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Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

Opinion 695

Duty to keep information received from prospective client confidential; prospective clients and conflicts.

A New Jersey law firm inquires whether it has an obligation to advise an existing corporate client that one of the corporation's employees contacted the law firm seeking representation in a lawsuit against the corporation. A related question is whether the firm may continue to represent its corporate client after receiving unsolicited information from a potential adverse party who contacted the firm as a prospective client.

First, we conclude that new R.P.C. 1.18, effective January 1, 2004, applies, prohibiting use or revelation of information from a prospective client. Moreover, we find that even prior to new R.P.C. 1:18, a duty of confidentiality equivalent to that set forth in the new rule is applicable. Under R.P.C. 1.6(a) the firm has a duty of confidentiality to the individual who sought its assistance, precluding disclosure of the identity of the inquiring individual, the fact of the individual's contact, and any information received in connection with the contact. R.P.C. 1.6(a) sets forth a broad duty of confidentiality, more extensive than the testimonial attorney-client privilege, extending to any "information relating to representation of a client," and then sets out a series of exceptions, none applicable to the current inquiry. For discussion of the breadth of the duty under R.P.C. 1.6(a), see generally In re Opinion 544, 103 N.J. 399 (1986). We recognize that by its express terms the 1.6(a) duty of confidentiality extends only to a "client". Nonetheless, we deem it essential to provide the communication of information from a prospective client with the same cloak of protection furnished to actual clients.

As explained below, the first part of the inquiry touches upon important issues concerning access to legal services, and we approach the question in that light. A typical potential client seeking legal assistance has a reasonable expectation that any information provided to a lawyer in order for the lawyer and the client to decide whether representation is to be provided will be kept in confidence, and will not be used in any way against the potential client if representation is not provided. While this precise point has not been explicitly addressed in prior New Jersey ethics opinions, it is well settled

nationally that a potential client's reasonable expectations of confidentiality are the determining factor in finding the attachment of the duty.

Brief reflection reveals the importance of preserving confidentiality in this context. The same considerations that underlie the attorney-client privilege and confidentiality in more traditional cases of extended representation – the need for a client to be able to communicate freely with an attorney without fear of later disclosure, retribution or other adverse effect from the communication itself – exist with equal force in the case of a potential client initially seeking or applying for services. If the subject matter of that applicant's communication may be freely disclosed to a third party, simply because no extended or ongoing attorney-client relationship ensued, the chilling effect on such prospective client communications would be substantial, crippling, and an unacceptable hindrance to the public's ability to gain access to attorneys.

These considerations are especially compelling in the context of services, especially limited assistance, provided by non-profit organizations to people of moderate means. Studies nationally and in New Jersey have documented the difficulties such individuals have in obtaining lawyers. See Legal Needs and Civil Justice: A Survey of Americans, American Bar Association (1994); Legal Problems, Legal Needs, Legal Services of New Jersey Poverty Research Institute (2002). Concerns about closing this legal assistance gap have led the American Bar Association and many states, including New Jersey, to encourage development over the past decade of many forms of limited legal assistance, such as hotlines, "unbundled" legal services and pro se assistance, often accompanied by special rules of court and professional ethics. See generally Handbook on Limited Scope Legal Assistance, American Bar Association Section of Litigation (2003). Protection of the confidentiality of information received from prospective clients, and clients who receive only limited assistance (i.e., one-time advice or very brief service), is a central tenet of such limited assistance initiatives.

This duty of confidentiality, however, does not preclude the inquiring firm from continuing to represent its ongoing corporate client. New R.P.C. 1:18(b) continues a prohibition against representation of a client adverse to a *former* prospective client, not the case in the present inquiry, where the firm represented a client prior to the contact by a new prospective client. We conclude that, assuming that all information received from the prospective client is kept confidential and completely shielded from any firm personnel engaged in the representation of the corporate client, such corporate representation may continue. Consistent with this conclusion, no firm personnel engaged in the communication with the prospective client may be involved in any corporate representation which relates in any way to that prospective client; such personnel must be completely screened. Since the prospective client never became an *actual* client of the firm, the conflict principles set forth in R.P.C. 1.7 are not otherwise implicated. We note, however, that for the various limited legal assistance vehicles described above, an attorney-client relationship *is* formed once such limited legal assistance is provided, and R.P.C. 1.7 would then apply.