

LAWYER DISQUALIFICATION AFTER INITIAL CONSULTATION

By Thomas K. Byerley

Many lawyers are presented with difficult disqualification issues when the lawyer briefly consults with one party, is not retained, and then an opposing party seeks to retain the lawyer for the litigation. This conflict of interest issue arises frequently in domestic relations matters, but also presents itself in other types of cases.

When does the attorney-client relationship begin? Put another way, when is a "client" really a "client" for conflict of interest purposes? Does a brief conversation with an individual prevent the lawyer from representing the opposing party in litigation?

In ethics opinion RI-48, the ethics committee was presented with a factual situation where Lawyer A was consulted by a wife regarding possible representation in a divorce action. After a lengthy discussion about the case, the wife decided not to retain Lawyer A. No fee was charged for the consultation. Lawyer A made no notes of the meeting and had no recollection of the conversation at the meeting. Ten months later, Lawyer B, another member of Lawyer A's firm, was approached by the husband of the woman who had consulted Lawyer A. Lawyer B asked the ethics committee whether it was ethical for Lawyer B to represent the husband.

The relevant ethics rules use the term "client" in defining conflict of interest. MRPC 1.9 states:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Therefore, if the first person is defined as a "client," Lawyer A would be prohibited from later representing another party in the same matter. Under MRPC 1.10(a), other members of Lawyer A's firm would be similarly disqualified.

Defining when an individual becomes a "client" is therefore critical. In *The Law of Lawyering*, Prentice-Hall, authors Hazard and Hodes stated:

Whether a client-lawyer relationship was established may depend on how specifically the case was discussed during consultation. If confidences were imparted in good faith, a client-lawyer relationship existed for purposes of applying Rule 1.9. pp. 179-180.

After closely examining the facts posed to the Ethics Committee, the committee offered the following guidance in ethics opinion RI-48 on how MRPC 1.9 should be applied:

The three criteria to be examined in applying MRPC 1.9 are: (1) is the new representation materially adverse to the interest of a former client, (2) is the new representation the "same or substantially related" to the representation of the former client, and (3) could confidential information gained in the former representation be used to the disadvantage of the former client?

Using this standard, the committee opined that since the initial consultation was extensive, it was possible that the confiden-

tial information gained in that consultation could be used to the disadvantage of the former client. For this reason, the committee opined that the lawyer and other members of his firm had a duty to decline the representation of the husband.

When the initial discussion is briefer, the same result may not apply. In RI-154, the Ethics Committee opined that a client-lawyer relationship is not formed between a lawyer and a prospective client as the result of a brief consultation when the prospective client does not reveal any confidences or secrets in the course of the consultation. In that case, the law firm would be able to represent the opposing party in a lawsuit.

As stated in the Commentary to MRPC 1.0, "[m]ost of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so." Unfortunately, there is no bright-line test for when the client-lawyer relationship begins. The Commentary further points out that "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."

Sometimes, savvy clients will use the disqualification issue as a sword and will "consult" with a lawyer whom the client does not want to represent the opposing party, solely for the purpose of having the disqualification issue present itself.

To address these uncertainties and lack of clarity in the existing rules, the American Bar Association's Ethics 2000 Commission has issued a draft of a new proposed rule dealing with the "prospective client." Proposed Rule 1.18 states:

RULE 1.18: DUTIES TO A PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

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(b) Even 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.

(c) Neither a lawyer subject to paragraph (b) nor a lawyer to whom disqualification is imputed under Rule 1.10 shall 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).

(d) Representation is permissible if either:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the confidential information took reasonable steps to avoid exposure to more information than was necessary to determine whether to represent the prospective clients, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client."

Under this new proposed rule, a lawyer will have the same duty of confidentiality to a person who discusses with the lawyer the possibility of forming a client-lawyer relationship, as the lawyer does to clients. If the lawyer receives information from the prospective client that could be considered "significantly harmful," the lawyer will not be permitted to represent any clients against the prospective client in the matter about which the lawyer was consulted, absent consent. Other lawyers in the firm would be permitted to undertake the representation, as long as the personally disqualified lawyer is screened from any participation in the matter and apportioned no part of the fee.

Therefore, if Proposed Rule 1.18 is adopted, lawyers will be given a much more objective standard for disqualification based on consulting with prospective clients. Further, knowledgeable clients cannot affirmatively disqualify an entire firm by seeking an initial consultation where there is no intent to retain the lawyer consulted. However, until Michigan's rules are amended, a lawyer is left with the current standard of trying to define whether or not a "prospective client" meets Michigan's definition of "client" for conflict of interest purposes. ♦

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