July 24, 2020

Lawyers Owe Duties To Prospective Clients, Too

Brian Cohen

Novack and Macey LLP

Picking up the phone and hearing the voice of a prospective client on the other end of the line can be one of the most exciting experiences for lawyers eager to grow their business. But when fielding these calls, lawyers must be mindful that they owe duties not only to actual clients, but to *prospective* clients as well. Model Rule 1.18 – and its various state law counterparts, including Illinois Rule of Professional Conduct 1.18 – lays out these duties and, depending on the depth and substance of the information discussed between the prospective client and the attorney, can preclude an attorney from representing another party with interests adverse to the one who called. Last week, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 492 which highlights many of the pitfalls these intake calls can create for attorneys.

Section (c) of Model Rule 1.18 is where the rubber hits the road. A lawyer who has consulted with a prospective client about a potential attorney-client relationship:

> shall not represent a client with interests materially adverse to those of [the] 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[.]

Formal Opinion 492 emphasizes the Rule's "significantly harmful" language. Simply learning *some* information from the prospective client is not, by itself, a sufficient basis to disqualify the lawyer from later representing another client in a related matter. But if the prospective client and lawyer discuss information that could potentially and significantly be harmful to the potential client's interests, the Rule applies and bars the lawyer's subsequent representation of the different party.

The Northern District of Illinois discussed Rule 1.18's "significantly harmful" standard in *Dahleh v. Mustafa*, No. 17 C 8005, 2018 WL 1167675 (N.D. Ill. Mar. 5, 2018). In that case, the lawyer had

met with Mustafa for about an hour, during which they generally discussed the case and she showed the lawyer some documents. Mustafa did not end up hiring the attorney, but when Dahleh later did, Mustafa moved to disqualify. The court found that Mustafa qualified as a prospective client under Rule 1.18, but failed to demonstrate that the lawyer received information that could be significantly harmful to Mustafa's case.

The Northern District of New York reached the opposite conclusion in *Zalewski v. Shelroc Homes, LLC*, 856 F. Supp. 2d 426 (N.D.N.Y. 2012), where the court granted a motion to disqualify an attorney pursuant to Rule 1.18. The Court found that the prospective client had shared "what they would consider to be a reasonable settlement, solicited his views on what would be a reasonable settlement, and gave the reasons why they were prepared to move settlement in a particular direction," and that such information in the possession of their opponent's counsel could be significantly harmful to the prospective client.

Lawyers hoping to keep their options open should keep a few things in mind to avoid a potential disqualification down the road. Rule 1.18(d)(1) permits a lawyer who has learned significantly harmful information from a perspective client to continue his representation of an adverse client if both the "affected client and the prospective client have given informed consent." But practically speaking, it may be awkward for an attorney to ask a prospective client to "consent" to the lawyer's later representation of an adverse party if the prospective client does not end up hiring the lawyer.

A lawyer's best defense might be to keep the level of discussion with prospective clients at a high level until the lawyer is formally retained. Formal Opinion 492 notes that whether information is significantly harmful depends on "the duration of the discussion, the topics discussed, whether the lawyer reviewed documents, and whether the information conveyed is known by other parties[.]" Taking and maintaining accurate notes and records of intake calls can help lawyers defend themselves if they later find themselves faced with a Rule 1.18 motion to disqualify.

Lawyers hoping to be retained by a client are probably not thinking about whether they may one day be asked to represent another party in a related matter. But it would only take one granted motion to disqualify in order for those same lawyers to wish that they had.

LATEST POSTS

- **Lawyers Owe Duties To Prospective Clients, Too**