The New York City Bar Association Opinion 2013-1: Duties Owed to Prospective Clients

In January 2013, the New York City Bar Association issued Formal Opinion 2013-1 (the "Opinion")[1] explaining the duties owed by lawyers under Rule 1.18 of the New York Rules of Professional Conduct (the "Rule") to prospective clients even when no lawyer-client relationship ensues.[2] Rule 1.18 was adopted in 2009 to fill a gap in the governing New York attorney ethics rules, which previously did not define the duties owed by lawyers to prospective clients other than in case law. As reflected in Comment 1 to the Rule, the Rule addresses duties to prospective clients after beauty contests and other preliminary meetings, and seeks to "balance the need for protection of those who consult lawyers about a possible representation with the need for freedom of the parties to decide not to pursue the representation." Thus, while the Rule imposes some substantial responsibilities to protect the interests of prospective clients, the responsibilities are not as extensive as those owed to former and current clients and include exceptions where informed consent is obtained or ethical screens are used.

As interpreted by the Opinion, Rule 1.18 imposes two primary duties on lawyers who have participated in a "beauty contest"[3] with a prospective client,[4] but were ultimately not retained by the prospective client: (1) lawyers are "restricted from using or revealing information learned in the consultation to the same extent that a lawyer would be restricted with regard to information of a former client" and (2) lawyers "may not represent a client with materially adverse interests in the same or a substantially related matter if the information received from the prospective client could be significantly harmful to the prospective client in that matter." (Opinion at 3). The Opinion explains these restrictions and their exceptions and includes several hypothetical scenarios to illustrate the application of the Rule.

I. Restrictions on Using and Disclosing Prospective Client Information and Relevant Exceptions

Rule 1.18(b) provides that "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions 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." Noting that Rule 1.9 and related Rule 1.6[5] only

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[1] New York City Bar Association Formal Opinion 2013-1, *Duties to Prospective Clients Following Preliminary Meetings*, January 30, 2013, available at http://www.nycbar.org/ethics/ethics-opinions-local/2013opinions/1713-formal-opinion-2013-01.

[2] New York Rules of Professional Conduct [22 NYCRR 1200] Rule 1.18.

[3] Kenneth D. Agran, *The Treacherous Path to the Diamond-Studded Tiara: Ethical Dilemmas in Legal Beauty Contests*, 9 GEO. J. LEGAL ETHICS 1307, 1308 (1996) ("A legal beauty contest is a competitive interviewing process in which a client seeking legal representation (often a major corporation looking for outside counsel) interviews several different law firms for the same job."). Note that the Opinion's analysis "is not limited to beauty contests and would apply in any situation where the prospective client communicates with a law firm about a possible representation . . . .whether or not other firms are approached." (Opinion at 7).

[4] The term "prospective client" is defined as a "person who discusses with a lawyer the possibility of forming a lawyer-client relationship with respect to a matter," however the term excludes those who "communicate[] information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship" as well as those who "communicate[] with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation." (New York Rules of Professional Conduct [22 NYCRR 1200] Rule 1.18(a),(e); Opinion at 3-4). The Opinion further clarifies that "[m]eetings and communications that do not focus on a particular representation, such as introductory and general promotional calls or visits, as well as social meetings, by themselves generally should not give rise to prospective client duties." (Opinion at 4).

[5] Rule 1.9(c) provides that a lawyer may not "use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except where the Rules would permit or require" and that a lawyer may not "reveal

restrict the use and disclosure of "confidential information,"[6] the Opinion thus interprets Rule 1.18(b) to mean that the restriction on disclosing prospective client information only applies to "confidential information" learned in a consultation with a prospective client and that similarly the restriction on using prospective client information only applies to "confidential information" learned in a consultation with a prospective client where the use of the confidential information would "disadvantage" the prospective client[7], and that the restrictions on both the use and disclosure of the prospective client's confidential information would also be subject to the exceptions in Rules 1.9 and 1.6 in which confidential information may be used or disclosed. (Opinion at 4-5).

The Opinion concludes that two additional exceptions contained in Rule 1.18(d) also apply to the restrictions of Rule 1.18(b). Although Rule 1.18(d) does not expressly contemplate the use of informed consent and ethical screens to comply with the restrictions on the use or disclosure of a prospective client's confidential information, the Opinion concludes that "these means can also be used to comply with the restrictions on using or revealing information." (Opinion at 5). Reasoning that Rule 1.18(b) incorporates the relevant exceptions of Rule 1.6, which permits the use and disclosure of confidential information where the client has given "informed consent," the Opinion finds that Rule 1.18(b) "thus should permit the use of informed consent to avoid the restriction."[8] *Id.* The Opinion also concludes that "if a law firm implements an ethical screen as contemplated in Rule 1.18(d), it may rely on the screen to comply with paragraph (b) as well as paragraph (c)."[9]

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confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require." New York Rules of Professional Conduct [22 NYCRR 1200] Rule 1.9(c). Rule 1.6 in turn provides that a "lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person unless [one of the enumerated exceptions applies]." *Id.* at Rule 1.6.

[6] The term "confidential information" is defined in Rule 1.6(a) as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." New York Rules of Professional Conduct [22 NYCRR 1200] Rule 1.6(a).

[7] The Opinion notes that Rule 1.18(b) "incorporates the use restrictions from Rule 1.9, not Rule 1.6, and thus prohibits only [the] use of protected information to the disadvantage of the prospective client." Thus, Rule 1.18 is less restrictive than the restrictions on the use of current client confidential information, which also may not be used "to the advantage of the lawyer or a third person." (Opinion at 5).

[8] The Opinion interprets the informed consent provision of Rule 1.18(d) as applied to Rule 1.18(c) to permit representation by the otherwise disqualified lawyer or affiliated law firm if "both the affected client and the prospective client have given informed consent, confirmed in writing" and a "reasonable lawyer would conclude that the firm would be able to provide competent and diligent representation in the matter." (Opinion at 4). With respect to Rule 1.18(b), however, the Opinion concludes that the informed consent requirement differs in two respects: First, the informed consent need not be confirmed in writing (as is the case with the informed consent exception to Rule 1.18(c)) and second, the informed consent is only required of the prospective client (and not both the prospective and affected client as required for the informed consent exception to Rule 1.18(c)) because written confirmation and informed consent of the affected client is not required by Rule 1.6, which is incorporated by reference in Rule 1.18(b). *Id.* at 5-6.

The general substance of the informed consent, however, is the same under both Rules 1.18(b) and (c): As the Opinion explains, "consent will not be informed unless the lawyer has communicated information adequate for the consenting party to make an informed decision and adequately explained to the party the material risks of the proposed course of conduct (*e.g.*, using or revealing information learned in the consultation or representing others in a substantially related matter) and reasonably available alternatives," which will depend on the relevant facts and circumstances concerning the lawyer's dealings with the prospective client, including the sophistication of the prospective client. The consent need not be signed or otherwise acknowledged in writing by the prospective client. (Opinion at 6).

[9] The Opinion interprets the ethical screen provision of 1.18(d) to permit representation by the disqualified lawyer's law firm "if the disqualified lawyer took reasonable steps to limit his or her exposure to disqualifying information in discussions

II. Restrictions on Adverse Representation and Relevant Exceptions

Rule 1.18(c) provides that "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 [(c)], 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)." The Opinion concludes that the restriction on adverse representation applies only where the lawyer is already restricted from disclosing or using confidential information of the prospective client under Rule 1.18(b) and has received information through the consultation with the prospective client that "could be significantly harmful"[10] to the prospective client in the new matter. (Opinion at 4-6). Subject to several exceptions, where a lawyer is disqualified, the disqualification will also apply to all other lawyers in the firm. *Id.* at 4. The Opinion finds that Rule 1.18(c) is less restrictive than the limitations on adverse representation in the context of former and current clients, which apply whether or not the lawyer received information that "could be significantly harmful" and regardless of whether the representation involves "the same or a substantially related matter." *Id.* at 5-6; *see* Rules 1.7 and 1.9.

The Opinion summarizes the two exceptions to the restriction on adverse representation: (1) representation by the otherwise disqualified lawyer or affiliated law firm is permissible if "both the affected client and the prospective client have given informed consent, confirmed in writing"[11] and a "reasonable lawyer would conclude that the firm would be able to provide competent and diligent representation in the matter" and (2) representation by the disqualified lawyer's law firm is permissible "if the disqualified lawyer took reasonable steps[12] to limit his or her exposure to disqualifying information in discussions with the prospective client and the

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with the prospective client and the firm takes specific steps to implement an effective ethical screen and notifies the prospective client of the representation and the screening measures taken" and a "reasonable lawyer would conclude that the firm would be able to provide competent and diligent representation in the matter." (Opinion at 4). The Opinion notes that the Rule does not provide specific procedures to be followed in implementing an ethical screen and compliance will thus "continue to depend . . . on the relevant facts, particularly the nature of the law firm and the information received from the prospective client." *Id.* at 7. However, the Opinion highlights several considerations noted in the commentary to the Rules, such as the firm's "ability to implement, maintain and monitor screening procedures before undertaking or continuing the representation," giving consideration to the size, practices and organization of the firm, the promptness of the notice and implementation of the screen, and the fee-apportionment of the disqualified lawyer who "may not receive compensation directly related to the matter." *Id* at 7, 9-10*.; see* Rule 1.18 cmt. 7B, C. Above all, the Opinion cautions that the screen will be irrevocably broken "if any lawyer in the firm acquires confidential information from the disqualified lawyer, and subsequent efforts to institute or maintain a screen will not be effective in avoiding the firm's disqualification." *Id.* However, the Opinion concludes that firm disqualification should not prevent "disclosure of information to a limited number of lawyers in the firm for the purpose of evaluating the firm's duties under Rule 1.18 or otherwise in deciding whether to take on the representation, provided those lawyers are also disqualified from working on the matter and are appropriately screened." *Id.*

[10] Citing to Comment 6 to Rule 1.18, the Opinion concludes that the test to determine whether information is "significantly harmful" under Rule 1.18(c) "focuses on the potential use of the information" as the lawyer must consider whether the information "could be significantly harmful if used in that matter" under the relevant facts and circumstances of the particular situation. (Opinion at 6). The Opinion concludes that "we do not believe that a lawyer who receives the information may avoid the bar solely on the ground that he or she will make no actual use of the information." *Id.*

[11] *See* footnote 8 above.

[12] Rule 1.18(d)(2) requires that "the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client." The Opinion concludes that the term "necessary" information will generally encompass that information which the lawyer needs to run a conflicts check, but that "it should not be so limited and . . . may encompass any information reasonably

firm takes specific steps to implement an effective ethical screen and notifies the prospective client of the representation and the screening measures taken"[13] and a "reasonable lawyer would conclude that the firm would be able to provide competent and diligent representation in the matter." (Opinion at 4; *see* Rule 1.18(d)).

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com or Christine Mott at 212.701.3015 or cmott@cahill.com.

necessary to enable the lawyer to decide whether to pursue a representation." (Opinion at 7).

[13] *See* footnote 9 above.