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RPC 1.18:
Duties to Prospective Clients

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The idea of "prospective clients" is not new. The Washington Supreme Court in 1918 used this term in the same way we use it today: someone who is discussing the possibility of retention with a lawyer, but has not and may never become a client.[1] Similarly, courts have long applied the attorney-client privilege to preliminary conversations between lawyers and prospective clients over the possibility of retention.[2]

What is comparatively new is a professional rule specifically addressing prospective clients.[3] The ABA adopted Model Rule 1.18—"Duties to Prospective Clients"—in 2002 and then modified it modestly in 2012.[4] Washington followed by adopting the ABA Model Rule with minor modifications in 2006 and then amending it in 2016 to reflect the 2012 ABA Model Rule amendments.[5]

In this column, we'll survey three aspects of the rule. First, we'll discuss who is—and who is not—a "prospective client" under RPC 1.18. Second, we'll examine the duty to protect a prospective client's confidential information and the related conflict that arises when a law firm lawyer learns "significantly harmful" information from a prospective client and then the firm is asked to represent another client in the same matter adverse to the prospective client. Finally, we'll discuss the tools built into the rule—informed consent and screening—that can

allow other lawyers at the firm to represent a client adverse to a prospective client notwithstanding the fact that the prospective client shared confidential information with another firm lawyer.

Before we do, however, three caveats are in order.

First, although we'll approach today's topic from the perspective of law firm lawyers, firms cannot avoid conflicts arising from prospective clients simply by having nonlawyer staff handle initial contacts with prospective clients. Under RPC 5.3, law firm lawyers are generally responsible for nonlawyer staff under their supervision—including those assisting with client intake.[6]

Second, while not required by RPC 1.18, prudent practice suggests running a conflict check *before* meeting substantively with a prospective client. If a conflict surfaces during a meeting with a prospective client, it may—depending on the circumstances—trigger a need to withdraw from an existing representation[7] or at least put the law firm at risk of disqualification.[8] Ideally, therefore, the names of the parties should be obtained first and a conflict check run, before moving on to a meeting with a prospective client to discuss possible representation.[9]

Third, although RPC 1.18 occasionally results in discipline, the far more frequent result is disqualification from the court proceeding involved.[10] In other

words, failure to follow the guideposts in RPC 1.18 is most often a "firm problem."[11]

Prospective Clients

RPC 1.18(a) defines a prospective client:

> A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.[12]

By contrast, a unilateral communication to a lawyer—such as an unsolicited email—does not make the sender a "prospective client." Comment 10 to RPC 1.18 explains:

> Unilateral communications from individuals seeking legal services do not generally create a relationship covered by this Rule, unless the lawyer invites unilateral confidential communications. The public dissemination of general information concerning a lawyer's name or firm name, practice area and types of clients served, and contact information, is not in itself, an invitation to convey unilateral confidential communications nor does it create a reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.

Comment 2 to RPC 1.18, in turn, discusses the grayer area when a lawyer or law firm invited confidential communications from a prospective client—such as a law firm web site that solicits confidential information for analysis that does not include any disclaimers of a relationship:

> Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's communications in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. . . . In contrast, a consultation does not occur if a person provides information to a lawyer in response to a communication that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming an attorney-client relationship, and is thus not a "prospective client."[13]

Neither the text of RPC 1.18 nor its comments address the role of compensation. Some lawyers charge for preliminary consultations while arguing that payment does not convert the consultation into a brief attorney-client relationship governed instead by the former client conflict rule, RPC 1.9, if no further representation results. The Washington Court of Appeals, albeit in an unpublished portion of an otherwise published opinion, *In re Marriage of Herridge*, 169 Wn. App. 290, 279 P.3d 956 (2012), expressed skepticism about this position. As of this writing, however, neither the Supreme Court nor the Court of Appeals have spoken directly to the issue in "published" form.[14] The difference has potentially significant practical consequences. As we will discuss further, RPC 1.18 includes a screening mechanism allowing a law firm to take on

the other side of the same matter as long as the consulted lawyer is screened. RPC 1.9, by contrast, does not and, although former client conflicts are waivable, it is unusual for a former client to consent to their confidential information shared with a lawyer being used against them.

Confidential Information

RPC 1.18 weaves together two threads on confidentiality.

First, under RPC 1.18(b), a lawyer consulted by a prospective client has a duty to maintain the confidentiality of the information learned—regardless of whether the lawyer's firm later represents anyone in the same or a substantially related matter. Borrowing from the former client conflict rule, confidential information can only be used or revealed when it has become "generally known" or when the RPCs would otherwise permit or require.[15]

Second, absent informed consent or screening discussed below, under RPC 1.18(c), a lawyer cannot represent a client in the same or substantially related matter if the lawyer obtained information from a prospective client "that could be significantly harmful to that person in that matter[.]" Although not an exclusive list, ABA Formal Opinion 492 (2020) suggests that, depending on the circumstances, "significantly harmful" information may range from sensitive

personal information relevant to the matter concerned to a prospective client's strategic thinking on the objectives for the matter.[16]

With both of these threads, RPC 1.18(e) allows a lawyer to condition a consultation with a prospective client on the person's consent that "no information disclosed during the consultation will prohibit the lawyer from representing a different person in the same matter." RPC 1.18(e) also permits "consent to the lawyer's subsequent use of information received from the prospective client." Although potentially useful, the tools in RPC 1.18(e) may also dissuade a prospective client from speaking further with a lawyer depending on the sensitivity of the information concerned.

Consent and Screening

Under RPC 1.18(c) and 1.18(d), if a lawyer has obtained a prospective client's "significantly harmful" information, that lawyer is prohibited (absent the agreements just noted in RPC 1.18(e)) from handling the same or a substantially related matter for another person adverse to the prospective client unless both the prospective client and the lawyer's client give their informed consent, confirmed in writing. As noted earlier, consent in this scenario can be a "tough sell" depending on the sensitivity of the information involved and a prospective client is under no legal obligation to consent. (By contrast, Comment 5 to RPC

1.18 makes the point that if the consulted lawyer obtained no "significantly harmful" information, that lawyer is not precluded from taking on the other side of the matter involved.)

A law firm lawyer's conflict in this scenario is imputed to the lawyer's firm as a whole under RPC 1.18(c).[17] Other lawyers at the firm can, nonetheless, represent someone adverse to the prospective client in the same or a substantially related matter if, under RPC 1.18(d)(2), the lawyer consulted by the prospective client "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client[,]" the consulted lawyer is timely screened from the matter involved, and written notice is "promptly" given to the prospective client.

Screening in this scenario is similar to the more familiar lateral-hire context and generally means that the firm is taking reasonable measures appropriate to firm size and practice to ensure that the consulted lawyer plays no role in the matter involved.[18]

A much more nuanced—and inherently fact-specific—question, however, is whether the consulted lawyer took "reasonable measures to avoid exposure to more disqualifying information than was necessary[.]" If the consulted lawyer did,

then screening is available. If not, then screening doesn't prevent the conflict from being imputed to the entire firm and the firm would need to rely on consent instead (which, as noted, is usually unlikely). ABA Formal Opinion 510 (2024) offers a necessarily imperfect gauge based on Comment 4 to the Model Rule on which its Washington counterpart is patterned:

> Once a lawyer has sufficient information to decide whether to represent the prospective client, further inquiry may be permissible, but it will no longer be "necessary." That means once a lawyer has decided there is any basis on which the lawyer would or must decline the representation, stopping inquiry on all subjects would place the lawyer in the best position to avoid potential imputation of a conflict to other lawyers in the firm.

ABOUT THE AUTHOR

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[1] *Roche v. Madar*, 104 Wn. 21, 26, 175 P. 314 (1918), *aff'd on reh'g en banc*, 181 P. 857 (1919).

[2] *See generally Barton v. U.S. Dist. Court for Central Dist. of Cal.,* 410 F.3d 1104, 1111 (9th Cir. 2005) (discussing privilege applicable to prospective clients).

[3] The ABA earlier had adopted an ethics opinion—Formal Opinion 90-358 (1990)—addressing the protection of confidential information received from prospective clients. For an early Washington application of this principle, *see In re Morales*, WSBA Disciplinary Bd., Aug. 19, 1997 (censuring lawyer for disclosing "potential" client's confidential information) (available in WSBA disciplinary notice database at https://www.mywsba.org/PersonifyEbusiness/DisciplineNoticeDirectory/DisciplineNoticeDetail.aspx?dID=276).

[4] *See* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 397-406 (2013).

[5] *See* Washington Supreme Court Orders 25700-A-851 (July 10, 2006) (adopting rule), 25700-A-1146 (June 2, 2016) (amending rule); *see also* Washington Supreme Court Order 25700-A-1096 (Mar. 23, 2015) (adding references to limited license legal technicians); *see generally* WSBA, *Reporter's Explanatory Memorandum to Ethics 2003 Committee's Proposed Rules of Professional Conduct* 172-73 (2004) (surveying adoption of the rule and Washington modifications); Thomas R. Andrews, *The Law of Lawyering in Washington* 7-128 through 7-132 (2012) (same).

[6] *See also* Washington RPC 1.10, cmt. 11 (addressing conflicts imputed to a law firm through nonlawyer staff); ABA Formal Op. 506 (2023) (discussing the role of and lawyer responsibility for nonlawyer staff who assist with client intake); ABA Formal Op. 512 at 6 (2024) (noting that the duty of confidentiality under Model Rule 1.18(b) extends to the use of artificial intelligence tools with prospective clients).

[7] *See, e.g., In re Collins*, WSBA Disciplinary Bd. No. 20-00030, Order on Stipulation, June 18, 2020 (imposing stipulated discipline where lawyer obtained confidential information from prospective client before running a conflict check and learning of conflict with current client that required withdrawal).

[8] *See, e.g., Kitchen Cabinet Manufacturers Association v. AAA Cabinets & Millworks, Inc.*, 2020 WL 13505052 (E.D. Wash. Feb. 12, 2020) (unpublished) (disqualification motion, although ultimately denied, focused on fact law firm lawyer began discussing matter with prospective client without running conflict check and then learned later that another firm lawyer had already been contacted by opposing party).

[9] Comment 4 to RPC 1.18 notes that once a lawyer learns of a conflict, the lawyer should inform the prospective client and either decline the representation or obtain necessary waivers.

[10] As of this writing, the online disciplinary notice database on the WSBA website lists two lawyers who have been disciplined under RPC 1.18.

[11] *See generally* ABA, *Annotated Model Rules of Professional Conduct* 341-351 (10th ed. 2023) (*Annotated Model Rules*) (surveying decisions nationally). On a related point, an attorney-client relationship is generally required in Washington to support a legal malpractice claim. *See Hizey v. Carpenter,* 119 Wn.2d 251, 260, 830 P.2d 646 (1992) (elements of legal malpractice claim). The Supreme Court, however, has permitted general negligence claims against nonlawyers for flawed legal advice. *See Jones v. Allstate Ins. Co.,* 146 Wn.2d 291, 306, 45 P.3d 1068 (2002) (permitting negligence claim by insureds against insurer for allegedly defective legal advice by claims adjuster). For a case noting, but not resolving, the basis of legal liability of a law firm to a prospective client for allegedly deficient legal advice, *see Eakin Enterprises, Inc. v. Stratton Ballew, PLLC*, 2020 WL 1649806 (Wn. App. Mar. 24, 2020) (unpublished).

[12] Comment 2 notes that a person who communicates with a lawyer for the sole purpose of disqualifying the lawyer is not a "prospective client." This practice is known colloquially as "taint shopping." *See* Sylvia Stevens, *Effective Use of RPC 1.18*, 70 Or. St. B. Bull. 9 (Feb./Mar. 2010) (noting practice and the term).

[13] *See also* WSBA Advisory Op. 2080 (2006) (analyzing communications through a law firm's web site).

[14] Regionally, the Oregon Supreme Court in *In re Knappenberger*, 108 P.3d 1161 (Or. 2005), held that a two-hour paid consultation in a family law matter that did not result in a further representation should be analyzed under the former client conflict rule rather than the prospective client rule. A bankruptcy court in Idaho under similar circumstances held that a paid consultation was governed by the prospective client rule in *In re Hodge*, 2021 WL 961068 (Bankr. D. Idaho Mar. 9, 2021) (unpublished). For a national survey on this point, *see Annotated Model Rules*, *supra*, at 344. Comment 11 to RPC 1.18 notes that "[t]his Rule is not intended to modify exising case law defining when a client-lawyer relationship is formed" and cites the leading case in Washington on defining attorney-client relationships: *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992).

[15] *See generally* ABA Formal Op. 479 (2017) (addressing the "generally known" exception).

[16] ABA Formal Op. 492, *supra*, at 6; *see, e.g., Goldmanis v. Insinger*, 2014 WL 3739430 (W.D. Wash. July 29, 2014) (unpublished) (examining the concept of "significantly harmful" information under RPC 1.18); *Collins v. Nova Association Management Partners LLC*, 2021 WL 2184879 (W.D. Wash. May 28, 2021) (unpublished) (same).

[17] *See also* RPC 1.18, cmt. 7 (noting that the conflict is also imputed under RPC 1.10).

[18] *See* RPC 1.0A(k) (defining "screened"); WSBA, *Legal Ethics Deskbook* §6.3(3)(a) (2d ed. 2020) (outlining the mechanics of screening); *see also Jimenez v. Rivermark Community Credit Union,* 2015 WL 2239669 at *6 (D. Or. May 12, 2015) (unpublished) (surveying cases nationally on the timeliness of screening in this context).