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PERSPECTIVE

You had me at hello.

The duty of confidentiality to prospective clients

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One of the more significant changes to California's ethical rules in 2018 was the adoption of a specific rule delineating a lawyer's duties to a prospective client. California Rule of Professional Conduct 1.18. The proposition that a lawyer may owe a duty of confidentiality even if she is not ultimately hired is not new; but, prior to adoption of Rule 1.18, the metes and bounds of that duty and its impacts were developed in case law and ethics opinions. Having a specific rule alerts lawyers to and makes clearer the duties owed to prospective clients, particularly the need to keep confidential information conveyed in the course of seeking representation. Rule 1.18 also contains specific guidance on methods by which a lawyer and law firm can limit the attendant risk of possible firm-wide disqualification that can arise from communicating with a prospective client. This article describes provisions of Rule 1.18, recounts three stories of prospective client conflicts drawn from recent rulings on motions to disqualify, and finally, discusses steps lawyers should take to limit receipt of confidential information from prospective clients to avoid be precluded from other representations unnecessarily.

Who Is (and Is Not) a Prospective Client?

The first part of the rule defines a prospective client to whom duties are owed. A prospective client is one who "consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice from the lawyer in the lawyer's professional capacity." Rule 1.18(a). The comments to the rule explain who or what is not a prospective client for purpose of the rule. First, the guy who buttonholes you at a cocktail party and proceeds to share confidential details about his case while you are merely trying to get to the cheese plate is not a prospective client unless he had a "reasonable expectation" that you are willing to discuss forming a lawyer-client relationship with him. Comment [2]. Similarly, if you tell your cocktail party confidante "I'm too busy to take on a new case" or "actually, I represent your competitor," or otherwise state your "unwillingness or inability to consult" with him, the fact that he proceeds to share confidential information will not make him a prospective client for purpose of the rule. *Id.* Third, someone who communicates information to a lawyer without a good faith intention to seek representation is not a prospective client, since they did not consult the lawyer for the requisite purpose. *Id.* Of course, whether a party had a good faith intention to seek representation will be a highly fact-based determination and the rule and commentary does not address the factors that would go into such an inquiry.

What Duty Is Owed By the Lawyer?

The second part of the rule defines the duty owed by a lawyer to a prospective client, which centers on the duty of confidentiality. Rule 1.18(b). Quite simply, the lawyer is prohibited from using or revealing client information protected by Business and Professions Code Section 6068e. Section 6068e provides that a lawyer must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The obligation of confidentiality frames the remaining scope of duties set forth in Rule 1.18.

Adversity?

Subparagraph (c) of Rule 1.18 precludes a lawyer who has received confidential information from a prospective client from representing a client "with interests materially adverse to those of a prospective client in the same or substantially related matter." That language exactly tracks the former client duty rule, 1.9. Thus, a prospective client is treated much like a former client under the rules. It is important to note that in a motion to disqualify, the prospective client does not need to establish that the lawyer's possession of the prospective client's confidential information will prejudice the prospective client. This is different from the ABA Mod-

el Rule 1.18, which does require such a showing.

Imputation and Screens

Like a conflict arising out of a former representation, a prospective client conflict generally will be imputed to the lawyer's law firm with certain exceptions. But there is a significant caveat: If the lawyer who receives the information takes "reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client," the law firm can avoid imputation through screening and notice to the prospective client. This, then, creates a template for how lawyers should interact with prospective clients.

Three prospective client stories

Story 1: A bank issues a request for proposals to law firms for potential representation in litigation. A law firm reviews the materials in the RFP and additional materials provided by the client and makes a proposal. The lawyers never meet with the bank; they simply respond to the RFP. The law firm is not selected. The case goes forward for three years at which time the bank's adversary in the case seeks to hire lawyers in the same firm that responded unsuccessfully to the bank's RFP. The bank moves to disqualify. In opposition, the law firm argues that the materials provided in the RFP have become known to the other side in the course of litigation and therefore there is no harm to the bank. The court rejects the argument, finding that at the time that the materials were provided, the materials included nonpublic information and potential harm to the prospective client is not a factor under California's Rule 1.18. The law firm is disqualified. *Export-Import Bank of Korea v. ASI Corp.*, 2019 WL 8200603.

Story 2: A law firm is invited to participate in a competitive pitch process for a manufacturer that has been sued for patent infringement. The law firm receives information from the manufacturer, provides an extensive memo outlining its thoughts on the case and proposed strategy, and meets with the company's management to discuss the case. The law firm is not selected as counsel. Some months later, the law firm hires as a lateral partner the lead lawyer for the party on the other side of the case. Cognizant of the potential conflict, the law firm establishes a screen before the lateral begins work at the firm, so that every lawyer involved in the initial pitch is walled off from the lateral and his team. The manufacturer moves to disqualify the firm. The court holds that because the firm did not take "reasonable measures to avoid exposure to more information than was reasonably necessary," the screening exception to the ethical rule did not apply. The law firm is disqualified. *Skybell Technologies, Inc. v. Ring, Inc.*, 2018 WL 6016156.

Story 3: A lawyer represents an investor in a multiparty lawsuit over ownership of certain property. As part of his investigation of the facts, the lawyer calls a third party, B, who has interests in the property at issue. During the call, the lawyer tells B that it will likely be named as an interested party in the lawsuit. B asks the lawyer whether the lawyer can jointly represent B because B is concerned about legal fees. The lawyer says he needs to determine if there is a conflict. B says he is concerned about sharing information with the lawyer because it may imperil his relationship with another party involved in the case. The lawyer agrees that he will keep their communications confidential and confirms his commitment to confidentiality in writing. The lawyer determines he has a conflict and declines to represent the third party. On behalf of his investor client, the lawyer moves to intervene, suing all interested parties including B. The complaint references information received from B. B moves to disqualify the lawyer claiming that he was a prospective client and that he provided the lawyer with material confidential information. The lawyer disputes that B was a prospective client and that B provided confidential information. The court disagrees, finding that B did not have a lawyer at the time of the communication, asked about representation and provided information to the lawyer after securing a promise of confidentiality. The lawyer is disqualified. *Ocean Thermal Energy Corp. v. Coe*, 2020 WL 5237276.

Lessons: All lawyers need to be thoughtful and deliberate in communicating with potential clients and to the extent possible limit the information provided prior to retention (or the decision that the lawyer is willing to take the case). A best practice is generally to limit the information provided initially to party identification to run a conflicts check and the barebones nature of the case. To the extent the client shares information with the lawyer prior to retention other than simple conflict information, the lawyer should limit that information to (a) only nonconfidential information if possible or (b) only what confidential information is necessary for a retention decision to be made. In either case, the lawyer should document any agreed-upon limitation to avoid dispute over what occurred in the future.

In some circumstances, a lawyer may want to consider seeking an advance waiver to protect against future disqualification. Story three is a good illustration of a scenario in which a waiver would be appropriate. There, the lawyer already had a client and was approached about a joint representation. To protect the lawyer's existing representation, the lawyer could condition receipt of any information on the prospective client's informed written consent not to seek to disqualify the lawyer from representing his existing client. In such circumstances, the lawyer must remember that informed consent requires that the lawyer communicate and explain the relevant circumstances and material risks. *See* California Rule of Professional Conduct 1.0.1.

Consultations with potential clients represent new opportunities but also new potential risks. With proper procedures and deliberate action, a lawyer can explore those new opportunities in a manner that does not foreclose subsequent representations. ■

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