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In Between:
Duties to Prospective Clients

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When evaluating conflicts and other duties, lawyers often put people into two groups—clients and non-clients. There is, however, another category that can enter the mix: "prospective clients." A "prospective client" is a person who speaks with an attorney about the possibility of hiring the lawyer but no attorney-client relationship results. Under RPC 1.18, we have limited duties of loyalty and confidentiality to those who consult with us about the possibility of retention even if no relationship follows. Reflecting the limited scope of those duties, RPC 1.18 also provides a unilateral mechanism for a law firm to screen an individual lawyer-member who spoke to a prospective client so that others at the firm may still take on the other side of the matter involved.

In this column, we'll first survey the limited duties of loyalty and confidentiality included in RPC 1.18. We'll then turn to the screening mechanism incorporated into the rule.

Before we do, however, a caveat is in order. In *In re Knappenberger*, 338 Or 341, 352-53, 108 P3d 1161 (2005), the Oregon Supreme Court held that a brief—*compensated*—consultation that did not result in further work constituted an attorney-client relationship. Although *Knappenberger* predated Oregon's adoption of RPC 1.18, the Supreme Court in *Knappenberger* considered and

rejected the argument that the person who was billed for a two-hour consultation with the lawyer was merely a prospective client. Therefore, absent the Supreme Court revisiting *Knappenberger*, prudent lawyers should assume that RPC 1.18 does not apply to compensated consultations—however brief.

Duties

RPC 1.18 came to Oregon when the RPCs replaced the former Disciplinary Rules in 2005. RPC 1.18 is based on its ABA Model Rule counterpart. Although there was no corresponding provision in the former DRs, the notion of duties to prospective clients was not unknown in Oregon. The Oregon Supreme Court in *In re Spencer*, 335 Or 71, 83-85, 58 P3d 228 (2002), for example, discussed the general concept. Similarly, Oregon Evidence Code 503(1)(a) has long included a person "who consults a lawyer with a view to obtaining professional legal services from the lawyer" within the definition of "client" for purposes of the attorney-client privilege.

RPC 1.18(a) defines a "prospective client" as "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter[.]"

RPC 1.18(c) and (b) outline, respectively, the limited duties of loyalty and confidentiality we owe prospective clients. Both are focused on the specific

matter on which the lawyer was consulted and the particular contents of the conversations involved.

Under RPC 1.18(c), a lawyer who was consulted by a prospective client is generally precluded from representing an adverse party in "the same or a substantially related matter[.]" But, this limited duty of loyalty is tempered by an important qualifier relating to the kind of information the lawyer acquired from the prospective client: it only applies "if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter[.]" As explained in the comments to the corresponding ABA Model Rule, the intent of the qualifier is to permit a lawyer to obtain information that is not confidential so that the lawyer can, for example, run necessary conflict checks or determine generally whether the matter is within the lawyer's area of practice before discussing the matter in more detail with the prospective client.

Under RPC 1.18(b), confidential information communicated during an initial call or meeting with a prospective client will also generally disqualify the lawyer involved from later using the confidential information against the prospective client. Again, the comments to the corresponding ABA Model Rule suggest conditioning initial meetings on either not receiving such information or an agreement allowing the lawyer to later be adverse to the prospective client

notwithstanding a discussion of confidential information. In many instances, however, those conditions may not be practical because the lawyer may need to evaluate confidential information to assess the prospective client's position and the prospective client may not be willing to provide it without assurance that it will remain confidential.

Screening

If the prospective client does not hire the lawyer and the firm is approached by the opposing party about taking the matter on against the prospective client, RPC 1.18(d)(1) permits both affected parties to waive any conflict. As a practical matter, however, waivers are rare in this setting in light of the human dynamics often present. Therefore, RPC 1.18(d)(2) allows the law firm that was approached but not hired to unilaterally screen the lawyer who met with the prospective client from the matter and then have other lawyers at the firm handle it for the opposing party. OSB Formal Opinion 2005-138 (rev 2016) applied the same general approach to a paralegal who took in the otherwise disqualifying information rather than a lawyer.

RPC 1.18(d)(2)(i) requires that screening be "timely" and RPC 1.18(d)(ii) requires that written notice of the screen be given to the prospective client "promptly." Although these are inherently fact-specific terms, the federal district

court in Portland in *Jimenez v. Rivermark Community Credit Union*, 2015 WL 2239669 (D Or May 12, 2015) (unpublished), denied a motion to disqualify the defendant's law firm where it had screened the lawyer involved under RPC 1.18(d)(2) and provided notice six days after plaintiff's counsel has asserted a conflict.

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