

NEW ETHICAL DUTIES TO PROSPECTIVE CLIENTS

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Rule 1.18 of New Hampshire's new professional conduct rules addresses for the first time the status of prospective clients. A prospective client is a "person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship" and then does not form such a relationship. New Hampshire Rules of Professional Conduct (RPC), R.1.18(a) (effective 1/1/2008). This Advisory will analyze the rule and provide practical guidance to firms wishing to set up "screens" to avoid disqualification in these situations.

Even prior to the adoption of Rule 1.18, courts have protected the confidences of persons seeking to retain lawyers. For example, in *Bays v. Theran*, 639 N.E.2d 720 (Mass. 1994), the SJC barred a law firm from representing a party adverse to a person with whom a firm lawyer had a telephone conversation about the possibility of representation. The phone call included a discussion of the merits. Based on this, the court concluded that the confidentiality interest of the prospective client justified the law firm's disqualification. *See also Poly Software Int'l, Inc. v. Su*, 880 F.Supp. 1487 (D. Utah 1995) (no disqualification when lawyer avoided learning details of case during half-hour consultation with opposing party).

A. Rule 1.18

The new rule attempts to strike an appropriate balance between the confidentiality interests of prospective clients and the interests of others to hire lawyers of their choice. It seeks to accomplish this balance in two ways: by limiting potential disqualification to cases where the information could be significantly harmful to the potential client; and by allowing the firm to continue with the new representation if the firm minimizes the confidential information received during the case intake process and thereafter implements adequate screening procedures. This is the first time the ethics rules have allowed screening in settings not involving former government lawyers. See RPC 1.11.

Specifically, the rule provides the following:

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1. A lawyer who receives information from a prospective client may not use or reveal that information, unless otherwise permitted by Rule 1.9 (which governs the use of former client information). RPC 1.18(b);
2. A lawyer who has received information from a prospective client may represent the adverse party, even in a substantially related matter, if the information received is not likely to be significantly harmful to the prospective client. RPC 1.18(c); and
3. Even if the matters are substantially related and the information could be significantly harmful, the law firm may represent the adverse party if either:
 - a. Both clients consent; or
 - b. The lawyer who received the information took steps to avoid exposure to more disqualifying information than was necessary to determine if he or she should take the case AND the disqualified lawyer is timely and adequately screened. RPC 1.18(d).

In light of this rule, firms will, at a minimum, need to enter the names of prospective clients in their conflict systems - - including targets of individual or firm marketing efforts who discuss their potential legal representation needs in any detail with firm lawyers. Also, if firms wish to represent parties adverse to prospective clients, they will need to have the capacity to implement adequate and effective screens. The screening principles that will be discussed below may also be useful for firms setting up voluntary screens to encourage a current or former client to consent to adverse representation.

B. Requirements of a Timely and Adequate Screen

The new professional conduct rules have added a set of definitions. See RPC 1.0. Screening is defined as “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” RPC 1.0(k). See also ABA Comments 8-10 setting out guidelines for adequate screens.

Since a number of states, not including New Hampshire, allow screening to prevent firm disqualification for former client conflicts caused by lateral transfers, there is a good deal of case law to which one can look for guidance. See e.g., *Manning v. Waring, Cox, James, Skalk and Allen*, 849 F.2d 222 (6th Cir. 1988). The cases, though based on the specific rules of each state, establish a relatively uniform set of guidelines.

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1. Timely implementation

Any screen must be implemented in a timely fashion. This means the screen must go into effect “as soon as practical after a lawyer or firm knows or reasonably should know that there is a need for screening.” ABA Model Rule 1.0, Comment 10 (emphasis supplied). In the prospective client context, this means that the screen should be set up before any substantive work commences on the new client’s case. If the appropriate information about the prospective client is in the conflict system and a conflict check is properly run, the firm should know about the issue prior to accepting the new case.

2. Notice to prospective client

Rule 1.18(d) requires that written notice of the screen be promptly given to the prospective client. Such notice should include a general description of the subject matter about which the lawyer was consulted and of the screening procedure employed. See RPC 1.18, Comment 8.

3. Fees

The rule also requires that the disqualified lawyer is apportioned no part of the fee from the new matter. RPC 1.18(d)(2)(ii). Implementing this may seem complex. ABA Comment 7 provides some guidance and states that the rule “does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.”

4. Effective Screening

To fulfill its purpose, the screen should include intra-firm mandates assuring affected parties that their confidential information will be protected. While some of these steps will necessarily depend on the circumstance of each case, a recent article in the ABA/BNA Lawyers’ Manual on Professional Conduct listed the following recommended steps:

- a. Written acknowledgement by the disqualified lawyer of the obligation not to communicate with other firm personnel about the case;
- b. Notice and periodic reminders of this to other firm personnel. The firm may also wish to specify consequences for violating the screen;

- c. Denial of access of the disqualified lawyer to the physical or electronic files;
- d. If possible, physical separation of those working on the case and the disqualified lawyer.

Imputed Disqualification, 23 ABA/BNA Lawyers' Manual on Professional Conduct 647 (12/26/2007).

Difficulty in satisfying any of the above steps should be a red flag for a law firm. For example, if the firm is too small or integrated to afford physical separation, the firm may want to consider whether it will be able, if challenged on the screen, to meet its burden to show adequacy. The firm seeking to avoid disqualification must show that it can minimize, in an effective way, contact between the quarantined attorney and others in the firms. See *Kala v. Aluminum Smelting*, 688 N.E.2d 258 (Ohio 1998); *U.S. Filter Corp. v. Ionics*, 68 F.Supp.2d 48 (D.Mass. 1999)(casting doubt on small firm screening).

The BNA article recommends that if a firm harbors doubt about its screen that it not wait for a disqualification motion and seek a ruling on the legitimacy of its screen. In the *U.S. Filter* case, plaintiffs took such an approach. However, the court did not reach the issue since the applicable rule did not allow screening in the proposed situation.

C. Conclusion

Rule 1.18 makes clear that people who transmit confidential information to a lawyer seeking representation have the right to expect confidentiality. This was likely the common law on client-lawyer relationships, but was not previously delineated in a disciplinary rule. For some firms, this may require a change in conflict procedures.

The rule also recognizes that the interest of the lawyer in accepting cases and of others in selecting the lawyer of their choice are also of value. It thus seeks to balance these competing interests by protecting the confidential information and allowing screening. However, establishing a screen that will withstand court scrutiny requires careful implementation of the required actions.

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The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct & Liability Practice Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.