

Client Wannabees

Your Ethical Duties When Dealing with Prospective Clients

by Dennis Carlson



“Advice is what we ask for when we already know the answer but wish we didn’t.”

—Erica Jong

Who among us has not been approached at a cocktail party by someone seeking free legal advice? In my case it seems to happen when my taste buds are craving one of those little hot dog looking things simmering in barbecue sauce. Suddenly my concentration is broken by a voice, usually coming from a guy with a mullet haircut and tank top, saying something like “I hear you’re a lawyer.” Before I can respond, I am barraged by the details of a legal horror story. When reason is finally restored, my eyes are glazed over and the food supply has been reduced to a few crackers and a spoonful of bean dip. While my experience may be a bit of an exaggeration (there normally are

also some potato chips left on the table), such a scenario is not uncommon.

A few years ago a grievance was filed against a Nebraska attorney alleging that he had disclosed client confidences. In his response the attorney said that he had never formed an attorney-client relationship with the complaining party and, therefore, could not have disclosed privileged communication. The attorney explained that on a Saturday afternoon he was raking leaves at his law office when he was approached by the complaining party. Without prompting by the attorney, the complaining party began giving details about himself and his background. It was this information that the complaining party later claimed was confidential when revealed at a hearing in which the complaining party was a witness.

A stranger having a “discussion” with a lawyer about a legal matter may seem like an innocuous act but not if that “discussion” is later deemed to have established an attorney-client relationship. When an attorney-client relationship is created, the attorney-client privilege attaches, and the attorney (and the attorney’s firm) may be prohibited from representing an adverse party in the same or a substantially related matter. [See *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W. 2d 430 (1997)].

The question of when confidentiality attaches may arise when an attorney is screening a potential client for a conflict of interest. To determine if there is a conflict with a current client, an attorney must have at least a limited discussion with the prospective client. These preliminary inquiries have, on occasion, resulted in the filing of a disciplinary grievance if the lawyer later represents the adverse party in the same matter.

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The ethical duties of an attorney when dealing with a prospective client have been clarified by the adoption of Rule of Professional Conduct 1.18 (effective in Nebraska on September 1, 2005). Rule 1.18 was added to the American Bar Association's Model Rules in February, 2002, upon the recommendation of the Ethics 2000 Commission. The Rule was adopted to specifically address the time period in which an attorney and a prospective client have communicated but not yet formed an attorney-client relationship.

A prospective client is defined in Rule 1.18 as a person "who discusses with a lawyer the possibility of forming a client-lawyer relationship." The definition does not include one who unilaterally shares information with a lawyer without a reasonable expectation that the lawyer is willing to enter into an attorney-client relationship (sorry, Mr. Mullet-guy).


Under Rule 1.18 a lawyer has an ethical obligation to preserve the confidences of a prospective client. This is true even if the initial discussions do not result in the establishment of a client-lawyer relationship. Generally, a lawyer who discusses possible employment with a prospective client is prohibited from representing an adverse party in the same matter or a substantially related matter if the information received from the prospective client "could be significantly harmful to that person in the matter." As a general rule, if a lawyer is disqualified from representation under Rule 1.18 the conflict extends to the lawyer's law firm.

The above paragraph sets out the general parameters of Rule 1.18. The true substance of the Rule, however, is found in the exceptions section. These exceptions should be noted, highlighted, and underscored as they differ greatly from past practices.

The first exception in Rule 1.18 provides that an attorney who receives "significantly harmful" information from a prospective client may later represent an adverse party in the same matter if both the prospective client and the affected client waive the conflict with informed consent. This informed consent (see Rule 1.0 (e) for a definition) must be confirmed in writing.

Comment (5) to Rule 1.18 provides a practice tip for those seeking to avoid disqualification based upon discussions with prospective clients. Comment (5) states that it is permissible for an attorney to receive consent in advance from a prospective client: "A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." In addition, Comment (5) to Rule 1.18 takes the further step, assuming the prospective client consents, of permitting the lawyer to use the information received from a prospective client: "If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client."

In addition to obtaining informed consent, a law firm receiving "significantly harmful" information from a prospective client may represent an adverse party in the same matter if: (1) the lawyer who received the information "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary" and; (2) the lawyer is timely screened from participation in the matter. (See Rule 1.0 (K) for a definition of "screening".) The lawyer who received the information must also give written notice to the prospective client and may not receive compensation directly related to the matter.

In summary, the adoption of Rule of Professional Conduct 1.18 has brought clarity to the ethical duties of an attorney when dealing with a prospective client. Although initial consultations or discussions with a prospective client may disqualify a lawyer from subsequent participation in a matter, the exceptions set forth in the Rule provide reasonable alternatives to disqualification. 

If you have a question as to your ethical responsibilities, contact the Office of the Counsel for Discipline of the Nebraska Supreme Court at (402) 471-1040 or (877) 504-0967.

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