

Practical Strategies for Conflicts Involving Prospective Clients

Article By:

Carole J. Buckner

Contacts with prospective clients may limit a lawyer's ability to represent other parties involved with a prospective client's matters. For example, a client might contact a lawyer and provide confidential information in order to disqualify the lawyer from representation of the client's adversary. But lawyers may take reasonable measures to limit consultations with prospective clients to preserve the ability to represent other parties in connection with the same or related matters. ABA Formal Opinion 510, issued in March 2024, provides excellent practical guidance to lawyers in handling consultations with prospective clients, and lays out multiple measures lawyers may take to limit the risk of disqualification based on such consultations.

MAINTAIN CONTROL OF THE CONSULTATION

During the pre-engagement consultation, the lawyer must exercise discretion and limit the information obtained from the prospective client to what is "reasonably necessary to determine whether to represent that prospective client," rather than having a "free flowing" conversation. If the lawyer instead elicits extensive information without an express waiver from the prospective client, the lawyer will not be able to preserve the opportunity to represent the opposing party in connection with the same or a substantially related matter.

Informed Written Consent

Lawyers may request a prospective client's informed written consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the same or a related matter, and may request the prospective client's consent to the lawyers' later use of the information received from the prospective client.

Cautionary Language

A lawyer also can caution the client against providing any "prejudicial" information. When engaging in a consultation with a prospective client, a lawyer can warn the prospective client to limit the information shared to only what is "reasonably necessary" for the lawyer and client to decide whether to move forward with the representation. Perhaps most necessary in this initial discussion is the lawyer's receipt of information needed to determine whether a conflict of interest exists, or

whether a conflict waiver would be required, including information regarding the identity of the parties, witnesses and counsel. Reconciling a conflict check may require additional information. Information relevant to the lawyer's business decision to take the case also may be "reasonably necessary," including the compensation, expenses and time frame, and whether the matter aligns with the lawyer's expertise

Modest Inquiry

When taking on a new representation, it is reasonably necessary to make some inquiry into the facts of the matter to determine whether the prospective claim is frivolous, which the ABA's recent opinion posits can be determined based on a "modest inquiry," rather than an "extensive inquiry." Although a further inquiry might be desirable to ascertain the likely success on the merits, or the likely damages, the opinion indicates that such an inquiry may not be reasonably necessary.

Further Determinations

An inquiry designed to determine whether the client's proposed course of conduct is criminal or fraudulent also would be reasonably necessary for the lawyer to determine whether to represent the client. Such an inquiry would include the identity of the client and nature of the requested legal services, relevant jurisdictions involved (for example, whether a jurisdiction is considered high risk for money laundering or terrorist financing), and the identities of those depositing funds with the lawyer.

Prospective clients may engage in detailed discussions with lawyers about possible representation in litigation or transactional matters, with lawyers providing strategic insight based on the lawyers' expertise. While this is permissible, such exchanges likely go beyond what is "reasonably necessary" for the lawyer to determine whether to engage in the representation and are more likely related to the prospective client's decision as to whether to engage the lawyer.

ADDITIONAL CONSIDERATIONS

A law firm may implement a "timely" screen of the lawyers involved in the consultation with a prospective client when the firm learns that Rule 1.18 is implicated. On this point, the guidance is very practical. Erecting a screen for every potential client is not necessary and would create an unreasonable burden, so the Opinion provides that doing so is not required. Instead, implementing a screen once the firm learns that Rule 1.18 is implicated will suffice. For example, screening the disqualified attorney who had the prior consultation once plaintiff's counsel notified defendant's counsel of the prior consultation satisfies the "timely" screening requirement. ABA Formal Opinion 510 provides important practical guidance lawyers can implement to limit the risk of later disqualification based on consultations with prospective clients.

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