defend it in a lawsuit brought by the same prospective client. Now what?

A pre-ER 1.18 analysis would have required you to keep what you learned confidential and to determine if a lawyer–client relationship had been formed. If so, you had to refuse to represent Company A because the potential client's interests would obviously be adverse to Company A in the same matter and improper under ER 1.9.[8]

New ER 1.18(b) still requires you to keep confidential the information you learned during the consultation, and if this requirement will materially limit your responsibilities in Company A's representation, you will have a "concurrent conflict of interest" as defined in ER 1.7(a)(2)[9] and you cannot take the case. However, new ER 1.18(c) allows you to take another step before disqualifying yourself: Only

—continued on p. 61

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if the information you received from the prospective client could be "significantly harmful" to her in her case will you be prevented from representing Company A. The second step is allowed because information given you in confidence may later be subject to Rule 26.1 disclosure requirements (and your inability to disclose it because of the restrictions of ER 1.6 would therefore not materially limit your responsibilities to your client), whereas significantly harmful information, such as the prospective client's need to settle immediately, may not.[10] In other words, if what you were told passes muster under ER 1.7(a)(2) and it is not "significantly harmful" to the former potential client's case, you can still represent Company A.

Finally, and as a further example of the lessened protections afforded the potential client who ends up with another lawyer, the effects of potentially limiting confidences shared during the initial consultation can be waived by the potential client or can be avoided by "screening" the infected lawyer so another lawyer in the same firm can represent the potential client's opponent. This was an alternative not specifically recognized under the former rules, but is now recognized in both the Restatement and Arizona's version of the new Model Code.[11]

ER 1.18 is a codification of a significant body of case law and other authority that has interpreted the duty of confidentiality to apply to prospective clients. The net result of new ER 1.18 is to provide a reduced level of protection for the prospective client, but protection nevertheless. The lawyer must continue to honor all duties of confidentiality, but has a lessened responsibility with the "significantly harmful" information requirement.

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. *Id*.
3. See Arizona Rules of Professional Conduct at *Scope*, ¶ 14, which is the same as under the former rules. For an excellent treatment of decisions under the former rules that is just as valid today, *see* Op. No. 02-04 (Sept. 2002), Committee on the Rules of Professional Conduct, State Bar of Arizona, *and see* ABA Formal Op. 90-358 (Protection of Information Imparted by Prospective Client) (Sept. 13, 1990).
4. *Id*. *See also* comment 2 to ER 1.18.
5. *Id*.
6. Comment 4 to ER 1.18. 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).
7. North Carolina Ethics Op. 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).
8. For example of how a case was analyzed using ER 1.9, *see Bridge Prods., Inc. v. Quantum Chem. Corp.*, 1990 WL 70857 (N.D. Ill. 1990) (one-hour consultation in which prospective client disclosed confidential strategies, desires to settle and privileged communications with other counsel and created attorney–client relationship, requiring application of ER 1.9). *cf.* Vermont Ethics Op. 2000-10 (lawyer who disclosed potential conflict to caller seeking to retain him in employment related matter involving lawyer's corporate client may continue to represent his corporate client in dispute, but may not tell it about telephone call).
9. ER 1.7 (Conflict of Interest: Current Clients) provides in pertinent part "(a) except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists if: "(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to … a third person."
10. This is the same test that previously existed under the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 (2000). For examples that may fit into our new rule, see *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir.1975) (extensive or sensitive information) and *B.F. Goodrich Co. v. Formosa Plastics Corp.*, 638 F. Supp. 1050 (S.D. Tex. 1986) (confidential information that would be detrimental to potential client).
11. Normally, if one lawyer in a firm is disqualified from representing a client, all the lawyers in the firm are also disqualified. ER 1.10. The new "Chinese Wall" or screening concept among lawyers in the same firm is new in Arizona, and is also available for newly associated but otherwise disqualified lawyers in a firm (ER 1.10(d)) and for lawyers disqualified because of previous government service. (ER 1.11).