

Welcome Guidance on a Lawyer's Duties to Prospective Clients

New Michigan Rule of Professional Conduct 1.18

By Edward J. Hood

For reasons personal¹ and professional, new Michigan Rule of Professional Conduct 1.18 is my favorite. The State Bar of Michigan Representative Assembly and the Michigan Supreme Court accepted suggestions from the SBM Professional Ethics Committee to import into the Michigan rules desirable elements of the American Bar Association Model Rules.² MRPC 1.18 further endeared itself to me by providing clearer guidance for navigating issues involving prospective clients.

What did we do without you?

Prospective client issues arise when a person has an initial consultation with, but does not retain, a lawyer. William Freivogel, a leading authority on conflicts of interest, notes that prior to the ABA's promulgation of Model Rule 1.18 in 2002, issues involving prospective clients were addressed in an "unsatisfactory patchwork" of cases and ethics opinions.³ Michigan authorities contributed their fair share to that patchwork — not that any of them were necessarily wrong.

Before MRPC 1.18, there was no "happy place" for solving these problems. At the time, rules were geared towards explaining a lawyer's duties in a full-fledged attorney-client relationship. As a result, Michigan authorities focused on whether an attorney-client relationship had been formed.

For example, Michigan ethics opinion RI-048 (May 11, 1990) dealt with a woman who had a lengthy consultation with a lawyer regarding potential divorce representation. She did not retain that attorney, but 10 months later, her husband met with another lawyer from that firm to represent him in the divorce. Now what?

While clear that no express relationship had been formed with the woman, the ethics committee quoted "The Law of Lawyering" by Geoffrey C. Hazard and W. William Hodes, who observed that 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."⁴ The committee concluded an attorney-client relationship had been formed, triggering the former client conflicts rule. The lawyer with whom the wife consulted had a conflict imputed to the entire firm under Rule 1.10, precluding representation of her husband.

In Michigan ethics opinion RI-154 (February 1, 1993), the committee reached a different result. There, a prospective client inquired whether a lawyer could represent him in connection with his employer's tax reimbursement policy. The lawyer was not hired. Three years later, the employer ap-

proached a different lawyer in the same firm regarding the same issue adverse to the employee who had consulted the firm. The committee opined that since the employee provided only general information in the initial consultation, no attorney-client relationship had been formed and the firm did not have a conflict of interest.

Before MRPC 1.18 was adopted, no reported Michigan cases appear to have dealt with the prospective client problem. Decisions in federal cases originating in Michigan, however, took a decidedly different path by recognizing that potential clients are entitled to protection based on implied and fiduciary relationship theories.

In *Banner v. City of Flint*,⁵ a city employee consulted with a lawyer regarding a potential employment claim. The lawyer told the prospective client she had no case but later subpoenaed the prospective client and elicited confidences at deposition to benefit the plaintiff, another client of the lawyer. The U.S. District Court for the Eastern District of Michigan struck the testimony, sanctioned the lawyer, and referred the matter to the Attorney Grievance Commission, reasoning that "obligations under the attorney-client privilege were undiminished by the fact that [the prospective client] had only a preliminary consultation and never formally retained [the lawyer]."⁶

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The lawyer had a duty to not reveal or force the prospective client to reveal privileged information without consent.⁷

The U.S. Court of Appeals for the Sixth Circuit affirmed the holdings, but the big takeaway was stated without citation: “When a potential client consults with an attorney, the consultation establishes a relationship akin to that of an attorney and existing client...”⁸ Later Sixth Circuit cases seized on that proposition to help solve prospective client issues, though not in a consistent way.

In *Factory Mutual Ins Co v. APCoPower, Inc.*,⁹ the U.S. District Court for the Western District of Michigan cited *Banner*’s “potential client consultation” principle but analyzed the prospective client issue by mixing and matching MRPC 1.9 and ABA Model Rule 1.18. The court observed that “[t]he primary difference between the rules is that representation is not barred by ABA Model Rule 1.18 unless ‘the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.’”¹⁰ The court concluded a conflict existed under the “significantly harmful” test under Model Rule 1.18 (though not in a way that complied with Model Rule 1.18).¹¹

Freivogel’s “unsatisfactory patchwork” was on full display in *McCool v. Operative Plasterers’ & Cement Masons’ Intern Ass’n*,¹² which involved a union business manager alleging employment discrimination. The manager contacted a lawyer whose firm represented the union and with whom he had dealt in his professional capacity. They briefly discussed a potential suit, but the manager later sued the union through a different lawyer. The manager sought to disqualify the union’s law firm because of the pre-suit discussion.

To its credit, the *McCool* court examined Michigan ethics opinions, federal cases test-

ing formation of attorney-client relationships, and *Banner* and its progeny. It concluded that disqualification was not warranted under any of the tests — a just result, but an odyssey to get there.

Rule 1.18 stops the madness!

Michigan’s adoption of MRPC 1.18 is a relief to lawyers and courts alike by providing direction in four steps:

1. It defines a “prospective client,”
2. It defines the lawyer’s duty of confidentiality to a prospective client,
3. It explains when a prospective client consultation results in a disqualifying conflict, and
4. It instructs a lawyer and/or law firm on how to resolve a disqualifying conflict.

Who is a “prospective client”?

MRPC 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.” The comments state that whether a consultation has occurred depends on the circumstances. Under the rule, a unilateral, uninvited communication by a person to the lawyer is not a consultation. On the other hand, if the lawyer has requested or invited the information, the communication may be protected. The information must be with respect to a matter and not a generalized inquiry about the lawyer’s willingness to represent a client in the future. The comments further clarify that the rule is no haven for those with bad strategic intentions: a person is not a prospective client

if the communication is for the purpose of disqualifying the lawyer.

What information must remain confidential?

A lawyer owes someone qualifying as a prospective client a duty of confidentiality; MRPC 1.18(b) borrows the lawyer’s duty of confidentiality applicable to former clients under MRPC 1.9. Lawyers have twin duties to refrain from using and revealing former clients’ information. MRPC 1.9(c)(1) prohibits lawyers from using “information relating to the representation to the disadvantage of the former client” except as may be allowed or required by MRPC 1.6 or MRPC 3.3. The duty not to reveal extends beyond that which may be disadvantageous to all “information relating to the representation” except that which “Rule 1.6 or Rule 3.3 would permit or require with respect to a client.”¹³ Thus, for confidentiality purposes, prospective clients have the same protections as former clients.

When is a lawyer disqualified from representing a client against a prospective client?

Again, Rule 1.18 borrows from Rule 1.9 to define when a lawyer may be disqualified from representation adverse to a prospective client. Rule 1.18(c) prohibits a lawyer from representing a client “with interests materially adverse to those of a prospective client in the same or a substantially related matter.” Those same terms are found in Rule 1.9(a) and (b), but (c) contains a unique qualifier — “if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter[.]”

Consequently, a lawyer may have a duty to not use or reveal information communicated by the prospective client but may not necessarily be disqualified from representing someone adverse to the prospective client. Disqualification occurs only when the lawyer received information that “could be significantly harmful” to the prospective client “in the matter.” Disqualification is imputed to other firm lawyers except as specified in Rule 1.18(d).

A lawyer is not disqualified for receiving information that “could be significantly harmful” but relates to a different matter undertaken against the prospective client. This reflects that the duty of loyalty to prospective clients is lighter than that owed to former clients under Rule 1.9, and much lighter than that owed to current clients under Rule 1.7.

How may an otherwise disqualified lawyer or firm undertake representation materially adverse to a prospective client?

If a lawyer receives disqualifying information from a prospective client, all may not be lost. Rule 1.18(d) allows the lawyer to proceed with representation adverse to the prospective client if both the prospective client and the affected client give “informed consent, confirmed in writing.” Note that Rule 1.18 expresses the requisite consents/waivers different from Rules 1.7 and 1.9, which require “consent after consultation.” Nevertheless, the concept of informed consent is the functional equivalent of consent after consultation — consultation denotes an exchange of information essential to making a decision.¹⁴ What is different altogether is MRPC 1.18’s requirement that consent be “confirmed in writing.” While committing waivers to writing is always a best practice, MRPC 1.7 and MRPC 1.9 do not require it.

Even if the prospective client is unwilling to consent to the disqualified lawyer’s adverse representation, MRPC 1.18 spares others in the firm from imputed disqualification on three conditions:

1. The disqualified lawyer “took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client.”
2. The disqualified lawyer is “timely screened.”
3. Written notice is “promptly given” to the prospective client.

Timely screening with prompt notice is a familiar concept; Michigan allows screening to avoid imputed disqualifications.¹⁵ Thus, multi-lawyer firms should already have

screening and notice protocols.¹⁶ The first condition is less familiar. When does the lawyer learn too much?

How Michigan courts address that issue remains to be seen, but some best practices exist. First, initial communication with a potential client should be limited to the names of the parties, type of matter, and other basic information needed to run a proper conflict check. Second, upon clearing conflicts, consider cautioning the potential clients (or even requiring a pre-consultation agreement) that any information they provide will not be kept confidential and, therefore, they should not provide anything more than very basic details about potential representation.¹⁷ Third, document details of the consultation and, if the representation does not proceed, confirm that the person did not engage the lawyer in the matter. Following these procedures gives lawyers a fighting chance in any dispute over what was or was not communicated in the consultation.¹⁸ ■



Edward J. Hood is a member and general counsel at Clark Hill. The opinions expressed in this article are his own and not necessarily those of Clark Hill. He thanks his colleagues on the Michigan Professional Ethics Committee and counsel at the State Bar of Michigan for their helpful insights and feedback.

ENDNOTES

1. As much as it is possible for an ethical rule to do so, MRPC 1.18 won my heart because it was adopted on my birthday and made effective on my wife’s birthday.
2. For example, in addition to the adoption of MRPC 1.18 and stylistic changes suggested by the Committee and submitted by the Representative Assembly, the Court amended MRPC 1.16(b) in 2018 to require that in order to effect discretionary withdrawal in a litigated matter a lawyer must apprise the client that the lawyer must obtain permission from the tribunal. RI-378 (February 22, 2019).
3. Freivogel *Initial Interview — Hearing Too Much*, Freivogel on Conflicts <<http://www.freivogelonconflicts.com/initialinterview.html>> [https://perma.cc/7N65-BEMN] (website accessed September 11, 2021). This excellent resource aggregates conflict of interest authorities and organizes them by issue.
4. Hazard & Hodes, *The Law of Lawyering: A Handbook on the Modern Rules of Professional Conduct* (New York: Prentice Hall, 1989), pp 179–180.

5. *Banner v City of Flint*, 136 F Supp 2d 678 (ED Mich, 2000).
6. *Id.* at 683.
7. These concepts are traceable to theories of implied and fiduciary relationships as recognized in such cases as *Kearns v Fred Lavery Porsche Audi Co*, 745 F2d 600, 603 (Fed Cir, 1984) and *Westinghouse Elec Corp v Kerr-McGee Corp*, 580 F2d 1311, 1319 (CA 7, 1978) (citing *McCormick’s Handbook of the Law of Evidence* (2d Ed), (St. Paul: West, 1972), p 179, “Communications in the course of preliminary discussion with a view to employing the lawyer are privileged though the employment is in the upshot not accepted”).
8. *Banner v City of Flint*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued April 8, 2004 (Case Nos. 01-1118, 01-1401, and 02-1297).
9. *Factory Mutual Insurance Co v APCoPower, Inc*, 662 F Supp 2d 896 (WD Mich, 2009).
10. *Id.* at 900.
11. *Id.* at 901–902. The court held that the defendant’s insurer gave “express or implied consent,” waiving the conflict. While this may pass muster under MRPC 1.9’s “consent after consultation,” it does not comport with Model Rule 1.18’s requirement of “informed consent, confirmed in writing.”
12. *McCool v Operative Plasterers’ & Cement Masons’ Intern Ass’n*, unpublished opinion of the United States District Court, for the Eastern District of Michigan, issued February 18, 2014 (Case No. 13-13614).
13. MRPC 1.9(c)(2).
14. MRPC 1.0.
15. The MRPC allow screening to avoid imputed disqualification due to conflicts created when lawyers change firms (MRPC 1.10(b)), lawyers move from government to private employment (MRPC 1.11(a)), and a judge or other adjudicative officer moves to private practice (MRPC 1.12(c)).
16. The MRPC do not define “screened.” ABA Model Rule 1.0(k) defines “screened” as “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” Those procedures should include restricting the screened lawyer’s access to paper and electronic files relating to the matter and prohibiting the screened lawyer from communicating with others about the matter. See also Davis & Downey, *Components of an Effective Ethical Screen*, Paragon Brokers, available at <<https://www.paragonbrokers.com/wp-content/uploads/2012/10/Components-of-an-Effective-Ethical-Screen-01-03-11.pdf>> [https://perma.cc/WV5SH-G483] (website accessed September 11, 2021).
17. While a buzzkill to some, such admonition or agreement is suggested by the comments and may be useful if the lawyer believes s/he is being interviewed as part of a so-called “beauty contest.”
18. ABA Formal Opinion 492 (June 9, 2020) provides additional helpful information on obligations to prospective clients.