

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Obligations to Prospective Clients: Confidentiality, Conflicts and “Significantly Harmful” Information

A prospective client is a person who consults a lawyer about the possibility of forming a client-lawyer relationship. Model Rule 1.18 governs whether the consultation limits the lawyer or the lawyer’s firm from accepting a new client whose interests are materially adverse to the prospective client in a matter that is the same or substantially related to the subject of the consultation, even when no client-lawyer relationship results from the consultation. Under Model Rule 1.18 a lawyer is prohibited from accepting a new matter if the lawyer received information from the prospective client that could be significantly harmful to the prior prospective client in the new matter. Whether information learned by the lawyer could be significantly harmful is a fact-based inquiry depending on a variety of circumstances including the length of the consultation and the nature of the topics discussed. The inquiry does not require the prior prospective client to reveal confidential information. Further, even if the lawyer learned information that could be significantly harmful to the prior prospective client in the new matter, the lawyer’s firm can accept the new matter if the lawyer is screened from the new matter or the prospective client provides informed consent, as set forth in Model Rule 1.18(d)(1) and (2).¹

I. Introduction

Prospective clients often consult with a lawyer in anticipation of forming a client-lawyer relationship. These consultations give clients and lawyers an opportunity to get to know one another, to ascertain whether they will like working together, and to discuss preliminary matters like conflicts, fee arrangements, and the client’s legal needs. During these consultations it is likely that the prospective client will reveal information necessary for each to decide whether to proceed. Some of that information could create a conflict of interest that would prevent the lawyer from undertaking a future representation.

This opinion provides guidance on the types of information that could give rise to such disqualifying conflicts, what the prospective client should be asked to demonstrate in support of a claim that the lawyer has a conflict of interest in a subsequent matter, what precautions the lawyer and the lawyer’s firm might take to avoid receiving disqualifying information during an initial consultation with a prospective client, and how to minimize the consequences of receiving such information.²

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

² Unless otherwise indicated, “prospective client” (sometimes referred to in case law as a “former prospective client”) refers to an individual who has consulted with the lawyer about the possibility of forming a client-lawyer relationship with respect to a matter, but no client-lawyer relationship is subsequently established.

Prior to 2002, the Model Rules did not address obligations owed to individuals who consulted with a lawyer but never established a client-lawyer relationship with the lawyer.³ In 2002, as part of the Ethics 2000 amendments, the ABA adopted Model Rule 1.18, which establishes a lawyer's obligations to a "prospective client."⁴ Earlier, the ABA had provided guidance on ethical obligations to prospective clients in Formal Opinion 90-398 (1990).⁵

II. Analysis

A. Who is a "Prospective Client"?

Under Model Rule 1.18(a), a "prospective client" is "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter."⁶ Comment [2] to Model Rule 1.18 explains:

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.⁷

Comment [2] clarifies, however, that not every contact between a lawyer and an individual regarding legal services makes that individual a "prospective client:"

[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."

³ See, e.g., ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 (2013).

⁴ *Id.* at 397-406. The only change to Rule 1.18 after 2002 was made in 2012, when the word "consults" was substituted for "discusses" in Rule 1.18(a) and in the Comments. This was not intended as a substantive change. The amendment clarified that communications that could constitute a "discussion" or a "consultation" could be written, oral or electronic. See MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. [2] (2019) [hereinafter MODEL RULES]; ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 309 (9th ed. 2019).

⁵ See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990) ("Information imparted to a lawyer by a would-be client seeking legal representation is protected from revelation or use under Model Rule 1.6 even though the lawyer does not undertake representation of or perform legal work for the would-be client.").

⁶ MODEL RULES R. 1.18 (2019). As discussed below a client-lawyer relationship may be formed during the consultation. The lawyer should take the precautions discussed in this opinion to avoid that result if that is not the lawyer's intention.

⁷ MODEL RULES R. 1.18(b) cmt. [2].

Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client.”⁸

Thus, a person who communicates information unilaterally to a lawyer after reviewing the lawyer’s website or other advertising describing the lawyer’s education and experience does not *for that reason alone* become a “prospective client” within the meaning of Model Rule 1.18.⁹ Additionally, as the last sentence of Comment [2] notes, if the person consulting with the lawyer does not have a reasonable intent to retain the lawyer, but instead is merely attempting to disqualify the lawyer from representing anyone else in the matter, the person is not a “prospective client.”¹⁰

B. The Obligation to Protect Confidential Information

Model Rule 1.18(b) imposes a duty of confidentiality with respect to information learned during a consultation, even when no client-lawyer relationship ensues. It provides:

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.”¹¹

This duty includes protecting all information learned during the consultation, unless the lawyer has the informed consent of the prospective client to condition the consultation on the lawyer *not* maintaining the confidentiality of the information communicated. As stated by Comment [5] to Model Rule 1.18, “[a] lawyer may condition a consultation with a prospective

⁸ *Id.*

⁹ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010) (“not all initial communications from persons who wish to be prospective clients” result in such status); Ariz. State Bar, Advisory Op. 02-04 (2002) (no duty of confidentiality owed to person who unilaterally sends unsolicited information to a lawyer); Fla. Bar, Advisory Op. 07-3 (2009) (a person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information); San Diego County Bar Ass’n, Advisory Op. 2006-1 (2006) (no duty of confidentiality owed to someone who sends information to a lawyer after obtaining the email address of the lawyer from a state bar website); Va. State Bar Op. 1842 (2008) (lawyer has no duty of confidentiality to person who unilaterally transmits unsolicited information in voice mail or email); Wis. State Bar Prof’l Ethics Comm., Formal Op. EF-11-03 (2011) (person seeking representation who sends unsolicited confidential information through email to a lawyer does not thereby establish a client-lawyer relationship or a duty of confidentiality).

¹⁰ *Bernacki v. Bernacki*, 1 N.Y.S.3d 761, 764 (Sup. Ct. 2015) (husband in a divorce sent an email to his wife titled “Attorneys Which [sic] Whom I Have Sought Legal Advice” and then listed “twelve of the most experienced matrimonial attorneys in the county,” each of whom the husband asserted “would conflict themselves out” or be subject to disqualification); RESTATEMENT OF THE LAW (THIRD), THE LAW GOVERNING LAWYERS § 15 cmt. c [hereinafter RESTATEMENT THIRD] (“a tribunal may consider whether the prospective client disclosed confidential information to the lawyer for the purpose of preventing the lawyer or the lawyer’s firm from representing an adverse party rather than in a good faith endeavor to determine whether to retain the lawyer”).

¹¹ MODEL RULES R. 1.18(b). See also N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1 (2013) (discussing the scope of protected information under Rule 1.18(b)); D.C. Bar Op. 374 (2018) (information from prospective client is protected from disclosure to the same extent as client information is protected by D.C. Rule 1.6); RESTATEMENT THIRD, *supra* note 10, § 59 cmt. c (2000) (“Information acquired during the representation or before or after the representation is confidential so long as it is not generally known . . . and relates to the representation. Such information, for example, might be acquired by the lawyer in considering whether to undertake a representation.”).

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."¹² Model Rule 1.0(e) defines "informed consent."¹³

C. Disqualifying Conflicts Based on the Acquisition of "Significantly Harmful" Information

Model Rule 1.18(c) provides for potential disqualification arising out of the consultation:

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 . . .*¹⁴

The phrase "significantly harmful" qualifies the lawyer's duties toward prospective clients where no client-lawyer relationship is established and distinguishes these duties from duties owed to clients. Comment [1] explains:

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*.¹⁵

The notion that "prospective clients" receive "some but not all of the protections afforded clients" can be illustrated by comparing the application of Model Rule 1.9 with Model Rule 1.18 with respect to possible conflicts of interests. Under Model Rule 1.9, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client" unless certain conditions are met.¹⁶ As Comment [3] to Model Rule 1.9 explains, for former clients the question is whether confidential information *could have been* shared, not whether confidences were in fact shared, regardless of the harmful quality of the information. The Comment reads, in part,

¹² MODEL RULES R. 1.18 cmt. [5].

¹³ MODEL RULES R. 1.0(e).

¹⁴ MODEL RULES R. 1.18(c) (emphasis added).

¹⁵ MODEL RULES R. 1.18 cmt. [1] (emphasis added). *See also* Wis. State Bar Prof'l Ethics Comm., Formal Op. EI-10-03 (2011) (the "more lenient standard [in Rule 1.18] reflects the attenuated relationship with prospective clients"); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1, *supra* note 11 ("The 'significantly harmful' test makes the [Rule 1.18(c)] restriction less exacting than the corresponding restriction on representations that are materially adverse to a former client."). A person and a lawyer may, of course, have as many consultations and discussions as they mutually find beneficial in order to determine whether to enter into a client-lawyer relationship. In such circumstances, however, the lawyer is more likely to receive information that could be "significantly harmful" in a later representation adverse to the prospective client.

¹⁶ MODEL RULES R. 1.9(a).

A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in a subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and the information that would in ordinary practice be learned by a lawyer providing such services.¹⁷

A former client need not reveal confidential information to satisfy the “substantial relationship” test. “Matters are ‘substantially related’ for purposes of [Model Rule 1.9] if they involve the same transaction or legal dispute or *if there otherwise is a substantial risk* that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.”¹⁸ As described by Judge Posner in *Analytica v. NPD Research*:

[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is “substantially related,” which means: if the lawyer *could have obtained confidential information* in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client¹⁹

Model Rule 1.18 is different than Model Rule 1.9 because it imposes the additional requirement, not found in Model Rule 1.9, that the prospective client have communicated information that “could be significantly harmful” in a subsequent matter. As a result, the mere fact that a prospective client consulted with a lawyer in a substantially related matter is not sufficient, alone, to disqualify the lawyer from a later matter.²⁰ Nor is it sufficient to conclude that a conflict exists merely because a prospective client volunteers information to a lawyer because, as noted above, the unilateral transmission of information to a lawyer does not create a Model Rule 1.18 duty, nor will Model Rule 1.18 protect someone who contacts a lawyer with the intent to disqualify the lawyer from representing other parties in the matter.²¹

With respect to what must be shown to establish that a person is entitled to the protections of Model Rule 1.18, evidence beyond the mere fact of a consultation is generally required.²² The

¹⁷ MODEL RULES R. 1.9 cmt. [3]. See also N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 (“Under Rule 1.9(a), the bar against adverse representation is automatic; if the relevant parties’ interests are materially adverse and the matters are the same or substantially related, the bar applies whether or not the lawyer received any information, harmful or otherwise from the former client.”) (footnote omitted); *Analytica Inc. v. NPD Research*, 708 F.2d 1263, 1267 (7th Cir. 1983) (“If the ‘substantial relationship’ test applies . . . it is not appropriate for the court to inquire into whether actual confidences were disclosed [by the former client].”).

¹⁸ MODEL RULES R. 1.9 cmt. [3] (emphasis added).

¹⁹ *Analytica, Inc.*, 708 F.2d at 1266 (emphasis added).

²⁰ *Bernacki v. Bernacki*, 1 N.Y.S.3d 761, 764 (Sup. Ct. 2015) (prospective client’s “reference to the information as ‘confidential’ without more is insufficient”); RESTATEMENT THIRD, *supra* note 10, § 15, cmt. c (after a consultation with a prospective client, “a lawyer is not always prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter”).

²¹ See MODEL RULES R. 1.18 cmt. [2]. See also *supra* note 9 (collecting opinions).

²² See *Thomson v. Duker*, 346 S.W.3d 390, 396 (Mo. Ct. App. 2011) (Rule 1.18 requires “at least some disclosure, either by the objecting prospective client or by the lawyer, of the scope of information discussed” during the consultation) (cites omitted); RESTATEMENT THIRD, *supra* note 10, § 15(c) (the prospective client “bears the burden

fact that the prospective client must come forward with some evidence concerning the contents of the consultation with the lawyer does not mean, however, that the prospective client must disclose confidential information or detail the substance of the discussions. The cases and other authorities support the conclusion that only certain disclosures are required, for example, the date, duration and manner of communication (*i.e.*, in person, email, over the phone, etc.), and a summary description of the topics discussed.²³

With respect to the “significantly harmful” test, information disclosed by the person invoking the protection of Model Rule 1.18 need not demonstrate that the harm is certain to occur in order to demonstrate a conflict. Instead, the Model Rule addresses information that “could be significantly harmful,” a standard that “focuses on the *potential* use of the information.”²⁴ Post-hoc promises by the lawyer not to use the information do not change the standard from one of potential use or harm to a standard that requires actual use or harm.²⁵

Information that is typically viewed as “significantly harmful” includes, for instance, “views on various settlement issues including price and timing”; “personal accounts of each relevant event [and the prospective client’s] strategic thinking concerning how to manage the situation”; an “18-minute phone call” with a “prospective client-plaintiff [during which a firm] ‘had ‘outlined potential claims’” against defendant and “discussed specifics as to amount of money needed to settle the case”; and a presentation by a corporation seeking to bring an action of “the underlying facts and legal theories about its proposed lawsuit.”²⁶ Other recognized categories of significantly harmful information include: “sensitive personal information” in a divorce case; “premature possession of the prospective client’s financial information”; knowledge of “settlement position”; a “prospective client’s personal thoughts and impressions regarding the facts of the case and possible litigation strategies,”²⁷ and “the possible terms and structure of a proposed bid” by one corporation to acquire another.²⁸

of persuading the tribunal that the lawyer received information “that could be significantly harmful to the prospective client in the matter”); *but see* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457, *supra* note 9 (a lawyer’s website that “specifically encourages a website visitor to submit a personal inquiry about a proposed representation on a conveniently provided electronic form” may be deemed to invite the submission of confidential information and therefore provide information to the lawyer that could be “significantly harmful” to the prospective client in a subsequent adverse representation).

²³ The format could be similar to what is known as a “privilege log,” submitted to a court in connection with a claim of privilege. The information which is the subject of the privilege claim is not disclosed. Rather information sufficient to establish the claim of privilege is ordinarily all that is required. Federal Rule of Civil Procedure 26(b)(5) (requiring that privilege logs “describe the nature of the documents, communications, or tangible things not produced or disclosed --- and do so in a manner that, without revealing information itself privileged or protected will enable other parties to assess the claim [of privilege or other protection].” In appropriate instances, protected information can be disclosed to courts *in camera*. See *O Builders Associates, Inc. v. Yuna Corp.* of N.J., 19 A.3d 966, 978 (N.J. 2011) (“the parties may protect the confidentiality of their information by, among other means, requesting that the record be subject to a protective order . . . and the movant may further request that the application be considered *in camera*”) (cites omitted); *Keith v. Keith*, 140 So.3d 1202, 1211-1212 (La. Ct. App. 2014) (discussing the use of *in camera* proceedings in Rule 1.18 decisions).

²⁴ N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 (emphasis in original).

²⁵ *Id.*

²⁶ *Id.* at 8, note 9 (cites omitted).

²⁷ Wis. State Bar Prof’l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 4-5 (cites omitted).

²⁸ See N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at 7 (discussion of “Scenario 3”).

The Restatement also offers helpful guidance. Section 15(2) of the Restatement provides for disqualification of a lawyer who, in discussing “the possibility of . . . forming a client-lawyer relationship” received “from the prospective client confidential information that could be significantly harmful to the prospective client” in a matter.”²⁹ Further, in the words of the North Dakota Supreme Court:

Information may be “significantly harmful” if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; or if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies or potential weakness. “Significantly harmful” may also be the premature possession of information that could have a substantial impact on settlement proposals and trial strategy; the personal thoughts and impression about the facts of the case; or information that is extensive, critical, or of significant use.³⁰

As an illustration, the Restatement discusses an initial meeting between a lawyer and a prospective client seeking a divorce. The prospective client and the lawyer have an hour-long conversation in which they discuss the prospective client’s “reasons for seeking a divorce and the nature and extent of his and Spouse’s property interests.” The prospective client decides not to retain the lawyer because “the suggested fee [is] too high.” Thereafter, the spouse seeks to hire the lawyer. The Restatement concludes that the lawyer received “significantly harmful information” from the prospective client and cannot represent the opposing spouse.³¹

On the other hand, and as the New Jersey Supreme Court explained in *O Builders & Associates v. Yuna Corp.*, “significantly harmful” information under Rule 1.18 “cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a determination that is exquisitely fact-sensitive and -specific.”³²

So, for example, information that causes embarrassment or inconvenience “does not seem to be ‘significant’” while information relating to “[c]ivil or criminal liability would seem to easily

²⁹ RESTATEMENT THIRD, *supra* note 10, § 15 (2000). The language “information that could be significantly harmful to that person” in Rule 1.18(c) tracks the Restatement’s language.

³⁰ *Kuntz v. Disciplinary Bd. of Supreme Court of North Dakota*, 869 N.W.2d 117, 125 (N.D. 2015) (comparing duties under North Dakota Rule 1.18 with duties under North Dakota Rule 1.9, which are analogous to the corresponding Model Rules) (cites omitted). *See also In re Carpenter*, 863 N.W.2d 223 (N.D. 2015) ([a] lawyer can also violate Rule 1.18(b) if the lawyer misuses information gathered in connection with a consultation with a prospective client; discipline imposed for using information about owners of mineral rights learned as part of a consultation with a prospective client for the benefit of a subsequent client in a substantially related matter).

³¹ RESTATEMENT THIRD, *supra* note 10, § 15(2), at 142 (2000). *See also Sturdivant v. Sturdivant*, 241 S.W.3d 740, 742 (Ark. 2006) (prospective client provided “significantly harmful information” when he told divorce attorney “everything he knew regarding the children and his concerns about his former wife”). *See also* Wis. State Bar Prof’l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 4-5 (collecting cases); N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at note 9 (collecting cases).

³² *O Builders Associates, Inc. v. Yuna Corp. of N.J.*, 19 A.3d 966, 978 (N.J. 2011) (cites omitted). *See also Kuntz*, 869 N.W.2d at 125.

qualify.”³³ Specific instances in which information was deemed *not* to be “significantly harmful” include: a lawyer who “avoided learning the details of the case in half-hour consultation”; a brief consultation that occurred ten years earlier and concerned a “tenuously related matter”; and a one-day “beauty contest” consultation where the prospective client’s in-house lawyer “regulated disclosures and there was no showing that confidential information disclosed could be detrimental to client.”³⁴

Context is important. In *Marriage of Perry*, for instance, the court concluded that information had been disclosed during the consultation but did not disqualify the lawyer pursuant to Montana’s Rule 1.18 because the prospective client “did not establish that any information [she disclosed to the challenged counsel] in telephone calls several years earlier could have any impact on the proceeding, particularly since [the challenged counsel] “was not associated as counsel until three years into the proceeding, by which time substantially more information had been disclosed.”³⁵ Further, information that may be on its face “significantly harmful,” may not be such if the court determines that it was generally known by the parties.³⁶

D. Limiting Information During an Initial Consultation and Avoiding Imputation of Conflicts.

In order to avoid receiving “significantly harmful information” from a prospective client, lawyers should warn prospective clients against disclosing detailed information. Comment [4] to Model Rule 1.18 states that a lawyer “should limit the initial consultation [with a prospective client] to only such information as reasonably appears necessary” for the purpose of “considering whether or not to undertake a new matter.”³⁷ This caution, however, is not intended to discourage lawyers from engaging in a thorough discussion with prospective clients in order to ascertain whether the lawyer wants to take on the representation. It is simply a reminder that the more information learned in a consultation, the more likely that the lawyer may be precluded from representing other parties in a substantially related matter. Comment [5] provides that 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.”³⁸ If an agreement between the lawyer and the prospective client “*expressly*

³³ John M. Burman, *Waiving a Conflict of Interest and Revoking That Waiver Part III – Conflicts Involving Prospective and Former Clients*, 34 WYO. LAW. 45, note 53 (2011) (emphasis added).

³⁴ RESTATEMENT THIRD, *supra* note 10, § 15 cmt. c, Reporters Note (cites omitted).

³⁵ *Marriage of Perry*, 293 P.3d 170, 176 (Mont. 2013) *but see* Wis. State Bar Prof’l Ethics Comm., Formal Op. EI-10-03, *supra* note 15 (“the fact that information may be discoverable at some point in current or future litigation, does not by itself mean that the information should not be considered significantly harmful. [It] may be a factor in the analysis, but is not . . . determinative.”).

³⁶ *Mayers v. Stone Castle Partners*, 1 N.Y.S.3d 58, 62 (1st Dept. 2015) (information not significantly harmful because it was generally known, the adversary was aware of some of the details of the relevant transaction, and the motion to disqualify opposing counsel was made “a year into the litigation”).

³⁷ MODEL RULES R. 1.18 cmt. [4].

³⁸ MODEL RULES R. 1.18 cmt. [5]. With prospective clients who are inexperienced in legal matters, the burden will be on the lawyer to demonstrate that the discussions conformed to the agreed limitations or that the prospective client provided informed consent to the use of the information provided during the consultation. How the lawyer meets this burden depends on the circumstances. N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11 (“the adequacy [of the lawyer’s explanation and disclosure] will depend on the relevant facts, particularly the sophistication of the consenting party and [the party’s] familiarity with the retention of legal representation and

so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client."³⁹ This may include, for example, an explicit caution on a website intake link saying that sending information to the firm will not create a client-lawyer relationship and the information may not be kept privileged or confidential.

Once a lawyer receives confidential information from a prospective client that disqualifies the lawyer from future adverse representations imputation of the conflict to other lawyers in a firm may be avoided through screening, in some circumstances. Model Rule 1.18(d) reads:

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.⁴⁰

E. Resolving Disputes Related to “Significantly Harmful” Information

Finally, when the basic facts are contested, courts or disciplinary authorities may benefit from reviewing documents and/or holding a hearing to assess the facts and, if necessary, determine the credibility of the lawyer and of the person invoking Model Rule 1.18.⁴¹ However, evidentiary hearings may not be necessary and, when conducted, should avoid forcing the prospective client to reveal confidential information.⁴²

conflict waivers. For example, if the prospective client is an organization that frequently retains lawyers, particularly one with in-house legal advisors, it may need to be told little more than that the law firm would be free to use or reveal information received in the consultation or to represent others with materially adverse interests in the same or any related matter . . . in the event the organization does not retain the firm.”).

³⁹ MODEL RULES R. 1.18 cmt. [5] (emphasis added). *See also* N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 (noting that the consent must be informed and confirmed in writing and recommending other steps to ensure the effectiveness of the waiver); MODEL RULES R. 1.0 cmt. [6] (discussing how adequacy of disclosure and explanation by the lawyer may depend on the sophistication of the client); Wis. State Bar Prof’l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 6 (discussing how to avoid later disqualification through informed consent of the prospective client).

⁴⁰ MODEL RULES R. 1.18(d) (emphasis added). For the requirements of informed consent see Model Rule 1.0(e) and Comments [6] and [7] to Rule 1.0. Informed consent under Rule 1.18 may occur in different contexts. “Informed consent” may be obtained at the outset of a consultation containing a condition that any information provided by the prospective client “will not be disqualifying,” as set forth in Comment [5] to Model Rule 1.18. “Informed consent” may also allow a lawyer who has received “significantly harmful” information from a prospective client to represent an adverse party pursuant to Model Rule 1.18(d) above. In the former scenario, providing adequate disclosure at the outset of a consultation with a prospective client poses challenges for the lawyer who may not know much about the prospective client’s matter and may know even less about the opposing party’s potential claims.

⁴¹ *See, e.g.,* Marriage of Perry, 293 P.3d 170, 176-77 (Mont. 2013) (trial court held an evidentiary hearing and examined notes taken by the lawyer concerning the communications with the prospective client before ruling on whether “significantly harmful information” had been disclosed).

⁴² *See* Richman v. Eighth Judicial Dist. Court, No. 60676, 2013 WL 3357115 at *6 (Nev. May 31, 2013) (trial court did not abuse its discretion by ruling on affidavits and documents without an evidentiary hearing).

IV. Conclusion

A lawyer who receives information that “could be significantly harmful” from a prospective client and then represents a client in the same or a substantially related matter where that client’s interests are materially adverse to those of the prospective client violates Model Rule 1.18(c) unless the conflict is waived by the prospective client. Whether information that “could be significantly harmful” has been disclosed by a prospective client is a fact-specific inquiry and determined on a case-by-case basis. The test focuses on the potential harm in the new matter. The prospective client must provide some details about the time, manner and duration of communications with the lawyer and also some description of the topics discussed, but need not disclose the contents of the discussion or confidential information. Whether information conveyed is “significantly harmful” in the subsequent matter will depend on, for example, the duration of the discussion, the topics discussed, whether the lawyer reviewed documents, and whether the information conveyed is known by other parties, as well as the relationship between the information and the issues in the subsequent matter.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CHAIR: Barbara S. Gillers, New York, NY ■ Lonnie T. Brown, Athens, GA ■ Robert Hirshon, Ann Arbor, MI
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