

2003 Formal Ethics Opinion 8

October 24, 2003

Duties to Prospective Clients

Proposed opinion interprets various provisions of Rule 1.18.

Inquiry #1:

Rule 1.18(d) of the Rules of Professional Conduct, adopted in 2003, states that "representation" of a client with interests materially adverse to those of a prospective client in the same or substantially related matter

is permissible if both the affected client and the prospective client have given informed consent in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

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

Does the definition of "representation" under Rule 1.18(d) include an initial consultation with a client?

Opinion #1:

Yes. The term "representation" in the above context includes not only services provided subsequent to the formation of an attorney-client relationship, but also any initial consultation for the purpose of establishing an attorney-client relationship. See Rule 1.18, cmt. [1].

Inquiry #2:

Rule 1.18(d)(2) requires that written notice be given promptly to the prospective client. What comprises sufficient written notice under Rule 1.18(d)(2)?

Opinion #2:

Written notice should be given as soon as practicable after the need for screening becomes apparent and before any confidential information is leaked, even inadvertently, to the other lawyers in the firm. The notice should include a description of the screened lawyer's prior representation and of the screening procedures employed. Rule 1.18, cmt. [8]. Such procedures may include the following: the screened lawyer will acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter; other lawyers in the firm will not communicate with the screened lawyer concerning the matter; the firm will employ special procedures to ensure the screened lawyer has no contact with other personnel, firm files, or other materials associated with the matter; and there will be periodic reminders of the screen to all members of the firm. Rule 1.0, cmt. [9].

Inquiry #3:

Lawyer conducts an initial consultation with Client 1 on January 1, 2002. Client 1 does not retain Lawyer for any further representation. On April 1, 2003, Client 2 calls Lawyer to seek an initial consultation in the same matter.

Which client is the "prospective client" and which is the "affected client?"

Opinion #3:

Client 1 is a former "prospective client" and Client 2 is an "affected client" under Rule 1.18(d).

Inquiry #4:

Assume the facts in Inquiry #3. Firm drafts the following policy to handle inquiries of this nature:

No such consultation from Client 2 will be accepted unless a period of no less than three months has elapsed between the date of the prior meeting with Client 1 and the telephone call of Client 2. At such time as a consultation with Client 2 and Lawyer is scheduled, a letter will be sent promptly to Client 2 stating that Lawyer conducted an initial consultation with Client 1 on January 1, 2002. As a result of the prior representation, if Client 2 chooses to continue with the initial consultation, Lawyer will be screened from any and all participation in the matter. "Screening" means that Lawyer will be locked out of all files and databases related to the matter and an internal memo will be immediately circulated advising all employees of the firm of the screen and requiring that no employee of the firm engage in any interaction with Lawyer on the matter.

Does this policy sufficiently address the requirements of Rule 1.18?

Opinion #4:

Rule 1.18 requires that written notice, as the type described above, be given to the former "prospective client" rather than the "affected client." In inquiry #3, the prospective client is Client 1, and the affected client is Client 2. Therefore, Client 1 must receive this notice before Lawyer proceeds with Client 2's consultation, presuming the conflict and need for screening are discovered at that time. It is not necessary to obtain Client 1's consent to the representation if Lawyer implements screening measures in a timely fashion.

See Opinion #2 for a description of effective screening techniques to include in the notice.