NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1067 (7/27/15)

Topic: Prospective clients; confidentiality; duty to inform client of material developments

Digest: When a person consults with a lawyer in good faith about possible representation in a matter, the lawyer owes a duty of confidentiality pursuant to Rule 1.18(b) with respect to information the lawyer learns in the consultation, absent the prospective client's consent to disclosure or use. Whether the prospective client's identity, the fact of the consultation, and the subject matter of the consultation constitute confidential information turns on whether the information is protected by the attorney-client privilege, on whether disclosure likely would be embarrassing or detrimental to the prospective client, and on whether the prospective client has asked the lawyer not to disclose the information. Whether the consultation precludes or restricts the lawyer from undertaking representation of another client or continuing to represent another client depends on whether the matters are the same or substantially related and on whether the information the lawyer learned from the prospective client could be "significantly harmful" to the prospective client in the matter.

Rules: 1.4(a), 1.6(a), 1.9(c), and 1.18(a)-(d)

FACTS

1. Inquirer is a small law firm of three named partners X, Y and Z (the "Law Firm") practicing primarily in the fields of estate planning and administration, trusts and elder law, and related fields. Two partners in the firm, X and Y, have long represented a client ("Father") in a variety of matters, including a protracted and vigorously contested Article 81 proceeding brought by Father's adult child ("Child") over the guardianship of Father's wife. That litigation concluded in Father's favor. The firm continues to represent Father. Z, the third named partner in the Law Firm, took no part in the representation of Father in the guardianship proceeding and was not aware of it until the consultation that lies at the center of the inquiry.

2. Some six months after the guardianship proceeding concluded, Child sought a meeting with Z, ostensibly to discuss possible representation in connection with estate planning for Child. Z holds public seminars on elder law and estate planning from time to time and invites members of the audience to schedule a one-hour meeting with him to discuss individual concerns after the seminar. Child apparently was responding to such an invitation.

3. Z apparently did not check for conflicts before discussing the substance of Child's concerns, and Child did not mention until the end of the consultation that the Law Firm had represented Father in a guardianship proceeding in which Child was Father's adversary (*i.e.,* adverse to the Law Firm's client).

4. Without revealing any information beyond the fact that he had met with Child to discuss possible representation, Z then inquired of his partners whether there had been such a guardianship matter. X and Y confirmed that there had been such a matter involving heated and protracted litigation. The three attorneys agreed that, even if there were no conflict with undertaking planning for Child, they should not accept the representation, and they declined it.

QUESTION

5. Do the New York Rules of Professional Conduct (the "Rules") require the Law Firm to disclose to Father that his Child had sought to retain the Law Firm in connection with a matter unrelated to the Law Firm's representation of Father? Do the Rules permit such disclosure?

6. Under the Rule, does Z's consultation with Child preclude or restrict the Law Firm from continuing to represent Father?

7. Do the Rules require or permit the Law Firm to inform Child's lawyer in the guardianship proceeding ("W") that Child sought to retain the Law Firm for estate planning?

OPINION

Law Firm's Duties to a Prospective Client

8. Before addressing the Law Firm's obligations and authority with respect to Father and to Child's own lawyer (W), we must first examine the Law Firm's duties to Child, because Child's information is at the center of this inquiry. Unless Child was acting in bad faith when consulting Z concerning the possibility of representation (a possibility discussed below), Child became a "prospective client" of Z and his firm at the outset of that consultation, see Rule 1.18(a), and is thus entitled to some (albeit not all) of the protections that inure to clients in any client-attorney relationship. In particular, a prospective client benefits from the protection of confidential information, Rule 1.18(b), and protection against the lawyer representing another client with interests materially adverse to those of the prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client in the matter, Rule 1.18(c).

9. Our discussion of the Law Firm's duties to Child as a prospective client is premised on the assumption that Child was acting in good faith when consulting Z. Had Child communicated information to Z "unilaterally . . . without any reasonable expectation that . . . [Z was] willing to discuss the possibility of forming a client-lawyer relationship; or . . . for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter," Child would not be deemed to be a prospective client and the Law Firm would not owe Child any duties that a lawyer owes to a prospective client. *See* Rule 1.18(e) (describing two categories of people who are not prospective clients).

10. Rule 1.18(a) defines a prospective client as one "who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter."

11. Rule 1.18(b) provides that a lawyer who engages in discussion about possible

representation with a prospective client "shall not *use or reveal information learned in the consultation*, except as Rule 1.9 would permit with respect to information of a former client," even if no client-lawyer relationship ensues. [Emphasis added.] Rule 1.9, in turn, provides in pertinent part that a lawyer shall not reveal any "confidential information" of a former client protected by Rule 1.6 except as allowed or required by the Rules with respect to a current client, but Rule 1.9(c) places no restriction upon the revelation or use of non-confidential or "generally known" information. In this regard, it is similar to Rule 1.6(a) (defining "confidential information" to exclude, among other things, "information that is generally known in the local community or in the trade, field or profession to which the information relates"). Thus, Rule 1.18(b) prohibits a lawyer from using or disclosing prospective client information only if the information is "confidential information" as defined in Rule 1.6, and even then only if the information was "learned in the consultation."

12. Under Rule 1.18(c), a lawyer may also be subject to *conflict of interest rules* with respect to a prospective client:

> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that *could be significantly harmful* to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d) [stating conditions necessary for screening to be effective]. [Emphasis added.]

13. In the remainder of this opinion, we will first discuss the use of a prospective client's confidential information and then discuss whether the consultation with the prospective client creates a conflict of interest.

Identity of Client and Fact of Consultation as Confidential Information

14. In this inquiry, the identity of the prospective client (Child), the fact of Child's consultation with Z about representation, and the general subject matter of the consultation were all "learned [by Z] in the consultation." Are they pieces of confidential information of the prospective client? Applying the definition of "confidential information" in Rule 1.6, information protected by Rule 1.18(b) may be of three types: (i) information "protected by the client-attorney privilege"; (ii) information that is "likely to be embarrassing or detrimental to the [prospective] client if disclosed"; or (iii) "information that the [prospective] client has requested be kept confidential."

15. Whether information is protected by the attorney-client privilege is an issue of law on which we offer no opinion because issues of law are beyond our jurisdiction. For a general discussion of privilege in relation to the identity of a client, the fact of consultation and related matters, see American Law Institute, Restatement of the Law Third, *The Law Governing Lawyers,* §69, *comment g*, and Reporter's Note to *comment g.*

16. Whether use or disclosure of the information concerning the identity of a prospective

client, the fact of consultation, and the general subject matter of the consultation would be embarrassing or detrimental to the prospective client, and whether the prospective client has requested or been assured by the lawyer of confidentiality with respect to such information, are questions dependent upon the relevant facts and circumstances. We cannot answer such questions in a particular case. Each lawyer confronted with the issue of whether the identity of a prospective client, the fact of a consultation concerning possible representation, the general subject matter of the representation and like information is confidential will need to make his or her own judgment based on whether the relevant facts satisfy the criteria defining confidentiality.

17. However, if Z concludes that information about Child's identity, consultation with Z about possible representation, and the general subject matter of that consultation, fits under any of the rubrics of confidential information, then Z and, by extension, the other lawyers associated with the Law Firm, are duty bound under the Rules not to disclose such information in whole or in part. We are unable to conclude on the basis of the inquiry that any exception to the general rule of confidentiality contained in Rule 1.6 is applicable to the information at issue in this inquiry.[1]

Law Firm's Disclosure Obligations to its Existing Client

18. We turn now to whether the Law Firm has any disclosure obligations to its client, Father. If the information concerning Child's consultation is ***not*** confidential, the Law Firm may, at will, share that information with Father. Rule 1.6(a) – and the derivative Rules 1.9(c) and 1.18(b) – prohibit a lawyer from using or revealing only "confidential information" as defined in Rule 1.6(a). Those Rules do not govern information that is not confidential.

19. A more difficult question is what the Law Firm must do if any of the information disclosed by Child during the consultation ***is*** confidential information. If any of it is confidential information, then the inquirer must determine whether any of Child's confidential information would be material to the representation of Father in the matter in which the Firm represents or comes to represent Father. Rule 1.4(a)(1)(iii) obligates a lawyer to inform the client of "material developments in the matter." As the City Bar ethics committee stated in N.Y. City 2005-2 (2005), one client does not have any legitimate expectation that the lawyer will use confidential information of a second client for the benefit of the first client. However, if the information the lawyer has from the second client is so material to the matter in which the firm represents the first client that the lawyer cannot avoid using the information, then the firm will be faced with a

[1] Rule 1.6(a)(1) authorizes disclosure or use when the client has given informed consent. Some lawyers routinely ask prospective clients who are exploring the possibility of an engagement to agree to an advance waiver of any conflict that might result from the prospective client sharing confidential information. See Rule 1.7, Cmts. [22]-[22A] (discussing circumstances making it more or less likely that an advance conflict waiver will be deemed valid and effective). *See also* N.Y. City 2006-2 (2006) (discussing advance conflict waivers, imputation of conflicts and ethical screens under the former Code of Professional Responsibility); Rule 1.18, Cmt. [5] (lawyer may condition conversations with a prospective client on the person's informed consent (i) that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter and (ii) that the lawyer may subsequently use information received from the prospective client). Such an advance waiver apparently does not exist here – and even if it did, an advance waiver of conflicts of interest would not necessarily constitute advance consent to disclosure of confidential information to a conflicting client.

dilemma. Here, the firm would have an obligation of confidentiality to the Child under Rule 1.18 with respect to material information that the Law Firm is required under Rule 1.4 to disclose to Father.

20. If, as stated in the Inquiry, the matter upon which Child consulted Z is, in fact, unrelated to the representation of Father, then the information learned by Z in the consultation is unlikely to be material to matters within the scope of the Law Firm's representation of Father, and the Law Firm would have no obligation under the Rules to inform Father of Child's consultation and the representation of the Father would not be affected.

Law Firm's Disclosure Obligations to Prospective Client's Lawyer

21. With respect to Child's lawyer (W), the Law Firm has no duty of disclosure. Indeed, if disclosure would undermine Child's relationship with W, then the information would be confidential because disclosure would be detrimental or embarrassing to Child. If the information is confidential, Rule 1.18(b) prohibits the Law Firm from disclosing it to W without Child's informed consent.

Conflicts of Interest Between Prospective Client and Existing Client

22. As noted above, Rule 1.18(c) would apply if (i) the Firm represents or comes to represent the Father in a matter that is the same as, or substantially related to, the matter about which Child sought representation, (ii) the interests of Child in that matter are "materially adverse" to those of Father in the matter in which the Firm represents (or comes to represent) him, and (iii) the information Z obtained from Child in the consultation could be "significantly harmful" to Child in the matter. *See* N.Y. State 960 (2013) (discussing the meaning of "materially adverse," "substantially related" and "significantly harmful.")

23. Here, the Firm has represented Father in connection with a guardianship proceeding with respect to the Father's wife. The Child apparently sought representation in connection with the Child's own estate planning. Clearly the representations do not concern the same matter. The question is whether a reasonable lawyer would conclude that there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation [in this case, Z's consultation with Child] would materially advance the position of the client [in this case, Father] in the subsequent matter [in this case, the Firm's continuing representation of Father].

24. In N.Y. State 960 (2013), the inquirer had met with a prospective client who had recently purchased a home to discuss filing suit against the seller over substantial structural damage throughout the home, which required repairs by a contractor. Although the prospective client did not hire the lawyer, the contractor later sought to hire the lawyer to bring a lawsuit against the homeowner for the balance due for the repair work. We concluded that the facts presented did not enable us to determine whether any confidences received from the homeowner in the initial consultation were relevant to the contractor's claim for non-payment or to any potential counterclaim by the homeowner against the contractor. Here, since Child was consulting Z about estate planning, it seems less likely that Child would have imparted confidences relevant to

the Firm's representation of Father. However, the relevance of confidences imparted by Child are a factual question that is beyond the jurisdiction of this Committee and can only be made by Z.

25. If the interests of Child in any matters in which the Firm represents Father are materially adverse to those of Father, the question under Rule 1.18 is whether the information Z obtained from Child in the consultation could be "significantly harmful" to Child in the matter. We pointed out in N.Y. State 960 (2013) that, even if confidential information obtained by the lawyer in the consultation by the prospective client is somewhat harmful to the prospective client, the information does not disqualify the lawyer from representation against the prospective client. As Professor Simon notes:

> The "significantly harmful" qualification is a radical twist. Whereas a lawyer must not oppose a former actual client in a substantially related matter without obtaining the former client's informed consent, a lawyer may oppose a former prospective client in a substantially related matter without even seeking the former client's consent as long as the lawyer did not receive information from the prospective client that "could be significantly harmful to that person in the matter." Under Rule 1.9(a), we presume – almost irrebuttably – that a lawyer who formerly represented a client received information from the former client that "could be significantly harmful" to that person in any substantially related matter. Under Rule 1.18(c), we reject that presumption and turn it into a question, an "if" clause, a rebuttable presumption.

Simon's New York Rules of Professional Conduct Annotated 954 (2015 ed.). As in the case of whether the prospective client imparted relevant factual information, the degree of harmfulness of such information is a factual question beyond the jurisdiction of this Committee.

CONCLUSION

26. When a person consults with a lawyer in good faith about possible representation in a matter, the lawyer owes a duty of confidentiality pursuant to Rule 1.18(b) with respect to information the lawyer learns in the consultation, absent the prospective client's consent to disclosure or use. Whether the prospective client's identity, the fact of the consultation, and the subject matter of the consultation constitute confidential information turns on whether the information is protected by the attorney-client privilege, on whether disclosure likely would be embarrassing or detrimental to the prospective client, and on whether the prospective client has asked the lawyer not to disclose the information. Here, if the Child's consultation with the Law Firm was unrelated to the Law Firm's representation of the Father, then the information learned from Child is unlikely to be material to the firm's representation of Father, but this is a factual determination that can be made only by the lawyer. In that case, the firm would have no obligation to disclose it (and, if it is confidential to Child, no ability to do so without the consent of Child). Moreover, if the information is confidential to Child, then the Law Firm has no obligation to disclose it to Child's lawyer in an unrelated matter, or the ability to do so without the consent of Child. Whether the consultation precludes or restricts the lawyer from undertaking representation of another client or continuing to represent another client depends on whether the matters are the same or substantially related and on whether the information the lawyer learned from the prospective client could be "significantly harmful" to the prospective

client in the matter.

(17-15)