

June 16, 2020

TO: Prospective Clients Rule Subcommittee (Claude Ducloux and Amy Bresnen)

FROM: Vincent R. Johnson

RE: Adding a "Duties to Prospective Client" Rule to the Texas Disciplinary Rules

In 2002, the ABA House of Delegates promulgated Model Rule 1.18, entitled "Duties to Prospective Client." That rule was based on § 15 of the *Restatement (Third) of the Law Governing Lawyers* (2000), which states that a lawyer owes a prospective client a duty to: protect confidential information; avoid adverse representation in a substantially related matter; safeguard property entrusted to the lawyer; and exercise care in giving preliminary advice.<sup>1</sup> The ABA made minor changes to Model Rule 1.18 in 2012. The current version of the rule is set forth in Appendix A (page 1).

A vast majority of states have adopted a prospective client rule based on Model Rule 1.18, often in terms identical to the ABA language (e.g., AK, DE, IN, IA, KS, KY, LA, ME, MA, MI, NE, OK, RI, SD, UT, WV, WI). State variations are shown in Appendix A (pages 2-9). There is a high degree of consensus that a rule addressing the duties owed by lawyers to prospective clients is an appropriate, if not essential, component of a state ethics code.

Texas is one of only five states that have not adopted any disciplinary rule on duties to prospective clients (AL, GA, MS, TX, and VA). Yet questions about the duties owed by Texas lawyers to prospective clients have long confronted members of the bar.<sup>2</sup> A proposed rule on the duties owed by lawyers to prospective clients was defeated in the failed 2011 State Bar Referendum. See Appendix B.

I recommend that we propose the adoption of a rule patterned as closely as possible on ABA Model Rule 1.18. The reason for taking this approach is that the ABA Model Rule is what has been taught in law schools and tested on the Multistate Professional Responsibility Examination for nearly a full generation. Unless there is good reason for variation, we should minimize confusion about whether Texas differs from the Model Rule.

The following paragraphs shows in redlined format how I would propose to change Model Rule 1.18 for addition to the Texas Rules (presumably as Texas Disciplinary Rule 1.18):

Rule 1.18 Duties to Prospective Client

(a) A person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information, except ~~as Rule 1.9 would permit with respect to information of a former client~~ as these Rules would permit or require with

<sup>1</sup> GEOFFREY HAZARD, *et al.*, THE LAW OF LAWYERING § 23.02 (4<sup>th</sup> ed., 2017 Supp.).

<sup>2</sup> See, e.g., Texas Ethics Opinion 463 (1989) ("No provision of the Texas Code of Professional Responsibility prevents an attorney from using for the benefit of his client information obtained from a prospective client that is neither confidential nor secret.").

respect to a client, or if the information has become generally known or would not be disadvantageous to the former prospective client.<sup>3</sup>

(c) A lawyer subject to paragraph (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 paragraph (d). If a lawyer is disqualified from representation under this paragraph, 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 paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (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

(i) the disqualified lawyer is timely screened from any participation in the matter and is not directly apportioned any ~~no~~ part of the fee therefrom; and

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

## Comment

### *Client-Lawyer Relationship*

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

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<sup>3</sup> The reference in Model Rule 1.18(b) to Model Rule 1.9 provides an easy cross-reference to language in the "Duties to Former Clients" rule, which states:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

However, there is no similar language in the parallel Texas rule (Rule 1.09, Conflict of Interest: Former Client). Therefore, the substance of the cross-reference in Model Rule 1.18 has been written into the text of the proposed Texas Rule.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person 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, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." A person who communicates information to a lawyer for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation is not a "prospective client" within the meaning of this Rule.<sup>4</sup>

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9 with limited exceptions, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.067, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

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<sup>4</sup> Similar to Nevada Rule 1.18(e).

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers ~~as provided in Rule 1.10~~, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. ~~See Rule 1.0(k) (requirements for screening procedures).~~ Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.01. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.145.