When Does a Prospective Client Become the Real Thing?

A recent case from Alabama points out the potential problems lawyers face when, after what might be regarded as an unsuccessful initial interview with a potential client, a court holds that a client–lawyer relationship had been established—all to the complete surprise of the lawyer involved. In the not-yet-reported decision,[1] the lawyer for a longtime organizational client, a Baptist church, was disqualified from representing it and a contractor who claimed the church owed him money, and with whom the lawyer had consulted in two 15-minute meetings seeking the lawyer's advice concerning the contractor's claim to certain insurance proceeds due to be paid the church. As a lawyer for opposing parties in the same matter, the lawyer would have had an obvious conflict of interest.

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When the insurance company interpleaded the money and the lawyer appeared in the case representing the church, the contractor, now represented by other counsel, moved to disqualify the lawyer and his firm. In his defense, the lawyer argued that he had never formed a client–lawyer relationship with the contractor because he only met twice with him briefly and because he had informed the contractor, at the end of the second meeting, that he couldn't represent him in the matter. Noting that the lawyer billed the contractor and was paid for the consultations and that he never warned the contractor of the lawyer's potential and immediately obvious conflict of interest, the court stated that a client–lawyer relationship may arise even before the client formally retains his chosen attorney if the client has formed a reasonable subjective belief that he was consulting the lawyer for the purpose of obtaining legal advice. Arizona authorities are in accord on this point.[2]

Because the contractor had to hire other counsel, the Alabama court viewed him as a "former client" of the lawyer, disqualified the lawyer from representing the church under Alabama's counterpart to Arizona's ER 1.9 (Duties to Former Clients), and imputed the disqualification to the lawyer's entire firm, thereby preventing it from representing an established client.[3]

One thing needs to be pointed out about this case: Alabama is one of five states that did not adopt the ABA's Model Rule 1.18 (Duties to Prospective Client), the rule that was adopted in Arizona in 2003 as ER 1.18[4] and that presumably would be the place where an Arizona court would begin its analysis of the situation. The issue would be: Had the relationship between the lawyer and the contractor progressed to a point where the contractor could be regarded as having established a client–lawyer relationship so that the lawyer's refusal to consult with him any longer made the contractor a "former client" as contemplated in ER 1.9? Or was he simply a former "prospective client" as defined under ER 1.18[5]? The difference can be important.[6]

Thus, if the individual who conferred with the lawyer (the contractor) is regarded as a former client after the lawyer said he could not represent him, the lawyer could not by virtue of ER 1.9(a) represent "another person" (the church) whose interests are adverse in the same or substantially related matter. And the lawyer's conflict of interest would be imputed to the other members of his firm by virtue of ER 1.10 (Imputation of Conflicts of Interest: General Rule). This is exactly what happened in the Alabama case.

On the other hand, assuming we are in Arizona, if the situation is viewed as one involving a "prospective client" (more accurately, a "former prospective client") as described in ER 1.18, a lawyer who has not received information during the consultation that could be significantly harmful to the former prospective client (the contractor) in the matter will not be disqualified from representing the adverse party (the church) but must keep confidential any information he learned from the consultation. However, if the lawyer has received information during the consultation that could be significantly harmful to the prospective client if used against him in the matter, ER 1.18 provides for the lawyer's disqualification.[7] Even then, the worst-case scenario for the lawyer's firm would be that, after the contractor has presumably hired another lawyer to press his case against the

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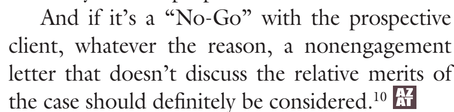
church, the disqualified lawyer could be screened from any participation in the case, thereby allowing any of the other lawyers in his firm to continue representing the church, their longtime organizational client.[8]

In view of these considerations, the distinction between a person being held to be a former client under ER 1.9 or as a former prospective client under ER 1.18 can result in important consequences for a law firm.

What we as lawyers need to avoid is finding ourselves in the Never-Never Land of having to have a court make the "former versus prospective client" decision for us. It's obviously wise to make sure potential clients understand that you will not be their lawyer until the required engagement letter setting forth the scope of your engagement and the basis for your fees and expenses is communicated to them in writing.[9] In addition, if you haven't had time to do a conflicts check before that first meeting, Comment [5] to ER 1.18 advises, "In order to avoid 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."

And if it's a "No-Go" with the prospective client, whatever the reason, a nonengagement letter that doesn't discuss the relative merits of the case should definitely be considered.[10] AZ AT



endnotes

1. *Mount Hebron District Missionary Baptist Ass'n of Alabama Inc. v. Sentinel Ins. Co. Ltd.*, 33 Law. Man. Prof. Conduct 525 (M.D. Ala. Sept. 7, 2017).
2. *Franco v. Mitchell*, 762 P.2d 1345 (Ariz. Ct. App. 1988); *In re Petrie*, 742 P.2d 796 (Ariz. 1987); Ariz. Ethics Op. 02-04 (Confidentiality; E-mail; Internet; Initial Consultation; Disclaimer) (September 2002).
3. Alabama's imputation rule is essentially the same as Arizona's, found at ER 1.10(a).
4. Rule 42, Ariz.R.S.Ct.
5. ER 1.18 defines a prospective client as a person who consults with a lawyer about the possibility of forming a client–lawyer relationship with respect to a matter.
6. We examined the differences between the two in previous columns. *See Obligations to Third Persons (Part 2)*, Ariz. Att'y (June 2012) at 8; *Disclaimers, Good Faith and the Prospective Client* (Feb. 2012) at 10; and *The Prospective Client* (March 2006) at 8.
7. *See Confidences of Prospective Clients*, Ariz. Att'y (July/August 2013), at 6.
8. ER 1.10(d).
9. ER 1.5(b).
10. There's a good discussion on nonengagement letters at 301 Law. Man. Prof. Conduct 1010.