ETHICAL DILEMMAS:
Minimizing Imputed Prospective-Client Conflicts

How can you prevent information from a prospective client – gathered so you can determine whether to accept a representation – from creating firm-wide conflicts? A new ABA Formal Opinion offers a framework for categorizing such information and strategies for preventing imputed prospective-client conflicts.

BY SARAH E. PETERSON

Question

I learned what I believe to be significantly harmful information from a potential client. I declined the representation but now the opposing party has reached out to another lawyer in my firm, and that lawyer would like to accept the representation.

Is my prospective-client conflict imputed to my firm? How can I avoid imputing my prospective-client conflicts to my firm in the future?

Answer

Prospective-client conflicts can be waived if both the affected client and the prospective client give informed consent,[1] confirmed in writing.[2]

Absent a waiver, the conflict is imputed to other members of the personally disqualified lawyer's firm, except as provided in SCR 20:1.18(d). This rule states that a prospective-client conflict is not imputed to other members of the personally disqualified lawyer's firm as long as the following are true:

- The personally disqualified lawyer took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client.
- The disqualified lawyer is timely screened[3] from any participation in the matter and is apportioned no part of the fee from the representation.

Wisconsin Formal Ethics Opinion EF-10-03 and ABA Formal Opinion 492 discuss what constitutes significantly harmful information, and therefore disqualifying information, under SCR 20:1.18(c).

In March 2024, the ABA issued Formal Opinion 510, which provides guidance on what constitutes "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client" under SCR 20:1.18(d)(2). The opinion provides a framework for determining what kind of information is reasonably necessary to determine whether to represent a client and strategies lawyers can take to avoid exposure to more

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disqualifying information than reasonably necessary to make that determination. It also discusses what constitutes "timely" screening.

Defining 'Reasonably Necessary' Information

ABA Formal Opinion 510 organizes the information a lawyer might receive from a prospective client into two sometimes overlapping categories:

"First, information may relate to the lawyer's professional responsibilities (i.e., whether the rules permit the lawyer to take on a matter), and second, information may relate to the lawyer's more general business decisions (i.e., whether the lawyer wants to accept the matter)."

The opinion elaborates on those two categories of information:

"The former category would naturally include information that is necessary to ensure compliance with legal and ethical obligations, including those set forth in the Model Rules of Professional Conduct. This could conceivably include, among other things, sufficient information to determine whether the lawyer could handle the matter competently (Rule 1.1), whether the client or prospective client seeks to use the lawyer's services to commit or further a crime or fraud (Rules 1.2(d) and 1.16(a)(4)), whether the lawyer would be able to communicate effectively with the prospective client (Rule 1.4), whether the lawyer has a conflict of interest (Rules 1.7-1.12 and 1.18), and whether all of the prospective client's potential claims would be frivolous (Rule 3.1). But it is very possible that less than all information that is responsive to these factors – particularly the merits of potential claims – is reasonably necessary to determine whether to undertake the representation.

"The latter category (i.e., information regarding the business decision) would potentially include information to enable the lawyer to assess the amount of time the engagement will take, the range of anticipated compensation for that time, the potential expenses, and the likelihood of being fully compensated. It might also include whether the matter aligns with the lawyer's abilities and interests, such as whether it is within an area of specialization or an area in which the lawyer seeks more experience. Additionally, lawyers may have other considerations regarding whether to take on a representation. For example, a law firm's internal policy, such as one limiting contingency matters or limiting the representation of parties in certain industries, may preclude accepting an engagement."

The opinion goes on to explain:

"Once a lawyer has sufficient information to decide whether to represent the prospective client, further inquiry may be permissible, but it will no longer be 'necessary.' That means once a lawyer

has decided there is any basis on which the lawyer would or must decline the representation, stopping inquiry on all subjects would place the lawyer in the best position to avoid potential imputation of a conflict to other lawyers in their firm. *See* Comment [4] to Rule 1.18.

"This understanding is consistent with the premise of Rule 1.18(d), which is that, as a general matter, even if a lawyer learns some disqualifying information from a prospective client, that amount will presumptively be limited compared to what would be required should an engagement ensue.... The imputation provision strikes a balance between the prospective client's interest in being assured that the lawyer will comply with the confidentiality obligation, on one hand, and other clients' interest in access to counsel as well as the law firm's legitimate business interests, on the other."

Measures to Avoid Exposure to Additional Information

The second part of the opinion focuses on strategies to avoid receiving more information than is reasonably necessary to determine whether to take on a representation.

The opinion recognizes that it is unreasonable for a lawyer to tell a prospective client not to reveal any information because that would make it impossible to make an informed decision about whether to accept the representation. The opinion then suggests strategies for limiting the amount of information received:

"One further measure to avoid exposure to more disqualifying information than is reasonably necessary is for the lawyer to warn the prospective client that the lawyer has not yet agreed to take on the matter and that information should be limited only to what is necessary for the lawyer and client to determine whether to move forward with an engagement. The warning need not have particular wording. The reasonableness of a lawyer's measures depends on whether they are designed to limit the information received before a lawyer-client relationship is established.

"When a prospective client is interviewing more than one firm, lawyers may be motivated to elicit or receive extensive information to evaluate the litigation and explain why they are a good fit for the potential client's needs. Lawyers are welcome to review and elicit extensive disqualifying information, recognizing that if the prospective client does not retain them, they and other lawyers in their firm will forgo the possibility of representing a client with interests that are materially adverse in the same or a substantially related matter. Alternatively, if the lawyers want to preserve the possibility of representing such a person, they will have to take reasonable measures to limit the amount of disqualifying information obtained from the prospective client, such as by cautioning against providing prejudicial information."

A law firm might want to examine its intake process to ensure there are safeguards to prevent exposure to more information than necessary, such as limiting the amount of information a prospective client can provide when filling out an online form and training staff in strategies for lessening the amount of potentially disqualifying information received during phone calls.

Timely Screening

The final hurdle to prevent imputation of a prospective-client conflict to your firm is "timely screening."[4] In this context, *screen* means the following: "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law." The opinion acknowledges that it is impractical to impose a screen for every potential client and instead concludes that screening is timely if it takes place when a law firm becomes aware that there is a potential conflict in representing someone adverse to a former prospective client.

Conclusion

Even absent consent from both the affected client and the prospective client, imputation of a prospective-client conflict can be avoided if the personally disqualified lawyer and the law firm act appropriately. The personally disqualified lawyer must take care not to obtain more disqualifying information than is reasonably necessary to decide whether to take on the representation, the law firm must timely screen the personally disqualified lawyer from participation in the matter, and the personally disqualified lawyer must receive no fees related to the representation. **WL**

ENDNOTES

[1]SCR 20:1.0(f) defines *informed consent* as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." For guidance on drafting informed consents to conflicts, see Timothy J. Pierce, *Conflict Waivers and the Informed Consent Standard,* 82 Wis. Law 18 (July 2009).

[2]*See* SCR 20:1.18(c). SCR 20:1.0(c) defines *confirmed in writing* when used in reference to the informed consent of a person as "informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.... If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." SCR 20:1.9(q) defines *writing* as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A 'signed' writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing."

[3]SCR 20:1.0(n).

[4]Wisconsin Formal Ethics Opinion EF 22-01 discusses elements of an effective screen. **WL**