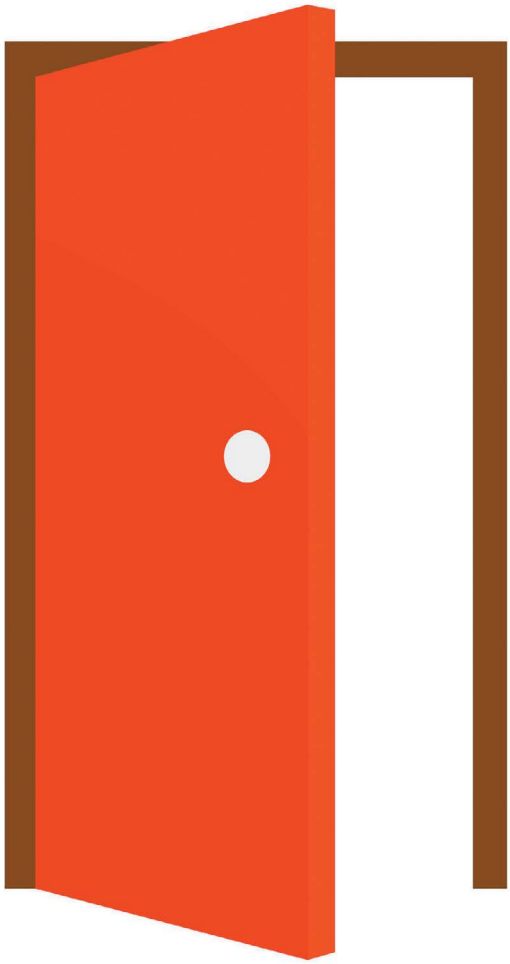
PROSPECTIVE CLIENT INTAKE: Learn Enough, But Not Too Much



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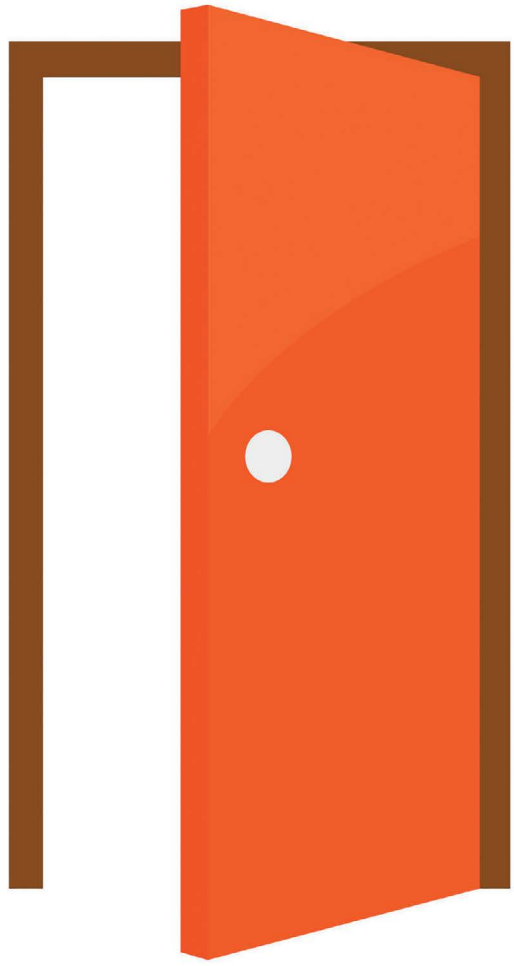
A lawyer meets with someone who is looking for representation and obtains information about the prospective client's matter. Suppose, for whatever reason, the prospective client does not become an actual client of the lawyer's firm. Does the lawyer owe the prospective client the same duties she would owe to an actual client? And are there circumstances where the communications with the prospective client might disqualify the lawyer or her firm from representing a different client who, as it turns out, is, in the same or a substantially related matter, adverse to the prospective client who never became a client?

The short answer to the first question is that the lawyer owes some duties to the person who does not become a client, but not the full range of duties owed to a client. And the answer to the second question is the subject of a recently issued opinion from the American Bar Association Standing Committee on Ethics and Professional Responsibility: ABA Formal Opinion 510, *Avoiding the Imputation of a Conflict of Interest When a Law Firm Is Adverse to One of its Lawyer's Prospective Clients* (March 20, 2024) ("ABA Opinion 510").



The authors of the Opinion begin by noting that, under Rule 1.18 of the Rules of Professional Conduct (RPC) (Duties to Prospective Clients), "[a] prospective client who does not ultimately form a client-lawyer relationship with a lawyer is entitled to confidentiality protections similar to those afforded to a former client" under Rule 1.9 (Duties to Former Clients). This means that the lawyer must protect the prospect's confidential information from disclosure, and may not use such information "to the disadvantage" of that prospect. But Rule 1.18 and Rule 1.9 have different standards for determining whether the lawyer or her law firm will be subject to disqualification. As the authors of the Opinion note, Rule 1.18 has a less restrictive standard than Rule 1.9:

> …Under Rule 1.9, without the former client's informed consent, confirmed in writing, a lawyer may not take on a new representations that is materially adverse to the former client if the new matter is the same as, or substantially related to, the earlier one….
>
> By comparison, under Rule 1.18(c), a lawyer is disqualified from undertaking a representation in the same or substantially related matter against a prospective client only if the lawyer received "disqualifying information"—i.e., "information from the prospective client that could be significantly harmful to" the prospective client.[1]

In an earlier opinion addressing Rule 1.18, the ABA gave some examples of the type of information from a prospective client that could disqualify a lawyer from later taking on a client adverse to the prospect in the same or a substantially related matter: (1) the prospective client's views on the weaknesses of a claim; (2) the prospect's thoughts on litigation strategies; (3) the prospect's position concerning potential settlement issues; (4) sensitive personal information; and (5) "personal accounts of relevant events."[2] Determining whether the information learned in speaking with a prospective client is sufficient to disqualify the lawyer from future adverse representation in a substantially related matter necessarily is a "fact-based inquiry that may depend on a variety of

factors including the length of the communication and the nature of the topics discussed."[3] For example, if the initial consultation lasted for a substantial amount of time, it is more likely that the lawyer obtained disqualifying information than if the consultation lasted ten minutes.

Limitations of Imputed Disqualification in Prospective Client Situations

Under Rule 1.10 (Imputation of Conflicts of Interest: General Rule), if a lawyer is disqualified from representing a party adverse to a former client, that disqualification will be imputed to all of the other lawyers at the disqualified lawyer's firm. But under Rule 1.18(a), in the prospective client situation, the intake lawyer's personal disqualification will not be imputed to other lawyers in the lawyer's firm so long as: (1) the lawyer took "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client"; (2) the disqualified lawyer is timely screened from any participation in the matter; and (3) the prospective client receives written notice.

Following up on Formal Opinion 492, in Formal Opinion 510, the ABA took a look at what it means to take "reasonable measures" in the initial consultation to learn enough from the prospective client, but not *too* much—that is, to obtain sufficient information to determine whether to take on the representation without obtaining more information than is necessary to make that determination. Without such measures in place, the intake lawyer's personal disqualification risks subjecting other lawyers at the firm to imputed disqualification.

Types of Information to Obtain from the Prospective Client

The first step requires consideration of what type of information a lawyer needs in order to make a determination about whether to represent a prospective client. Such information falls into two categories: information related to the lawyer's professional responsibilities, which necessarily includes the lawyer's obligations under the Rules of Professional Conduct, and information related to "the lawyer's more general business decisions." The first category requires the lawyer to obtain enough information to determine, for example, that the matter is one she is competent to handle (Rule 1.1); that the client's claims are not frivolous (Rule 3.1); that the representation would not be one in which the client sought to use the lawyer's services in connection with a crime or fraud (Rules 1.2(d) and 1.16(a)(4)); and that there is no conflict of interest (Rules 1.7-1.12 and 1.18).[4]

The second category:

> would potentially include information to enable the lawyer to assess the amount of time the engagement will take, the range of anticipated compensation for that time, the potential expenses, and the likelihood of being fully compensated. It might also include whether the matter aligns with the lawyer's abilities and interests, such as whether it is within an area of specialization or an area in which the lawyer seeks more experience. Additionally, lawyers may have other considerations regarding whether to take on a representation. For example, a law firm's internal policy, such as one limiting contingency matters or limiting the representation of parties in certain industries, may preclude accepting an engagement.[5]

While each of these areas would be permissible subjects of inquiry in gathering information from a prospective client, that does not mean that inquiry on any particular topic is "reasonably necessary" for the lawyer to make a determination about whether to take on the new client. And in order to be able to take advantage of the safe harbor of Rule 1.18(d), the intake lawyer must inquire no further than is "reasonably necessary" to make that determination. The authors of the Opinion offer this example to illustrate the distinction:

> [T]he lawyer may be inclined to substantially investigate the matter before committing to accept it on a contingent fee basis, not because of concerns that the claim may be frivolous, but to assess the likelihood of prevailing and the likely recovery. It would be permissible to conduct this detailed inquiry to make the business decision whether to accept the representation, but it may not be "reasonably necessary" to do so.[6]

And once the lawyer has enough information to determine that she will or must decline to take on representation of the prospective client, there is one obvious way to prevent the imputed disqualification of other lawyers at the firm in the event that an adverse party consults with the firm at a later date: stop making further inquiry of the prospective client.[7] If the intake lawyer can make that determination without the prospective

DOES THE LAWYER OWE THE PROSPECTIVE CLIENT THE SAME DUTIES SHE WOULD OWE TO AN ACTUAL CLIENT?

client having disclosed "disqualifying information"—that is, "information from the prospective client that could be significantly harmful to" the prospective client—then the lawyer will not be subject to disqualification if she subsequently represents a party adverse to the prospective client in the same or substantially related matter.

Reasonable Measures to Avoid Imputed Disqualification

But if the lawyer *has* obtained disqualifying information from the prospective client, the next question is what are the "reasonable measures" a lawyer should take in obtaining information from a prospective client so as to avoid disqualification by imputation for other lawyers in her firm? Here, the ABA, citing "limited guidance in prior opinions," offers little concrete advice beyond noting that the "'reasonable measures' standard means that lawyers must exercise discretion throughout the initial communications."[8] Exercising "discretion," the intake lawyer must stay within the narrow lane between "strictly limiting the scope of conversation"—thereby creating a risk of not obtaining adequate information to determine whether to take on the representation—and, on the other side, letting the "potential client talk freely about the matter" and then having a follow up interview as part of the investigation—a process "unlikely to involve reasonable measures to limit the information being provided."[9]

Stating the obvious, the ABA noted that lawyers "who seek and obtain information without limitations" do not meet the "reasonable measures" standard.[10] Beyond that suggestion, "reasonable measures" to take during intake with a potential client include the following:

1. **Obtain Information Sufficient to Run a Conflicts Check.** The first step with any prospective client is to obtain the information necessary to run a conflicts check. Effective law firm risk management requires that all firm lawyers know to refrain from having any substantive discussion of a prospective client's matter until the potential matter has cleared conflicts. This will often require a certain amount of self-restraint as such limitations run counter to the instinct to offer assistance, the desire to obtain a new client, and natural curiosity.
2. **Warn the Prospect to Limit Disclosures.** Before engaging in a broader conversation, the lawyer should explicitly advise the prospective client to limit disclosure to the information "necessary for the lawyer and client to determine whether to move forward with an engagement." Such a disclaimer might, however, be off-putting to many clients.
3. **Hold Your Curiosity.** The prospective client's story may pique your interest in a way that leads you to ask questions for the sake of satisfying your own curiosity, rather than for the sake of the initial task of determining whether to take on the representation. It's a given that good lawyering requires curiosity and the ability to dig deep. But the time to exercise those talents is after you are engaged, not while you are still deciding whether to represent the potential client.
4. **Matrimonial Lawyers Must Be Particularly Careful.** Members of the matrimonial bar routinely confront the prospective client dilemma when, having already been consulted by one spouse as a prospective client (who then did not become an actual client), they are contacted by the adverse spouse in connection with the same dissolution matter. Special care is needed in the fraught emotional context of an impending divorce action, where a prospective client is more than likely to spill out unsolicited information in the initial intake conversation.
5. **It May Be Necessary to Diplomatically Stop the Initial Consultation.** Sometimes you have a gut feeling about a potential client that triggers a warning bell. If that happens, or if the potential client reveals something that leads you to conclude that she is someone you do not want to represent, or that the matter is not a fit for your firm, that should be the end of your efforts to obtain information from the potential client. You will need to find a diplomatic way to just stop right there.
6. **Staff Members Must Exercise the Same Discretion.** It is not uncommon for a prospective client to have an initial contact with someone other than a firm lawyer. Because disclosures to a staff member could include disqualifying information, staff members should know that in the interest of learning enough, but not too much, they should avoid engaging in substantive discussion of a matter with a potential new client. Firms and law offices should train all staff members on the restrictions in communicating with a potential new client.

In a small state, lawyers in many practice areas are likely to encounter the problem of disqualification, imputed or otherwise, arising out of prospective client intake. Accordingly, Connecticut lawyers who wish to avoid potential disqualification are well-advised to keep the flow of information as limited as possible in the prospective client situation. ■

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NOTES

1 ABA Formal Opinion 510 at 2 (quoting Commentary to Rule 1.18).

2 American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 492, *Obligations to Prospective Clients: Confidentiality, Conflicts* and "*Significantly Harmful*" Information (June 9, 2020).

3 ABA Formal Opinion 510 at 2.

4 *Id*. at 4.

5 *Id*. 4-5.

6 *Id*. at 6.

7 *Id*. at 7.

8 *Id*. at 8.

9 *Id*. at 7-8.

10 *Id*. at 8.