

Prospective Clients

By Sharon Weedin

When it goes into effect July 1, 2007, Supreme Court Rule 4-1.18 will be “new” to Missouri’s Rules of Professional Conduct. It is the first rule of professional conduct directed specifically to duties owed to prospective clients. While the rule itself will be new, its mission of avoiding conflicts of interest and disclosure of confidential information is not. Rule 4-1.18 reads as follows:

(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.

(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 4-1.9 would permit with respect to information of a former client.

(c) A lawyer subject to Rule 4-1.18(b) 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 matter, except as provided in Rule 4-1.18(d). If a lawyer is disqualified from representation

under Rule 4-1.18(c), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in Rule 4-1.18(d).

(d) When the lawyer has received disqualifying information as defined in Rule 4-1.18(c), representation is permissible if:

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

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client and the disqualified lawyer is timely screened from any participation in the matter.

Subpart (a)’s definition of “prospective client” should exclude from the rule’s purview those situations where an individual initiates a unilateral “sharing” of unsolicited information, typically not in an office setting, in hopes of receiving quick (and free) advice because such contacts are not generally in furtherance of forming a client-lawyer relationship. Subsection (b) prohibits the use or revelation of information obtained from a prospective client, except as Rule 4-1.9 (Conflict of Interest: Former Client) would permit (note that you must refer back to Rule 4-1.6 (Confidentiality of Information) to make

sense of 4-1.9(b)).

Subpart (c) proscribes representing a client whose interests are materially adverse to a prospective client’s in the same or a substantially related matter if the prospective client conveyed information to the lawyer that could be significantly harmful to the prospective client. In other words, unless the consultation with a prospective client is conducted in accordance with the rule, the lawyer risks disqualifying himself from another representation, even though the representation with the prospective client does not pan out.

Subpart (d) allows a representation otherwise prohibited under subpart (c) to go forward if the lawyer obtains written, informed consent (see Rule 4-1.0(b), (e), and (n) for definitions of “confirmed in writing,” “informed consent,” and “writing”) from both the prospective client and the client. The other exception allowing the representation to proceed would allow the disqualified lawyer’s firm to represent a client if the disqualified lawyer is screened from the representation, and if 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.” This exception is contrary to the general rule of imputed disqualification, i.e., the rule that if one lawyer in a practice group is disqualified from representing a client, then all the lawyers in the group are disqualified from doing so (although there are exceptions for lawyers moving be-

tween government and private employment – *see* Rule 4-1.11).

Examples of how the new rule might apply in particular situations follow.

Example A: Wife consults with Lawyer regarding her future, unannounced intention to file for dissolution. Lawyer declines the representation, but notifies Husband’s business partner of the consultation and provides enough information for the business partner to surmise what the consultation was about.

Analysis: Lawyer violated Rule 4-1.18(b) by revealing information relating to the proposed representation to the prospective client’s disadvantage (Rule 4-1.9(b)), when no Rule 4-1.6 exception (e.g., to prevent death or substantial bodily harm, or to comply with a court order) was present.

Example B: President of Company X meets with Lawyer about possibly representing X in proposed litigation. In a short meeting, which Lawyer has advised President is for the limited purpose of establishing enough information to run a conflicts check, Lawyer learns that X intends to bring a breach of contract suit against Company Y. Lawyer learns after

the consultation that one of his partners represents Y.

Analysis: Lawyer must decline representation of X (see Rules 4-1.7(a) and 4-1.10(a)), but his partner may continue to represent Y so long as Lawyer is timely screened from the representation (Rule 4-1.18(d)(2)).

Example C: Prospective client requests consultation with Lawyer regarding representation arising from a multiple party vehicular collision. When advised that only a short meeting to establish sufficient information to run a conflicts check will occur, prospective client insists that Lawyer provide him with a preliminary legal opinion about the prospective client’s legal options. Lawyer agrees to do so only if prospective client provides an informed written consent acknowledging the possibility that Lawyer may decline representing prospective client and may represent another individual involved in the accident. Lawyer subsequently declines to represent prospective client, but does represent another party involved in the collision, after obtaining that client’s informed written consent. **Analysis:** The subsequent representation is appropriate. Rule 4-

1.18(d)(1). Note that if the prospective client’s interests are not materially adverse to the client’s, and if the prospective client divulged no information that could be significantly harmful to prospective client, then informed, written consent from either prospective client or client is not necessary. Rule 4-1.18(c).

Lawyers would be well-advised to carefully limit initial consultations to gathering sufficient information to run a conflicts check. Lawyers may want to be very up front with prospective clients about the possibility that the lawyer may not agree to go forward with the representation, and indeed, may opt to represent someone else in the matter. As an antecedent to these words of advice, lawyers’ antennae should be alert to identifying what may later be characterized as a consultation with a prospective client. Informed written consent from all involved individuals would be enormously helpful in refuting future complaints.

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