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Cocktails & Conflicts

Ethical **questions** crop up at times when you least **expect** them.

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Here is a familiar story: An attorney, invited to a cocktail party, is introduced as a lawyer to other guests. Within minutes, the attorney is accosted for legal advice about problems perhaps well outside his or her expertise. (The same lawyer might also be approached for advice by family members or friends outside of the office.) There is far more at stake here than awkward social situations. Merely saying, "I'm sorry, I can't help you," is a safe answer, but it curtails the attorney's ability to make professional contacts and bring in new business. On the other hand, offering informal advice or improperly handling unsolicited requests can create undesired attorney-client relationships, conflicts of interest, or even a claim of malpractice.¹

This article addresses an attorney's ethical responsibilities in these all too common scenarios, and attempts to balance these competing concerns. There is more at issue than simply what the attorney does — everything can turn on what the client believes.

Obligations to Prospective Clients

The American Bar Association (ABA) added Rule 1.18 to the Model Rules of Professional Conduct to address the protection of confidential information gained before formation of an attorney-client relationship:

[e]ven 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...[and] shall not 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 matter²...

A "prospective client" is defined as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter."³ The Restatement (Third) of the Law Governing Lawyers similarly suggests that regardless of whether an attorney-client relationship ensues, a lawyer must not use any confidential information divulged in preliminary discussions with a prospective client.⁴

New York has not adopted the ABA Model Rules or Restatement provisions, making the obligations of a lawyer in this scenario more difficult to discern. New York's Code of Professional Responsibility provides that a lawyer shall not knowingly "[r]eveal a confidence or secret of a client" or "[u]se a confidence or secret of a client to the disadvantage of the client...[or to] the advantage of the lawyer or of a third person, unless the client consents after full disclosure."⁵

The New York code also provides that an attorney owes a continuing duty to former clients not to reveal "confidences" and "secrets" learned in the course of professional representation.⁶ On its face, this portion of the code does not apply to prospective clients.⁷ New York courts, however, have held that

some duty of confidentiality exists, even without an actual attorney-client relationship, because one ethical consideration directs the "preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer."⁸

As at least one court has suggested, an attorney may be subject to a disqualifying conflict if the attorney "receives confidential information from a person who, under the circumstances, has a right to believe that the attorney, as an attorney, will respect such confidences."⁹ Thus, the New York code acts to preserve a potential client's confidences when he consults with an attorney to obtain legal advice, even if no legal advice was actually rendered.¹⁰

Protecting Communications

Comments to other provisions of the Restatement recognize that a lawyer dealing with a prospective client "must have reasonable latitude" in gathering relevant information from a prospective client, without fear of disqualification, and that "[i]f learning such confidential information were thereby inevitably to prevent the lawyer...from representing the lawyer's other clients, the cost [of] considering whether to undertake a new matter would be excessive."¹¹ The Restatement thus struck a careful balance—affording prospective clients "some but not all of the protection afforded clients."¹²

The ABA places the burden on the attorney to limit disclosure of confidential information. Formal Opinion 90-358 obligates attorneys "to protect information imparted by a would-be client seeking to engage the lawyer's services even though no legal services are performed

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and the representation is declined.”¹³

The duty of confidentiality attaches, according to the ABA opinion, before an attorney-client bond has formed, “when the lawyer agrees to consider whether a client-lawyer relationship shall be established,”¹⁴ but generally permits the attorney to continue to represent or undertake representation of another client in the same or a related matter if the lawyer took adequate measures to limit the information initially imparted by the would-be client. Only if the information is crucial to the representation of an existing or new client in the same or related matter, must the lawyer withdraw or decline representation absent client consent.¹⁵

These considerations are helpful for a lawyer at a “beauty contest” (where corporations sample multiple law firms), with sophisticated legal consumers, and carefully structured initial consultations with explicit disclaimers or prior waivers of confidentiality. But an attorney approached for unsolicited advice at a cocktail party may not actively be seeking business, may

qualify a lawyer who received an entirely unsolicited communication “would transgress the boundaries of ethics or common sense.”¹⁹ Nonetheless, the committee concluded that the unsolicited information could be protected as a confidence under DR 4-101 because of New York’s strong policy of protecting pre-retention statements “made when a prospective client in good faith intends to employ a lawyer.”²⁰ The committee explained:

[W]e believe that prospective clients who approach lawyers in good faith for the purpose of seeking legal advice should not suffer even if they labor under the misapprehension that information unilaterally sent will be kept confidential. Although such a belief may be ill-conceived or even careless, unless the prospective client is specifically and conspicuously warned not to send such information, the information should not be turned against her. Indeed, we see no reason that the other client should be benefited by the

an attorney approached for advice may not be conflicted from representing an existing client who is adverse to the party-going prospective client, but may be restrained from sharing information disclosed in the conversation with an existing client and in most instances could not use the information against the prospective client in any substantially related matter.

The city bar left open the question of whether an adequate disclaimer from the attorney or firm—“one that prominently and specifically warns prospective clients not to [disclose] any confidential information... because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check”—“would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning.”²⁵ How such a warning might apply in an informal setting remains to be seen, but as set forth below, at least one bar committee’s analysis suggests that a lawyer should do so as quickly as possible.

If the **lawyer**, or his or her firm, is already **representing** a client adverse or potentially adverse to the would-be client, the potential **impact** in terms of conflicts, disqualification, or a lawsuit is enormous.

be unprepared for an initial consultation, and may be dealing with people not used to working with lawyers. Do the considerations and applicable ethical obligations change?

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (ABCNY) has issued an opinion stating that a law firm need not necessarily be disqualified from representing an existing client adverse to a prospective client who unilaterally transmits confidential information to the law firm.¹⁶ The committee noted that “in most circumstances, balancing the interest of the existing client against those of the would-be client demands that the representation of the existing client continue as long as the lawyer believes that the representation would not be materially limited and this belief is reasonable.”¹⁷

The city bar committee contrasted unsolicited receipt of information with a “beauty contest,” where the firm “has elected voluntarily to participate and is able to warn a potential client not to provide any information to the lawyer that the client considers confidential.”¹⁸

The city bar committee reasoned that to dis-

fortuitous circumstances that the lawyer approached by the prospective client turned out to be the same lawyer retained by the adverse party.²¹

The city bar committee expressly recognized the conflict with Model Rule 1.18, which specifically limits confidentiality protection to “prospective” clients “who actually discuss[] with a lawyer the possibility of forming an attorney-client relationship....”²² The committee noted the comments to the rule: “a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’ within the meaning of [Rule 1.18].”²³ The city bar committee nonetheless concluded that the “strong policy of encouraging clients to seek legal advice,” and the New York rule generally protecting pre-retention communications counseled in favor of protecting the information, particularly since there was no warning against disclosing confidential information.²⁴

Thus, attorneys should be wary of relying solely on the Model Rule. At a cocktail party,

Avoiding (Mis)perception

What then, should a lawyer do when the would-be client approaches? If that person perceives an attorney-client relationship, even if the lawyer did not render any legal advice, the lawyer’s duties to that individual may well become broader. Worse, if the lawyer, or his or her firm, is already representing a client adverse or potentially adverse to this person, the potential impact in terms of conflicts, disqualification, or a lawsuit is enormous.

A formal opinion of the State Bar of California Standing Committee on Professional Responsibility and Conduct provides some guidance on attorneys’ responsibilities in certain pre-retention scenarios.²⁶ The opinion focused on the conduct of the attorney: “If the attorney’s conduct, in light of the surrounding circumstances, implies a willingness to be consulted, then the speaker may be found to have a reasonable belief that he is consulting the attorney in the attorney’s professional capacity.”²⁷

The opinion suggested that no duty of confidentiality would ensue if the lawyer “unequivocally explains to the speaker that he cannot or will not represent him, either before the speaker has an opportunity to divulge any information or as soon as reasonably possible after it has become reasonably apparent that the speaker wants to consult with him” or the lawyer “has not, by his

prior words or conduct, created a reasonable expectation that he has agreed to a consultation.”²⁸ The possible lack of legal sophistication on the part of a potential client may have driven the results in the three scenarios the panel then considered.

The opinion first considered a complete stranger approaching a lawyer in the courthouse and blurting out confidential information. If the stranger did not give the lawyer a chance to speak, there could be no finding that the lawyer was willing to be consulted in his professional capacity. But if the lawyer followed the stranger to a quiet corner of the hallway, that conduct would be a factor supporting a conclusion that the lawyer and the stranger impliedly agreed to a consultation.²⁹ A wise lawyer in this situation would, at a minimum, advise the “client” not to provide any confidential information and explain that he could not take on a representation without checking conflicts first.

The opinion then analyzed a guest approaching the lawyer at a party after the host tells the guest that the lawyer is an attorney. The lawyer politely listens but as soon as the guest finishes speaking, says that he cannot provide advice. The opinion found that this social setting weighed against finding that the conversation amounted to a preliminary consultation. The lawyer did not appear to have a chance to head off the guest’s question, or to interpose any disclaimer at an earlier time. The crowded setting also weighed against the information being protected as a confidence or secret.

The panel suggested that a different result may attach if the host indicated the attorney’s specialty in the attorney’s presence (signaling that the guest wanted legal advice).³⁰ Here too, cautioning the “client” against disclosing anything confidential and explaining the need to check conflicts is a wise added layer of precaution.

In the opinion’s third scenario, a lawyer receives a phone call at home from his cousin, who describes a potential legal problem and asks for advice. The lawyer listens without interrupting, but then tells the cousin that he cannot represent him. In this situation, the familial relationship and call at home would not put the attorney on notice that the cousin was attempting to consult him in his professional capacity. If the cousin spoke quickly without permitting the lawyer to

interrupt, the cousin could not claim that the lawyer consented to a consultation.³¹ It would, of course, be anomalous for an attorney to have to meet a higher standard to avoid an attorney-client relationship with a family member.

Applying the opinion’s reasoning to another scenario illustrates just how difficult this issue can be. An attorney is attending his son’s parent-teacher night at school. The attorney/parent exchanges business cards with another parent who is an executive. That parent describes a potential acquisition to the lawyer to get a “take” on it. The lawyer asks the executive to call him at the office, hoping only to table the discussion temporarily.

Under the guidelines explained in the California bar opinion, and particularly if the executive viewed the discussion as a consultation, the lawyer is now probably unable to use any confidential information he may have picked up in the discussion, and may even run into disqualifying conflicts issues if it turns out his firm represents the target of the business deal or another interested party in the transaction. Even that much of a discussion, without a disclaimer, could create heightened duties.

Conclusion

Attorneys confronted with unsolicited requests for advice should tread carefully. At a minimum, the attorney should expressly limit the discussion to only such information as reasonably appears necessary for the purpose of ascertaining possible conflicts with existing clients and determining whether representation is appropriate and desirable for both parties. This may create an awkward social situation, but it is necessary protection for the attorney (and her firm) and the approaching party.

Failing to give such a warning may burden the attorney with duties and obligations that far outweigh the scope of the legal advice often sought in these settings: a duty of confidentiality, an unwanted attorney-client relationship, or even a disqualifying conflict of interest that could bar the attorney’s entire firm from work on even unrelated matters. •

1. See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693-94 (Minn. 1980) (Attorney liable for legal malpractice for negligently failing to notify prospective client of statute of limitations on her claim despite the lack of any subsequent retention or representation.).

2. American Bar Association Model Rules Prof’l Conduct R. 1.18(b) (2000).

3. ABA Model Rule 1.18(a).

4. Restatement §15(1)(a) and comment b, c. The Restatement also prohibits a lawyer from representing a client whose interests are materially adverse to those of a for-

mer prospective client in the same or a substantially related matter where the lawyer has “received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter....” Id. §15(2).

5. DR 4-101(B) [22 N.Y.C.R.R. §1200.19].

6. See *Carimati v. Carimati*, 94 A.D.2d 659 (1st Dept. 1983); DR 5-108 [22 N.Y.C.R.R. §1200.27].

7. A “confidence” is described as any “information protected by the attorney-client privilege under applicable law.” DR 4-101(A) [22 N.Y.C.R.R. §1200.19] The broader term “secret” refers to other information “gained in the professional relationship” and “that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” Id.

8. EC 4-1 [22 N.Y.C.R.R. §1200.20].

9. *Nichols v. Village Voice, Inc.*, 99 Misc.2d 822, 824 (Sup. Ct. New York Co. 1979). The establishment of an attorney-client relationship, or duty of confidentiality even in the absence of a formal relationship, is often a close issue turning on multiple factors, including: the depth of information disclosed by the prospective client; whether the information was confidential; and any steps the attorney took to prevent the disclosure of confidential information or inform the prospective client that no privilege would attach. See *New York Univ. v. Simon*, 130 Misc.2d 1019, (Sup. Ct. New York Co. 1985); compare *Seeley v. Seeley*, 129 A.D.2d 625 (2d Dept. 1987) with *Bauerle v. Bauerle*, 161 Misc.2d 973 (Sup. Ct. New York Co. 1994).

10. *Simon*, 130 Misc.2d at 1021.

11. Restatement §213, comment g(i); see also Report of the Committee on Professional Responsibility, Association of the Bar of the City of New York, “Ethical issues in Beauty Contests,” 48 The Record 1003; Charles W. Wolfram, “Modern Legal Ethics,” §7.1.6, at 237 (1986) (lawyer who in good faith acquires information necessary for conflict check should not be barred from representing present client adverse to inquiring prospective client).

12. Restatement §15, comment b. See Hazard, “The Would-Be Client,” The National Law Journal v.18, A.19 (Jan. 15, 1996) (noting the need for at least a basic exchange of information for conflict-checking and attorney selection).

13. ABA Formal Opinion 90-358, at 1 (Sept. 13, 1990).

14. Id. at 2.

15. Id. at 3-5.

16. NYC Bar Association Formal Opinion No. 2001-1 (March 1, 2001).

17. Id. at 2.

18. Id.

19. Id. at 3.

20. Id. at 4. See also *People v. Belge*, 59 A.D.2d 307, 308 (4th Dept. 1977); *Bennett Silvershein Assocs. v. Furman*, 776 F.Supp. 800, 803 (S.D.N.Y. 1991); McCormick, Evidence §88 (5th Ed. 1999) (“communications in the course of preliminary discussion with a view to employing the lawyer are privileged even though the employment is in the upshot not accepted”); Weinstein, Korn and Miller, New York Practice, ¶4503.12 (Matthew Bender & Co. 2000) (“Such information should be protected because frank disclosure is required before an intelligent decision on the retainer can be made.”); 8 Wigmore, EVIDENCE §2304 (McNaughton rev. 1961).

21. NYC Formal Opinion 2001-1, at 6.

22. ABA Model Rule 1.18(a)-(b).

23. ABA Model Rule 1.18, comment 2.

24. NYC Formal Opinion 2001-1, at 5.

25. Id.

26. See State Bar of California Formal Opinion No. 2003-161 (2003).

27. Id.

28. Id.

29. Id.

30. Id.

31. Id.

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