

### **Rule 1.18. DUTIES TO PROSPECTIVE CLIENT**

(a) A person who, in good faith, 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 1.6 would require or permit or as Rule 1.9 would permit with respect to information of a former client.

(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 apportioned no part of the fee therefrom; and

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

—Added June 17, 2009, eff. Sept. 1, 2009.

#### **Comment**

[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 discussions 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.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, such as through an unsolicited e-mail or other communication, 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 paragraph (a). A person who participates in an initial consultation, or communicates information, with the intent to disqualify a lawyer from representing a client with materially adverse interests is not acting in good faith and is not "a prospective client" entitled to the protections of paragraph (b) or (c) of this rule. A person's intent to disqualify may be inferred from the circumstances.

[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, 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 interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation 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 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations 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.

[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 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

### **Reporter's Notes — 2009 Amendment**

V.R.P.C. 1.18 is a new provision in the Vermont Rules of Professional Conduct. It adopts Model Rule 1.18, also a new provision, with the addition of "in good faith" in Rule 1.18(a) and language in Comment [2] taken from Pa. R.P.C. 1.18, Comment [2], to address the problem of the individual whose intent is to disqualify the lawyer from representing others in a matter.

The ABA Reporter's Explanation is as follows:

Rule 1.18 is a proposed new Rule in response to the Commission's concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. For the most part, the current Model Rules do not address that pre-retention period.

TEXT:

**1. Paragraph (a): Define prospective client**

Paragraph (a) defines the limited circumstances to which this Rule applies by defining who qualifies as a "prospective client [adding a Vermont requirement of good faith in seeking representation]."

**2. Paragraph (b): Duty of confidentiality owed prospective client**

Paragraph (b) identifies the duty to treat all communications with a prospective client as confidential. This obligation is a well-settled matter under the law of attorney-client privilege, and the fact that Model Rule 1.9 does not now technically cover these communications is an omission that this proposal corrects.

**3. Paragraph (c): Prohibit later representation adverse to prospective client**

Paragraph (c) extends the application of Rule 1.9 to prohibit representation adverse to the prospective client in the same or a substantially related matter. Unlike Rule 1.9, however, this Rule does so only if the lawyer received information from the prospective client that could be "significantly harmful" to that person in the later representation.

The prospective client situation justifies that different treatment because, prior to the representation decision, there is an inevitable period in which it is in the interest of the prospective client to share enough information with the lawyer to determine whether there is a conflict of interest or simple incompatibility. The lawyer may learn very early in the consultation, for example, that the party adverse to the prospective client is a client of the lawyer's firm. If the discussion stops before "significantly harmful"

information is shared, it seems that the law firm's regular client should not be denied counsel of its choice if a substantially related matter arises.

Paragraph (c) also extends the prohibition of this Rule to associated lawyers, except as provided in paragraph (d).

4. Paragraph (d)(1): Representation permitted with client consent

Paragraph (d)(1) makes clear that the prohibition imposed by this Rule can be waived with the informed consent, confirmed in writing, of both the former prospective client and the client on whose behalf the lawyer later plans to take action adverse to the former prospective client. The expression of this requirement is parallel to that in Rules 1.7 and 1.9.

5. Paragraph (d)(2): Screening lawyer who conferred with prospective client

In the event that "significantly harmful" information is revealed, paragraph (d)(2) provides that the lawyer who received the information may be screened from any involvement in the subsequent matter, and others in the law firm may represent the adverse party, but only if the personally disqualified lawyer acted reasonably in attempting to limit that lawyer's exposure to potentially harmful information.

**COMMENT:**

[1] This Comment highlights three ways in which lawyers may assume obligations to prospective clients: disclosure of information, taking possession of documents or property and giving legal advice. It also explains the inevitably tentative quality of the initial consultation and suggests the reason for giving prospective clients somewhat less than the protection offered former clients by Rule 1.9.

[2] This Comment explains that lawyers are not disqualified when a person unilaterally communicates information to the lawyer without any reasonable expectation that the lawyer will agree to discuss the possibility of forming a client-lawyer relationship [or approaches the lawyer with the intent to disqualify her or him from representing others].

[3] This Comment explains the lawyer's obligation to preserve confidences of the prospective client, no matter what right the lawyer or law firm may have to undertake later adverse representation.

[4] This Comment first explains that a lawyer should obtain only the information required to determine whether to undertake the representation. If a conflict of interest is found to exist, the lawyer should decline the representation or obtain the required consent from all affected clients.

[5] This Comment identifies consent in advance of the consultation as one way to avoid later concerns about adverse use of the information obtained. Such an option was expressly approved in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 90-358.

[6] This Comment reiterates the right of a lawyer to undertake representation adverse to a prospective client from whom no "significantly harmful" information was obtained.

[7] This Comment describes how the imputation otherwise required by paragraph (c) may be avoided by either obtaining the informed consent of the prospective and affected clients under paragraph (d)(1) or by screening under the conditions stated in paragraph (d)(2).

[8] This Comment addresses the requirements of paragraph (d)(2)(i) and (ii).

[9] This Comment is a cross-reference to existing Rules that deal with two of the three issues identified in Comment [1]. Any advice a lawyer gives must be competent under Rule 1.1, and Rule 1.15 requires a lawyer to care for property of "third persons," which would include prospective clients.