



New York State Bar Association
Committee on Professional Ethics

Opinion 960 (2/26/13)

Topic: Conflict of Interest; Prospective Clients

Digest: Lawyer may ethically represent a client seeking payment of fees for repair services rendered to a prior prospective client, who had earlier sought advice from the lawyer regarding the damage that was subsequently repaired by the client, unless the lawyer learned confidential information from the prospective client that would be significantly harmful to the prospective client.

Rules: 1.6, 1.9, 1.18

QUESTION

1. After a homeowner has consulted with a lawyer about potential claims against the seller of a home that turned out to need substantial repairs, but the homeowner has not retained the lawyer, may the lawyer represent a contractor in an action against the homeowner to recover the unpaid balance for the repair services?

FACTS

2. A homeowner (the "homeowner") visited an attorney who is a sole practitioner to discuss potential claims against the person who sold the homeowner his home. The homeowner told the attorney that, after the closing, the homeowner discovered substantial structural damage throughout the home, which required repairs by a contractor. The homeowner did not discuss anything concerning the contractor who performed the repair work. The attorney advised the homeowner concerning potential claims against the seller of the home, but the homeowner never retained the attorney and never contacted the attorney again. The attorney did not bill for the homeowner's visit.

3. Over a year later, the attorney was approached by a contractor (the "contractor"). During the initial interview, the attorney learned that this was the contractor who had repaired the structural damage at the homeowner's residence. The contractor told the attorney that the homeowner did not fully pay the contractor. The contractor desires to retain the attorney and file a lawsuit against the homeowner for the balance due.

APPLICABLE RULES

4. Our analysis begins with Rule 1.18(c) of the New York Rules of Professional Conduct (the "Rules"), which prohibits a lawyer who possesses *confidential information* learned during a consultation with a prospective client from representing a party with interests *materially adverse* to those of a prospective client in the *same or a substantially related matter* if the attorney received information from the prospective client that could be *significantly harmful* to that person in the matter, unless either (i) the attorney obtains informed consent from both parties (*i.e.*, both the new client and the former prospective client), confirmed in writing, or (ii) adequate screening procedures are implemented pursuant to Rule 1.18(d).

OPINION

Confidential Information

5. The protection afforded to prospective clients under Rule 1.18(c) is contingent upon the lawyer's receipt of confidential information. N.Y. City 2006-2. Under Rule 1.18(b), a lawyer may not use or reveal a prospective client's information unless Rule 1.6 or other Rules permit the lawyer's use or disclosure or the information has become generally known. Rule 1.18(b); Rule 1.9(c); Restatement Third The Law Governing Lawyers, § 15(1) (a) (2000); Simon's New York Rules of Professional Conduct Annotated 688 (2012 ed.). Rule 1.6(a) protects "information gained during or relating to the representation of a client, whatever its source," "including information that is protected by the attorney-client privilege and information that could reasonably lead to the discovery of confidential information". *See also* Rule 1.6, Cmt. [4A] which states that information relates to the representation "if it has any possible relevance to the representation", N.Y. State 723 (1999) (indicating that a lawyer may not be disqualified due to possession of general information concerning a former client's "financial exposure, corporate or financial structure, workplace rules, settlement policies, and the like, . . . unless there are peculiar aspects of the current representation making such information particularly relevant"). Furthermore, information is not generally known just "because others come to learn that information." N.Y. City 2005-3.

6. In the consultation with the homeowner, the lawyer likely obtained confidential information protected by Rule 1.6, and thus Rule 1.18(b), because the homeowner disclosed information regarding the nature and extent of internal damage to the residence and the homeowner's personal knowledge thereof. Information regarding the homeowner's knowledge of the damage to the residence and the extent thereof could be relevant in an action to recover fees for repair of such damage, particularly in determining the nature of the services rendered and the value thereof.

Materially Adverse

7. The homeowner and the contractor's interests are materially adverse because the contractor seeks recovery directly from the homeowner for the balance due for repairing the residence. *See* N.Y. State 761 (2003).

Substantially Related

8. Matters are "substantially related" if they involve the same transaction or legal dispute or, if under the circumstances a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rule 1.9, Cmt. [3]. This includes "knowledge of specific facts gained in a prior representation that are relevant to the matter in question," Rule 1.9, Cmt. [3]; N.Y. State 628 (1992), and confidential information "that would be useful against the former client in the present representation." Simon's New York Rules of Professional Conduct Annotated 419 (2012 ed.). We have recognized that even where different facts are implicated, the matters are substantially related where both matters involve the same issues. N.Y. State 761 (2003); N.Y. State 723 (1999). As stated in N.Y. State 723 (1999), there likely is a substantial relationship between matters "where the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client," and where the lawyer obtained confidential information "that should be used against the former client in the current representation." Conversely, we have stated that where there is no likely use of previously obtained confidential information in the new matter, no substantial relationship exists. N.Y. State 628 (1992) (finding no substantial relationship between matters regarding a theft in a restaurant parking lot and a slip and fall in the restaurant because confidential information learned regarding former client's financial exposure or corporate structure not relevant in the subsequent matter).

9. The facts presented do not enable the Committee to determine whether any confidences received from the homeowner are relevant to the contractor's claim for non-payment or to any potential counterclaim by the homeowner against the contractor.

Significantly Harmful

10. Even if confidential information is obtained and it is only somewhat harmful, the information does not disqualify the lawyer from representation against the prospective client. Simon's New York Rules of Professional Conduct Annotated 690 (2012 ed.). This additional qualification is distinct from the automatic prohibition under Rule 1.9 regarding actual former clients. N.Y. City 2006-2 (stating that "[t]he 'significantly harmful' test sets the bar lower than in the case of a lawyer opposing a former client"). Thus, if the information imparted to the lawyer by the homeowner would not be significantly harmful to the homeowner, the lawyer could undertake the matter for the contractor.

Written Informed Consent or Screening Mechanisms

11. The prohibition under Rule 1.18 regarding prospective clients is not absolute. The lawyer or firm may be able to represent a subsequent client if the lawyer (i) obtains informed written consent from both the prospective client and the subsequent client, or (ii) establishes adequate screening mechanisms. Rule 1.18(d). However, there can be no screening here as the lawyer is a sole practitioner.

12. To waive the conflict under Rule 1.18, the lawyer must satisfy the requirements for "informed consent" and "confirmed in writing," as defined by Rule 1.0(j) and Rule 1.0(e),

respectively. To the extent such consents are obtained, the lawyer may represent the contractor in an action against the homeowner.

CONCLUSION

13. A lawyer may ethically represent a contractor seeking payment due from a homeowner who previously sought the lawyer's advice regarding potential claims against a third party for damage that the contractor subsequently repaired, unless the information imparted to the lawyer by the homeowner would be significantly harmful to the homeowner in the contemplated action by the contractor and informed written consent is not obtained from both the homeowner and the contractor.

(65-12)