PROGRAM MATERIALS
Program #30209
September 24, 2020

Updates on Recent American Bar Association Formal Ethics Opinions

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UPDATES ON RECENT AMERICAN BAR ASSOCIATION FORMAL ETHICS OPINIONS

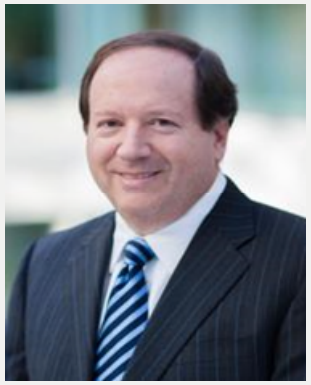
SEPTEMBER 24, 2020 @ 2:00 P.M. (EST)

Presented by:

Thomas G. Wilkinson, Jr.
Douglas B. Fox
Deborah A. Winokur
COZEN O'CONNOR

COZEN O'CONNOR

PRESENTERS



Thomas G. Wilkinson, Jr.

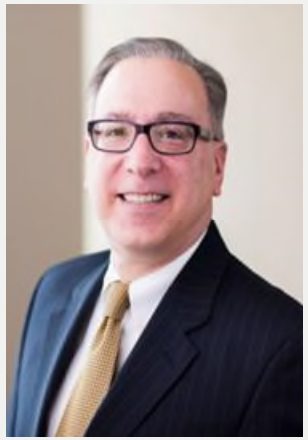
twilkinson@cozen.com

(215) 665-3737

Deborah A. Winokur

dwinokur@cozen.com

(215) 665-4195



Douglas B. Fox

dfox@cozen.com

(215) 665-2017

COZEN O'CONNOR

Fee Division Between Discharged Counsel and Successor Counsel in Contingent Fee Cases

- ABA Formal Opinion 487 (June 18, 2019) clarifies duties owed to the client by successor attorney when client terminates legal representation in a contingent fee matter.

- At the outset of the engagement, successor attorney is required to advise a contingency client of the existence and effect of the predecessor attorney's claim for fees.

- Successor lawyer should secure and confirm client's consent to resolve prior counsel's fee interest.

Formal Opinion 487 - Rules Cited

ABA Model Rules 1.5(b) and (c)

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

ABA Model Rule 1.15(e)

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Takeaways

- Notify client in writing that predecessor counsel may have a claim on a portion of the contingent fee recovery. (Successor counsel is not required to state the amount of potential recovery or likelihood that predecessor's claim will be enforceable.)
- Obtain client consent prior to disbursing fees to predecessor (or successor) counsel.
- Clarify whether successor counsel will represent client in a dispute with predecessor counsel regarding predecessor counsel's potential fee claims. (Obtain client's informed consent to conflict of interest relating to dual role as counsel and a party with an interest in the proceeds.)

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Lawyers' Duties To Avoid Counseling or Assisting A Client's Fraudulent or Criminal Behavior

- ABA Formal Opinion 491 (issued April 29, 2020) clarifies lawyers' obligations under ABA Model Rule 1.2(d) in non-litigation settings.

- Model Rule 1.2(d) states:

  (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- What “knowledge” is required of a lawyer? Actual knowledge? Constructive knowledge?

- ABA Model Rule 1.0(f) states that to “know” something “denotes actual knowledge of the fact in question.”

- **Query:** can a lawyer be willfully blind to a client’s intended criminal or fraudulent behavior to avoid having the requisite knowledge?

- Formal Opinion 491 provides additional guidance on this important subject.

- ABA Formal Opinion 491 counsels that where there is a “high probability” that a client seeks to use the lawyer’s services for criminal or fraudulent activity, then the lawyer is obligated to make further inquiries of the client.

- If, after making further *reasonable* inquiries, the lawyer is comfortable with the representation, the lawyer will have complied with Model Rule 1.2(d), “even if some doubt remains.”

- However, willful blindness, and failure to make reasonable inquiries where the facts and circumstances require it, may constitute a violation of Model Rule 1.2(d).

- Formal Opinion 491 provides two hypotheticals where a lawyer *would be* required to make further inquiries:

  - A prospective client has significant business interests abroad, and has received substantial payments from sources other than his employer. Those funds are held outside the US, but client wants to bring them to the US through a transaction that minimizes tax liability. The client tells you a) that he is employed outside of the US, but does not say how, b) the money is in a foreign bank, but the client will not identify the bank, c) client has not disclosed the payments to his employer or anyone else, and has not included the amounts on his US tax return.

  - A prospective client says he is an agent for a minister or other government official from a "high risk" jurisdiction and wants to buy a piece of property on behalf of an anonymous party. The client wants the property to be owned by undisclosed beneficial owners, and the source of the funds is vague or questionable.

- Consider this fact situation:

A new client, who says he is a business investor from South America, comes to your office in New York with $1 million in cash he says is for the production of a movie, assures you that the money is “clean,” and asks you to deposit the money into a client account and then redistribute the money to various designated accounts. The lawyer doesn’t have a good feeling about it but proceeds to assist the client nonetheless, without any further inquiry of the client. For his efforts, the lawyer collects a $25,000 fee. Later, it is determined that the $1 million was “drug money.”

- This was an actual case, not a hypothetical, and the lawyer involved was suspended from the practice of law for three years. The New York Appellate Division noted, “people usually don’t walk into an office with a million dollars in cash” and ask that it be converted into another form.

- Other ABA Formal Opinions and accepted lawyer guidance are consistent with the guidance provided by Formal Opinion 491.

- For example, ABA Formal Opinion 463 (May 23, 2013), entitled “Client Due Diligence, Money Laundering and Terrorist Financing,” cites Model Rule 1.2(d) and advises that an “appropriate assessment of the client and the client’s objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold. “

- Additionally, in August 2010, the ABA House of Delegates adopted the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* ("VGPG").

- The VGPG encourages all lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity—or being drawn into such activity.

- Formal Opinions 491 and 463 are also consistent with Informal Opinion 1470 (1981), which admonished that a "lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct…."

- A lawyer may also be subject to criminal prosecution under federal law if the lawyer aids, abets or commits a violation of US anti-money laundering laws or counter-terrorist financing laws.

- The IRS may also refer investigations of attorneys liable for Money Laundering Form 8300 violations under 26 USC §6050I. Form 8300 requires, under certain circumstances, reporting of cash payments over $10,000 received in a trade or business.

- If a client refuses to provide information where it is needed in order to evaluate the lawyer's compliance with Model Rule 1.2(d), or the client asks the lawyer not to evaluate the legality of a transaction, the lawyer should explain to the client that the lawyer cannot undertake the representation unless and until an appropriate inquiry is made.

- Formal Opinion 491 advises that if the client refuses to provide the requested information, then "the lawyer must decline the representation or withdraw."

- If the client agrees to provide additional information, and the lawyer concludes that the requested services would amount to assisting in a crime or fraud, the lawyer must either discuss the matter further with the client, decline the representation, or seek to withdraw under Rule 1.16(a).

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- If the lawyer needs information from sources other than the prospective client and can obtain that information without disclosing information protected by Rules 1.6 and 1.18, the information should be sought. If the lawyer needs to disclose confidential information in order to analyze the transaction, the lawyer must seek the client's informed consent in advance. If the client will not consent or the lawyer believes that seeking consent will lead to criminal or fraudulent activity, the lawyer must decline the representation or withdraw.

- If an inquiry would result in expenses that the client refuses to pay, the lawyer may choose to conduct the inquiry without payment or to decline or discontinue the representation.

- Formal Opinion 491 concludes:

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in a transaction or other non-litigation matter the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness or conscious disregard of available facts. Accordingly, where there is a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer must inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require further inquiry to help the client avoid crime or fraud, to advance the client's legitimate interests, and to avoid professional misconduct. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after that inquiry based on information reasonably available at the time does not violate the rules.

- Formal Opinion 491 only concerns transactions, not litigation. The Formal Opinion notes that "[i]n the wake of media reports, disciplinary proceedings, criminal prosecutions, and reports on international counter-terrorism enforcement and efforts to combat money-laundering, the legal profession has become increasingly alert to the risk that a client or prospective client might try to retain a lawyer for a transaction or other non-litigation matter that could be legitimate but which further inquiry would reveal to be criminal or fraudulent."

- The current state of affairs prompted the need for updated and amplified guidance about how a lawyer must proceed when faced with a client or potential client whose intent is to commit an unlawful or fraudulent act.

- However, Model Rule 1.2(d) is not limited to transactional matters. Therefore, the practitioner should consider the guidance offered by Formal Opinion 491 even where litigation or other dispute resolution is involved.

- For example, a client may intend to bring a fraudulent insurance claim or lawsuit, including claims arising from COVID-19.

- In the litigation context, for example, Model Rule 3.3 (Candor Toward the Tribunal) provides:

(a) A lawyer shall not knowingly:

> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

- Model Rule 3.3 uses the standard that the lawyer must “know” of the falsity of the proposed evidence to be offered to the tribunal, or that the client is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

- The guidance provided by Formal Opinion 491 can assist the practitioner in addressing his or her conduct under such circumstances.

- Other Model Rules contain this same “knowledge” standard, *e.g.,* Model Rules 1.13(b) and 3.8(a). Formal Opinion 491 can be instructive.

ABA Formal Opinion 492 on Duties to Prospective Clients

F.O. 492 (June 9, 2020) addresses conflicts of interest arising from a consultation between a prospective client and lawyer.

ABA Formal Opinion 492

What is a “prospective client”?

M.R. 1.18 (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

Yikes, that seems pretty broad! What if someone just emails me out of the blue with information and a request for assistance?

[2] 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. See also Comment [4]. In contrast, 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." (**emphasis added)

What if a prospective client meets with me to try to get me/my firm disqualified from representing my adversary?

Comment [2] addresses this specific situation and confirms that a person meeting with a lawyer with the intention of getting the lawyer disqualified is not a “prospective client.”

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ABA Formal Opinion 492

What are my obligations to prospective clients? Is it any different if I know the "prospective client" isn't going to hire me?

- **Protect confidential information**: Under Rule 1.18(b), a lawyer cannot use or reveal information learned from the "prospective client" except as permitted by Rule 1.9 (former clients). Even if an attorney-client relationship is not formed after the consultation, the lawyer must still abide by Rule 1.18.
- **Avoid conflicts of interest**: Under Rule 1.18(c), a lawyer may be disqualified from representing 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. . .."

ABA Formal Opinion 492

Opinion 492 drew a distinction between the relatively high level of protection offered to former clients to the lower level offered to prospective clients.

- Prospective clients (i) must demonstrate through some evidence that the client communicated information that (ii) "could be significantly harmful" in the subsequent matter. (Rule 1.18)

ABA Formal Opinion 492

If I’m disqualified because of a consultation with a prospective client, does that mean my entire firm is also disqualified?

- F.O. 492 specifies that imputation of the conflict may be avoided by adherence to M.R. 1.18(d) either by obtaining informed consent waivers from the affected client and the prospective client OR by following certain procedures, including avoiding obtaining an unreasonable amount of confidential information at the consultation, timely screening of the disqualified lawyer, ensuring that the disqualified lawyer does not obtain a portion of any fees relating to the affected client, and providing prompt written notice to the prospective client.

Takeaways

- Keep consultations brief – obtain information necessary to determine conflict of interest parties and the firm's ability and interest in taking on the representation.
- Document in the firm's conflicts database the parties involved in the potential representation in order to identify the need to screen the consulted attorney from the firm's new representation of an adversary in the matter.
- Consider asking the prospective client for a waiver that state that any information prospective client shares will not disqualify the lawyer from representing a different client.
- Use cautionary language for website intake links stating that information submitted may not be kept privileged or confidential.

- **COZEN O'CONNOR**
- **Legal Profession Practice Group**

- Thomas G. Wilkinson, Jr.
- Deborah A. Winokur
- Douglas B. Fox

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 487 **June 18, 2019**

Fee Division with Client's Prior Counsel

In a contingent fee matter, when a counsel (successor counsel) from one firm replaces a counsel (predecessor counsel) from another firm as counsel for the client, Rules 1.5(b) and (c) require that the successor counsel notify the client, in writing, that a portion of any contingent fee earned may be paid to the predecessor counsel. The successor counsel may not be able to state at the beginning of the representation the specific amount or percentage of a recovery, if any, that may be owed to the predecessor counsel unless the amount or percentage has been agreed by the client and both predecessor and successor counsels. The successor counsel is not bound by the requirements of Rule 1.5(e), either at the time of engagement or upon a recovery, because Rule 1.5(e) addresses situations where two lawyers are working on a case together, not situations where one lawyer is replacing another. Upon a monetary recovery, the successor counsel may only disburse a portion of the overall attorney's fee to the predecessor counsel with client consent or pursuant to an order of a tribunal of competent jurisdiction. If there is a dispute as to the amount due to the predecessor counsel under Rule 1.15(e) the disputed amount may have to remain in a client trust account until the matter is resolved. If successor counsel negotiates with predecessor counsel on the client's behalf, successor counsel must explain to the client the potential conflict of interest in the dual roles pursuant to Rule 1.7, where successor counsel has a personal interest in the amount predecessor counsel may receive or in the timing of the release of funds held pursuant to Rule 1.15(e).[1]

I. Introduction

A client has the right to terminate a lawyer's services at any time[2] but when the client terminates the services of a contingent fee counsel, without cause, prior to the occurrence of the contingency on which the parties' agreement is based, the counsel may be entitled to a fee for services performed before discharge under *quantum meruit* or, in some jurisdictions, pursuant to a so-called "conversion clause" or "termination clause" in the contingent fee agreement. This opinion addresses the successor counsel's obligations under the Model Rules of Professional Conduct after taking over the case when there is a monetary recovery. A counsel who subsequently takes over the case (the successor counsel) must advise the client, in writing, of the predecessor counsel's potential claim on a recovery.[3]

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

[2] MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 (2018) [hereinafter MODEL RULES]; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(1) (2000) [hereinafter RESTATEMENT].

[3] This opinion applies where the client terminates a lawyer without cause and hires a new lawyer to replace that lawyer to handle a contingent fee matter. The opinion does not apply when a client terminates a lawyer with cause, or the lawyer withdraws without cause. In such situations, a lawyer may forfeit some or all of her fee.

II. Analysis

A. The Successor Counsel's Obligation to Advise the Client that the Predecessor Counsel May Make a Claim Against Any Recovery

Just as in any contingent fee matter, the successor counsel must comply with both Model Rule 1.5(b) in describing the rate or basis of the fee and with Model Rule 1.5(c)'s requirement that the written fee agreement include the method of determining the fee. Paragraphs (b) and (c) of Rule 1.5 provide:

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
>
> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Although Rules 1.5(b) and 1.5(c) do not specifically address obligations when one counsel replaces another, both rules are designed to ensure that the client has a clear understanding of the total legal fee, how it is to be computed, when it is to be paid, and by whom. "[A]n understanding as to fees . . . must be promptly established."[4] A contingent fee agreement that fails to mention that some portion of the fee may be due to or claimed by the first counsel in circumstances addressed by this opinion is inconsistent with these requirements of Rule 1.5(b) and (c).[5] To avoid client confusion,

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RESTATEMENT § 37 (2000); David Hricik, *Dear Lawyer: If you decide it's not economical to represent me, you can fire me as your contingent fee client, but I agree I will still owe you a fee*, 64 MERCER L. REV. 363 (2012-2013).

[4] MODEL RULES R. 1.5 cmt. 2.

[5] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-389, at 4 (1994) (explaining that "the nature (and details) of the compensation arrangement should be fully discussed by the lawyer and client before any final agreement is reached."); Joyce v. Elliott, 857 P.2d 549, 552 (Colo. App. 1993) (stating that "one of the principal purposes of the rules respecting contingency fee agreements is to assure that a client is fully advised at the time such agreement is executed of all of the financial obligations that such client is assuming by the establishment of the attorney-client relationship."); Shaw v. Manufacturers Hanover Trust Co., 499 N.E.2d 864, 866 (N.Y. 1986) ("The importance of an attorney's clear agreement with a client as to the essential terms of representation cannot be overstated. The client should be fully informed of all of the relevant facts and the basis of the fee charges, especially in contingent fee arrangements[.]"); *In re* Davenport, 522 S.W.3d 452, 458 (Tex. 2017) ("The goal of an attorney-client fee agreement is to ensure that the client is informed of its terms. . . . whether the lawyer was reasonably clear is determined from the client's perspective.") (footnotes omitted).

making the disclosure in the fee agreement itself is the better practice, but this disclosure may be made in a separate document associated with the contingent fee agreement and provided to the client at the same time.

Assume, for example, that a client retains a lawyer in a matter and enters into a written fee agreement in which the lawyer is entitled to one-third of any recovery. The client then decides to terminate the lawyer, without cause, and hires new counsel. The successor counsel takes the matter on the same terms as the predecessor counsel (one-third of any recovery) but the successor counsel's written fee agreement is silent on whether that one-third is in addition to or in lieu of the one-third specified in the predecessor counsel's fee agreement, and no such disclosure is made in a separate document provided to the client. In these circumstances, the client may not know whether the client must pay one or both lawyers or the amount of the fees owed. The client may be aware of the right to terminate a lawyer's representation at any time but may not be aware that termination does not necessarily extinguish an obligation to pay prior counsel for the value of the work performed – the *quantum meruit* claim – or in some cases a termination amount specified in the predecessor counsel's fee agreement. If the predecessor counsel was not terminated for cause, that lawyer may be entitled to payment for the fair value contributed to the case before being terminated.[6] Under those circumstances, "a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney." [7]

Where a client hires successor counsel to handle an existing contingency fee matter, it does not pose an unreasonable burden on the successor counsel to advise the client that the predecessor counsel may have a claim to a portion of the legal fee if there is a recovery. In many instances, precision on this issue may be difficult as successor counsel may need to review the predecessor counsel's fee agreement and assess its enforceability. Similarly, successor counsel may not be fully familiar with the nature and extent of the prior lawyer's work on the matter. Successor counsel also will not know the amount of the recovery, if any, at the beginning of the representation. Nevertheless, Rules 1.5(b) and (c) mandate that successor counsel provide written notice that a portion of the fee may be claimed by the predecessor counsel.

Successor counsel must address with the client whether the client risks paying twice: one contingent fee to the predecessor counsel and another to the successor counsel. A client cannot be exposed to more than one contingent fee when switching attorneys, given that under the Rule 1.5(a) factors, each counsel did not perform all of the services required to achieve the result. Thus, neither the predecessor nor the successor counsel ordinarily would be entitled to a full contingent fee.

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[6] *See generally* RESTATEMENT § 40 cmts. b & c (2000) (On discharge, a lawyer may be entitled to the fair value of the lawyer's services. Determination of fair value takes into account the proportion of work performed by the discharged lawyer, and the value of work contributed. The determination also may consider a contract amount prorated for work actually performed.).

[7] San Francisco Bar Ass'n, Ethics Comm., Advisory Op. 1989-1 (1989).

B. Rule 1.5(e) Fee Division Provisions Do Not Apply

There is some authority concluding that successor counsel replacing a client's prior counsel must comply with Rule 1.5(e);[8] however, this Rule is designed to regulate fee-sharing between lawyers in different firms who handle a case simultaneously. Comment 7 to Rule 1.5 underscores this reading. It states:

> A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. *A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well*, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1. (Emphasis added.)

Comment 7 thus clarifies that Rule 1.5(e) is limited to situations where two or more lawyers are working on a case simultaneously – not sequentially. Accordingly, Rule 1.5(e) was not meant to apply to the situation where one lawyer's services are terminated and the client retains a second lawyer to complete the matter.

Under Rule 1.5(e), fees must either be divided in proportion to the work performed or in some other specified division where both lawyers assume "joint responsibility" for the matter. Fee-sharing in proportion to the work performed by lawyers concurrently representing a client is similar to the *quantum meruit* analysis that is frequently used post-hoc to divide contingent fees between successive law firms. What differs where predecessor and successor counsel are involved in such fee issues before a recovery has been obtained is that the underlying case and the client's rights to discharge her lawyer may be adversely affected if the client is required to enter into a fee-sharing agreement under Rule 1.5(e). Requiring the predecessor and successor counsel and the client to agree on a proportional fee division may hinder the client's right to terminate a counsel by making the process of finding a replacement more difficult and protracted. A simple fee negotiation between the client and successor counsel would turn into a three-way debate.

The other approach under Rule 1.5(e) to divide a fee among lawyers concurrently representing a client requires that all counsel assume "joint responsibility" for the related matter. Such

[8] These authorities focus on client consent to a fee division. *See, e.g.*, Statewide Grievance Comm. v. Dixon, 772 A.2d 160, 164-65 (Conn. App. Ct. 2001) (concluding that the lawyer violated Rule 1.5(e) by failing to inform the client of payment made from recovery to prior lawyer in a different firm); Conn. Bar Ass'n, Comm. on Prof'l Ethics Op. 01-10, 2001 WL 34004971, at *1 (2001) (involving a new lawyer replacing the original lawyer because of conflict). None discuss other provisions of the rule, for example, how "joint responsibility" works. As discussed above, we agree that client consent to a payment by the successor lawyer to the predecessor lawyer is necessary, but reach that conclusion without reliance on Rule 1.5(e).

responsibility entails financial and ethical responsibility for the representation as if the counsel were associated in a partnership.[9] A referring counsel is allowed to receive a greater portion of the fee than the counsel's own efforts would otherwise merit through the acceptance of joint responsibility.[10] When a client discharges a lawyer and hires a new one, there is no "referring counsel" and there is no simultaneous representation of the client. Joint responsibility in practice does not exist because predecessor counsel has been replaced. To require "joint responsibility" under Rule 1.5(e) in these situations as a pre-condition of paying the predecessor counsel's fee claim is not realistic and ultimately burdens the client's ability to discharge the first lawyer and find replacement counsel. If the successor counsel would be responsible for the errors or omissions of a discharged predecessor, he or she would at best be reluctant to accept the engagement.

C. Client Agreement on the Eventual Fee Allocation Between the Discharged Counsel and the Current Counsel and Conflict of Interest Waiver

Because the client approval requirement is explicit in Rule 1.5(e), some authorities have used it as the vehicle to mandate client consent to fee divisions in consecutive representations even though Rule 1.5(e) is limited to joint representations. Rule 1.5(a), however, alone supports the conclusion that client consent is required to divide the fee at the end of the case.

Rule 1.5(a) requires that any fee be reasonable, including the total fees of predecessor and successor counsel, and client consent is required for all disbursements, including all fees payable to predecessor and successor counsel.

A client always has the right to challenge the total fee charged or the separate fee claimed by the predecessor counsel. The successor counsel may not disburse fees claimed by that counsel absent the client's consent. Otherwise, the client's right to challenge the fee as unreasonable would be impaired, if not extinguished. Of course, there may be circumstances where client consent may be inferred. For example, consent may be inferred where successor counsel has repeatedly provided notice of a proposed payment to predecessor counsel and the client has not responded.[11]

D. Role of Successor Counsel with Respect to Predecessor Counsel's Claim for a Share of the Fee

The role of the successor counsel in the process of addressing the predecessor counsel's claim for a share of the fee may vary. The successor counsel's work may include an assessment of the legitimacy of the predecessor counsel's fee claim to properly advise the client on the client's share of any recovery and the amount of funds, if any, that successor counsel must hold in trust under Rule 1.15. If the initial scope of successor counsel's representation of the client simply leaves the matter to be decided by the predecessor counsel and the client, the successor counsel should so indicate in the engagement agreement. But if the successor counsel offers to represent the client

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[9] MODEL RULES R. 1.5 cmt. 7; N.Y. Cnty. Lawyers' Ass'n, Comm. on Prof'l Ethics Op. 715, 1996 WL 592658, at *4 & n.2 (1996).

[10] MODEL RULES R. 1.5(e)(1).

[11] The fee must, of course, be within the total fee as authorized by the client in the successor lawyer's fee agreement. The successor lawyer must also have a reasonable basis to conclude that the client has received the communications and is not suffering from any mental or physical disorder that prevents the client from considering the successor lawyer's communications.

in the *client's* dispute (as opposed to the successor counsel's dispute) with the predecessor counsel, such scope of representation should be reflected either in the initial fee agreement or in a new or revised fee agreement. Typically, where successor counsel is negotiating on behalf of a client with predecessor counsel, successor counsel should review with the client the nature and extent of the predecessor counsel's entitlement to a fee, including whether the predecessor counsel has forfeited the right to a fee, in whole or in part.

Successor counsel's compensation for representing the client in the client's dispute with predecessor counsel must be reasonable, which in this context means, at a minimum, that the successor counsel cannot charge the client for work that only increases the successor counsel's share of the contingent fee and does not increase the client's recovery. Successor counsel must also obtain the client's informed consent to any conflict of interest that exists due to successor counsel's dual roles as counsel for the client *and* a party interested in a portion of the proceeds.

In many situations, the fees paid to predecessor and successor counsel may not affect the client's recovery. In these instances, successor counsel may obtain the client's consent to any fee split that does not alter the client's recovery. The client can, after consultation and adequate disclosure, decide that the matter should be worked out between counsel without further need for consent or consultation with the client. The client's consent should be informed and successor counsel may need to raise the possibility of protracted proceedings that could burden a client who may have nothing to gain and may be indifferent about the outcome.[12] Where the client is indifferent as to the fee allocation between the two counsel, both counsel must, in adjudicating their own dispute over their respective shares of the contingent fee, take adequate steps to protect client confidentiality under Rule 1.6, as well as any confidentiality provisions in any underlying settlement agreement.

The predecessor counsel may also seek client consent to a share of the fee. If the successor counsel represents the client in the fee dispute, then the predecessor counsel may not communicate about the fee directly with the former client without successor counsel's consent under Rule 4.2.

E. The Successor Counsel's Obligations with Respect to the Funds

Where a disagreement persists between the predecessor counsel and the client, or predecessor counsel and successor counsel, about the amount of the predecessor counsel's fees from the proceeds obtained by the successor counsel, the successor counsel must comply with Rule 1.15 and substantive law in notifying predecessor counsel of the receipt of the funds and in deciding how to handle the funds. In many jurisdictions, a counsel terminated without cause has the right to payment based on *quantum meruit*. If the client asserts that client terminated the predecessor counsel for cause, that counsel may not have any right to proceeds from the recovery.[13] If there is

[12] Most disputes between lawyers about a fee will likely involve the client as a witness. The disputes may also involve disclosure of the client's confidential information under Rule 1.6. In many such circumstances, the client may wish simply to move on and not be involved in any dispute between her lawyers. In addition, where recoveries are obtained through settlement, many settlement agreements impose confidentiality obligations on the client as to the settlement terms. In adjudicating a fee dispute with predecessor counsel, the successor lawyer must take steps to ensure that any confidentiality term of a settlement is respected.

[13] Determination of what constitutes terminating a lawyer's services "for cause" or a lawyer withdrawing from a representation *without* "just cause" vary by state, but some examples of situations where a lawyer had justifiable

a dispute as to whether some or all of those funds should be paid to the predecessor counsel by the client but there is a claim to the proceeds by that counsel, the successor counsel must hold the disputed portion of the funds in a client trust account pursuant to Rule 1.15(e).[14]

III. Conclusion

Where a client has engaged successor counsel in a contingent fee matter to replace predecessor counsel, successor counsel must inform the client in writing that predecessor counsel may have a claim against the contingent fee. Successor counsel is not, however, bound by the fee-division procedures set forth in Model Rule 1.5(e) because such procedures are designed to address situations where two lawyers from different firms handle a case concurrently. Upon a recovery, successor counsel must obtain the client's agreement before dividing any fee with predecessor counsel. In resolving any dispute, particularly a dispute solely between counsel, both successor and predecessor counsel remain bound by their confidentiality obligations to the client and any further confidentiality obligations undertaken by the client in a settlement of the underlying matter. In handling funds that are in dispute, the successor lawyer must follow the requirements of Model Rule 1.15.

cause to withdraw and may be entitled to a *quantum meruit* fee are: obligation to withdraw due to unforeseen conflict of interest (Smith & Burnetti, P.A. v. Faulk, 677 So. 2d 404 (Fla. Dist. Ct. App. 1996)); unanticipated costs and expenses of litigation (Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820 (N.J. Super. Ct. App. Div. 1993)); client refused to comply with discovery obligations (Ashford v. Interstate Trucking Corp. of America, Inc., 524 N.W.2d 500 (Minn. Ct. App. 1994)).

[14] The statements in this section are general in nature and do not address substantive law issues that may vary from state to state regarding charging or retaining liens. The rights and claims of the predecessor lawyer may depend on whether the client terminated the lawyer for cause or without cause, whether the lawyer withdrew with or without cause, or whether the lawyer has an effective lien. These substantive law issues are not addressed in this Opinion.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 491 **April 29, 2020**

Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness to or conscious avoidance of facts. Accordingly, where facts known to the lawyer establish a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require the lawyer to inquire further in order to help the client avoid crime or fraud, to avoid professional misconduct, and to advance the client's legitimate interests. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after inquiry and based on information reasonably available at the time does not violate the rules. This opinion does not address the application of these rules in the representation of a client or prospective client who requests legal services in connection with litigation.[1]

I. Introduction

In the wake of media reports,[2] disciplinary proceedings,[3] criminal prosecutions,[4] and reports on international counter-terrorism enforcement and efforts to combat money-laundering, the legal profession has become increasingly alert to the risk that a client or prospective client[5] might try to retain a lawyer for a transaction or other non-litigation matter that could be

[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] *See* Debra Cassens Weiss, *Group Goes Undercover at 13 Law Firms to Show How U.S. Laws Facilitate Anonymous Investment,* A.B.A. J. (Feb. 1, 2016), https://www.abajournal.com/news/article/group_goes_undercover_at_13_law_firms_to_show_how_us_laws_facilitate; *see also* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html.

[3] *In re* Albrecht, 42 P.3d 887, 898–900 (Or. 2002) (disbarment for assisting client in money laundering).

[4] *See, e.g.*, United States v. Farrell, 921 F.3d 116 (4th Cir. 2019) (affirming conviction for money laundering); United States v. Blair, 661 F.3d 755 (4th Cir. 2011) (same); Laura Ende, *Escrow, Money Laundering Cases Draw Attention to the Perils of Handling Client Money*, STATE BAR OF CAL. (Feb. 2017), http://www.calbarjournal.com/February2017/TopHeadlines/TH1.aspx (lawyer sentenced "to five years in prison after being convicted of felonies related to a money laundering scheme").

[5] "Client" refers hereinafter to "client and prospective client" unless otherwise indicated.

legitimate but which further inquiry would reveal to be criminal or fraudulent.[6] For example, a client might seek legal assistance for a series of purchases and sales of properties that will be used to launder money. Or a client might propose an all-cash deal in large amounts and ask that the proceeds be deposited in a bank located in a jurisdiction where transactions of this kind are commonly used to conceal terrorist financing or other illegal activities.[7] On the other hand, further inquiry may dispel the lawyer's concerns.

This opinion addresses a lawyer's obligation to inquire when faced with a client who may be seeking to use the lawyer's services in a transaction to commit a crime or fraud. Ascertaining whether a client seeks to use the lawyer's services for prohibited ends can be delicate. Clients are generally entitled to be believed rather than doubted, and in some contexts investigations can be both costly and time-consuming. At the same time, clients benefit greatly from having informed assistance of counsel. A lawyer's obligation to inquire when faced with circumstances addressed in this opinion is well-grounded in authority interpreting Rule 1.2(d) and in the rules on competence, diligence, communication, honesty, and withdrawal.

As set forth in Section II of this opinion, a lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule. Whether the facts known to the lawyer require further inquiry will depend on the circumstances. As discussed in Section III, even where Rule 1.2(d) does not require further inquiry, other Rules may. These Rules include the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, the duty of communication under Rule 1.4, the duty to protect the best interests of an organizational client under Rule 1.13, the duties of honesty and integrity under Rules 8.4(b) and (c), and the duty to withdraw under Rule 1.16(a). Further inquiry under these Rules serves important ends. It ensures that the lawyer is in a position to provide the informed advice and assistance to which the client is entitled, that the representation will not result in professional misconduct, and that the representation will not involve counseling or assisting a crime or fraud. Section IV addresses a lawyer's obligations in responding to a client who either agrees or does not agree to provide information necessary to satisfy the duty to inquire. Finally, Section V examines hypothetical scenarios in which the duty to inquire would be triggered, as well as instances in which it would not.

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[6] Hereinafter, "transaction" refers both to transactions and other non-litigation matters unless otherwise indicated. This opinion does not address the application of rules triggering a duty to inquire where a client requests legal services in connection with litigation. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981), discusses how a lawyer *not* involved in the past misconduct of a client should handle the circumstance of a proposed transaction arising from or relating to the past misconduct.

[7] *See* AM. BAR ASS'N TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING 15–16 (2010) [hereinafter GOOD PRACTICES GUIDANCE] (describing institutions, such as the United Nations, the World Bank, the International Monetary Fund, and the U.S. Department of State, believed to be "credible sources" for information regarding risks in different jurisdictions); *id.* at 24 (noting the "higher risk situation" when a client offers to pay in cash).

II. The Duty to Inquire Under Rule 1.2(d)

Rule 1.2(d) states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." A duty to inquire to avoid knowingly counseling or assisting a crime or fraud may arise under this Rule in two ways. First, Rule 1.0(f) states that to "know[]" means to have "actual knowledge of the fact in question." When facts already known to the lawyer are so strong as to constitute "actual knowledge" of criminal or fraudulent activity, the lawyer must "consult with the client regarding the limitations on the lawyer's conduct."[8] This consultation will ordinarily include inquiry into whether there is some misapprehension regarding the relevant facts. If there is no misunderstanding and the client persists, the lawyer must withdraw.[9]

In *In re Blatt*,[10] for example, the New Jersey Supreme Court disciplined a lawyer for participation in a real estate transaction where "*[o]n their face* the [transaction] documents suggest[ed] impropriety if not outright illegality."[11] Addressing the lawyer's duties, the court wrote:

> A lawyer may not follow the directions of a client without first satisfying himself that the latter is seeking a legitimate and proper goal and intends to employ legal means to attain it. . . . The propriety of any proposed course of action must be initially considered by the attorney, and it may be thereafter pursued only if the lawyer is completely satisfied that it involves no ethical compromise. . . . [The lawyer's] duty, upon being requested to draft the aforementioned agreements, was to learn all the details of the proposed transaction. Only then, upon being satisfied that he had indeed learned all the facts, and that his client's proposed course of conduct was proper, would he have been at liberty to pursue the matter further.[12]

Additionally, if facts before the lawyer indicate a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, a lawyer's conscious, deliberate failure to inquire amounts to knowing assistance of criminal or fraudulent conduct. Rule 1.0(f) refers to "actual knowledge" and provides that "[a] person's knowledge may be inferred

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[8] MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. [13] [hereinafter MODEL RULES].

[9] *See* MODEL RULES R. 1.16(a)(1); Section IV, *infra*. Rule 1.2(d) nevertheless permits a lawyer to "discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

[10] 324 A.2d 15 (N.J. 1974).

[11] *Id.* at 18 (emphasis added).

[12] *Id.* at 18–19; *see also In re* Evans, 759 N.E.2d 1064 (Ind. 2001) (mem.) (three-year suspension for filing fraudulent federal tax returns knowingly misrepresenting sale proceeds from real estate transaction); *In re* Harlow, 2004 WL 5215045, at *2 (Mass. State Bar Disciplinary Bd. 2004) (suspending lawyer for violation of 1.2(d) for assisting client in knowing manipulation of state licensing agency's escrow account requirements); State *ex rel.* Counsel for Discipline of Nebraska Supreme Court v. Mills, 671 N.W.2d 765 (Neb. 2003) (two-year suspension for participating in illegal scheme to avoid estate taxes by knowingly backdating and preparing false documents); *accord* N.C. State Bar, Formal Op. 12, 2001 WL 1949450 (2001).

from circumstances." Substantial authority confirms that a lawyer may not ignore the obvious.[13]

The obligation to inquire is well established in ethics opinions. Nearly forty years ago, prior to the adoption of the Model Rules, ABA Informal Opinion 1470 (1981) declared that "a lawyer should not undertake representation in disregard of facts *suggesting* that the representation might aid the client in perpetrating a fraud or otherwise committing a crime . . . . A lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct . . . ."[14]

Relying on ABA Informal Opinion 1470, the Legal Ethics Committee of the Indiana State Bar Association concluded in 2001 that "[a] lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."[15] The opinion reasoned that an attorney asked to create a "new" sole power of attorney for a prospective client on behalf of her wealthy grandfather in matters concerning his estate has a duty to inquire further. The opinion emphasized the possibility that the granddaughter could fraudulently use the power of attorney to benefit herself rather than serve the interests of her grandfather, whom the attorney had not consulted, the possibility that the grandfather would not wish to grant sole power of attorney to his granddaughter, and the possibility that the grandfather might lack the capacity to consent to such an arrangement (made likely by the fact that the lawyer's paralegal observed the grandfather's deteriorated condition). Thus, although it is possible that the granddaughter's representation of the facts was accurate and therefore consistent with Rule 1.2(d), "the fact that a proposed client in drafting a power of attorney was the agent and not a frail principal should have suggested to [the lawyer] the possibility that the client's real objective might be fraud. [The lawyer] then *had an ethical responsibility to find out whether the proposal was above-board* before performing the services. By failing to make further inquiry, [the lawyer] violated Rule 1.2."[16]

Similarly, New York City Ethics Opinion 2018-4 concluded that lawyers must inquire when "retained to assist an individual client in a transaction that appears to the lawyer to be suspicious."[17] The opinion explains that "[i]n general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained

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[13] In the words of Charles Wolfram, "as in the criminal law, a lawyer's studied ignorance of a readily ascertainable fact by consciously avoiding it is the functional equivalent of knowledge of the fact. . . . As a lawyer, one may not avoid the bright light of a clear fact by averting one's eyes or turning one's back." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 696 (1986); *see also* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 47 (9th ed. 2019) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"); *id.* (gathering cases).

[14] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) (emphasis added) (interpreting the analogous ABA Model Code provision 7-102(A)(7), which provides that a lawyer must not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent").

[15] Ind. State Bar Ass'n Comm. on Legal Ethics, Op. 2, at 4 (2001).

[16] *Id.* at 4 (emphasis added). The Opinion reaches the same conclusion if the grandfather is considered to be the true client. *Id.* at 6–7. *Accord* N.C. State Bar Ass'n, Formal Op. 7 (2003).

[17] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 2 (2018); *see also* Conn. Bar Ass'n Standing Comm. on Prof'l Ethics, Informal Op. 91-22 (1991).

from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance. . . . What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances."[18] Failure to inquire may constitute "conscious avoidance" when, for example, "the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction."[19]

Courts imposing discipline are generally in accord. When a lawyer deliberately or consciously avoids knowledge that a client is or may be using the lawyer's services to further a crime or fraud, discipline is imposed.[20] Some courts have applied the even broader standard set out in Comment [13] to Rule 1.2, which requires a lawyer to consult with the client when the lawyer "comes to know or *reasonably should know* that [the] client expects assistance not permitted by the Rules of Professional Conduct . . . ." (Emphasis added.) For example, in *In re Dobson*,[21] the South Carolina Supreme Court identified facts showing that the lawyer "knew" or *"should have known*" that he was furthering a client's illegal scheme, and added, "[w]e also find that respondent *deliberately evaded* knowledge of facts which tended to implicate him in a fraudulent scheme. This Court will not countenance the conscious avoidance of one's ethical duties as an attorney."[22]

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[18] N.Y.C Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 3 (2018).

[19] *Id.* Hypotheticals in Section V of this opinion, *infra*, identify circumstances that should prompt further inquiry.

[20] *See In re* Bloom, 745 P.2d 61 (Cal. 1987) (affirming disbarment of lawyer who assisted client in sale and transport of explosives to Libya; categorically rejecting lawyer's defense that he believed in good faith that transaction was authorized by national security officials); *In re* Albrecht, 42 P.3d 887, 898–99 (Or. 2002) ("suspicious nature" of transactions, combined with other facts, support inference that lawyer must have known his participation in scheme constituted money laundering; upholding disbarment for knowingly assisting crime or fraud and rejecting defense that lawyer was "an unwitting dupe to a talented con man"); *see also* ELLEN BENNETT & HELEN GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 47 (9th ed.) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"). *But see* Iowa Supreme Court Att'y Disciplinary Bd. v. Ouderkirk, 845 N.W. 2d 31, 45–48 (Iowa 2014) (declining to infer knowledge of client's fraud despite what disciplinary counsel argued were "highly suspicious" circumstances where sophisticated, longstanding client who typically relied on the lawyer exclusively to prepare final paperwork deceived the lawyer about a fraudulent transfer to avoid creditors).

[21] 427 S.E.2d 166 (S.C. 1993).

[22] *Id.* at 427 (emphasis added); *see also* Florida Bar v. Brown, 790 So.2d 1081, 1088 (Fla. 2001) (suspension for soliciting illegal campaign contributions from employees and others for political candidates viewed as favorable to business interests of major client of firm; lawyer "should have known" conduct was criminal or fraudulent under Florida version of Rule 1.2(d) which expressly incorporates this standard); *In re* Siegel, 471 N.Y.S. 2d 591, 592 (N.Y. App. Div. 1984) (attorney "knew *or should have known* that at the very least, his conduct was a breach of trust, if not illegal") (emphasis added). Other jurisdictions have rejected a negligence standard for Rule 1.2(d). *See In re* Tocco, 984 P.2d 539, 543 (Ariz. 1999) (en banc) (declining to read a should have known standard into Arizona Rule 1.2(d); "While actual knowledge can be proven by circumstantial evidence, a mere showing that the attorney reasonably *should have known* her conduct was in violation of the rules, without more, is insufficient."); *accord* Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Jones, 606 N.W.2d 5, 7–8 (Iowa 2000).

The Committee acknowledges the tension between the "actual knowledge" standard of Model Rule 1.2(d), on the one hand, and those authorities applying a reasonably should know standard. This opinion concludes only that the standard of actual knowledge set out in the text of Model Rules 1.2(d) and 1.0(f) is met by appropriate evidence of willful blindness. When the Model Rules intend a lower threshold of scienter, such as "reasonably should know," the text generally makes this explicit. *See, e.g.*, MODEL RULES R. 2.3(b), 2.4(b), 4.3.

Criminal cases treat deliberate ignorance or willful blindness as equivalent to actual knowledge.[23] As the Supreme Court recently summarized:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. . . . [The Model Penal Code defines] "knowledge of the existence of a particular fact" to include a situation in which "a person is aware of a *high probability* of [the fact's] existence, unless he actually believes that it does not exist." Our Court has used the Code's definition as a guide . . . [a]nd every Court of Appeals—with the possible exception of the District of Columbia Circuit—has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.[24]

A lawyer may accordingly face criminal charges or civil liability, in addition to bar discipline, for deliberately or consciously avoiding knowledge that a client is or may be using the lawyer's services to further a crime or fraud.[25] To prevent these outcomes, a lawyer must inquire further when the facts before the lawyer create a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity.[26]

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[23] United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) ("[A]ctual knowledge and deliberate avoidance of knowledge are the same thing.").

[24] Global-Tech Appliances, Inc. v. SEB USA, 563 U.S. 754, 767 (2011) (emphasis added) (citations omitted) (applying willful blindness standard to statute prohibiting knowing inducement of patent infringement).

[25] *See* United States v. Cavin, 39 F.3d 1299, 1310 (5th Cir. 1994) (upholding deliberate ignorance jury instruction in prosecution of a lawyer); United States v. Scott, 37 F.3d 1564, 1578 (10th Cir. 1994) (affirming use of deliberate ignorance instruction against an attorney convicted of conspiracy to defraud the IRS); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 590 (9th Cir. 1983) (upholding deliberate ignorance finding against law firm in antitrust suit because firm was aware of high probability that client made illegal payments and failed to investigate); United States v. Benjamin, 328 F.2d 854, 862 (2d Cir. 1964) (a lawyer may be held liable in a securities fraud suit if the lawyer has "deliberately closed his eyes to the facts he had a duty to see"); Harrell v. Crystal, 611 N.E. 2d 908, 914 (Ohio Ct. App. 1992) (affirming finding of liability in malpractice action for lawyer's failure to investigate sham tax shelters); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2003-104 (2003) (where facts suggested property transfer to client from relative was to conceal assets from creditors, lawyer handling sale of property to a third party "must evaluate whether the transfer of realty to your client was 'fraudulent'" under state law); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94, Reporter's Note, cmt. g. at 17 (AM. LAW INST. 2000) ("the preferable rule is that proof of a lawyer's conscious disregard of facts is relevant evidence which, together with other evidence bearing on the question, may warrant a finding of actual knowledge").

[26] As the authorities and analysis in this Section make clear, the duty to inquire under Model Rule 1.2(d) is tied to the circumstances and the lawyer's state of knowledge. It is *not* a freestanding, blanket obligation to scrutinize every client for illicit ends irrespective of the nature of the specific matter and the attorney-client relationship. *See* United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972) ("Construing 'knowingly' in a criminal statute to include willful blindness . . . is no radical concept in the law," but the standard does not mean that an attorney has a general duty to "investigate 'the truth of his client's assertions' or risk going to jail"; upholding criminal conviction of lawyer who actively aided in immigration related marriage fraud); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2001-26 ("*Generally*, a lawyer has no obligation to inquire or otherwise uncover facts that are not necessary to enable the lawyer to fulfill his or her obligations with respect to the representation"; warning nevertheless that Rule 1.2(d) applies to filing of worker's compensation claims and leaving attorney to determine relevance of client's fatal condition to client's specific claim) (emphasis added). However, the

III. The Duty To Inquire Under Other Rules

Rule 1.2(d) is not the only source of a lawyer's duty to inquire. A lawyer may be obliged to inquire further in order to meet duties of competence, diligence, communication, honesty, and withdrawal under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. The kinds of facts and circumstances that would trigger a duty to inquire under these rules include, for example, (i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the matter (particularly whether such matters are frequently associated with criminal or fraudulent activity), (iv) the relevant jurisdictions (especially whether any jurisdiction is classified as high risk by credible sources), (v) the likelihood and gravity of harm associated with the proposed activity, (vi) the nature and depth of the lawyer's expertise in the relevant field of practice, (vii) other facts going to the reasonableness of reposing trust in the client,[27] and (viii) any other factors traditionally associated with providing competent representation in the field.

First, Rule 8.4(b) makes it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule 8.4(c) makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Providing legal services could violate Rules 8.4(b) and (c) where the relevant law on criminal or fraudulent conduct defines the lawyer's state of mind as culpable even without proof of actual knowledge.[28] In such a situation, the lawyer must conduct further investigation to protect the client, advance the client's legitimate interests, and prevent the crime or fraud.

Second, and more broadly, the lawyer's duty of competence, diligence, and communication under Rules 1.1, 1.3, and 1.4 may require the lawyer, prior to advising or assisting in a course of action, to develop sufficient knowledge of the facts and the law to understand the client's objectives, identify means to meet the client's lawful interests, to probe further, and, if necessary, persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud. Comment [5] of Rule 1.1 states that "[c]ompetent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem."[29]

Committee rejects the view that the actual knowledge standard of Rule 1.2(d) relieves the lawyer of a duty to inquire further where the lawyer is aware of facts creating a high probability that the representation would further a crime or fraud. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. g. at 11 ("Under the actual knowledge standard . . . a lawyer is not required to make a particular kind of investigation in order to ascertain more clearly what the facts are, although it will often be prudent for the lawyer to do so."); *id.* § 51 cmt. h., ill. 6 at 366; George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 116 (2014) (discussing association of willful blindness with recklessness, without citing to *Global-Tech Appliances*, and analyzing assumption that "the actual knowledge standard aims to exclude a duty to inquire").

[27] For facts that can undermine the reasonableness of reposing trust, see the discussion of "risk categories" provided by the GOOD PRACTICES GUIDANCE, *supra* note 7, at 15–36.

[28] *See In re* Berman, 769 P.2d 984, 989 (Cal. 1989) (en banc) (holding, in disciplinary proceeding for aiding a money laundering scheme, that attorney's "*belief* that the financial statements contained false information reflects sufficient indicia of fraudulent intent to constitute moral turpitude"). The same conduct would require the lawyer's withdrawal under Rule 1.16(a)(1).

[29] *See also* Iowa Supreme Court Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 301 (Iowa 2013) (failure to conduct even preliminary research on overseas internet scam violates Rule 1.1); *In re* Winkel, 577 N.W.2d 9 (Wis. 1998) (failure to obtain information on trust funds of clients' business prior to surrendering clients' assets to bank). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. c at 377 ("[A] lawyer must perform tasks reasonably appropriate to the representation, including, where appropriate, inquiry into the facts.").

The duty of diligence under Rule 1.3 requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner.[30] Rule 1.4(a)(5), which requires consultation with the client regarding "any relevant limitation on the lawyer's conduct" arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law, may require investigation of the relevant facts and law. Rule 1.4(b) requires the lawyer to give the client explanations sufficient to enable the client to make informed decisions about the representation.

Rule 1.13 imposes a duty to inquire in entity representations. Rule 1.13(a) provides that a lawyer "employed or retained by the organization represents the organization acting through its duly authorized constituents." Determining the interests of the organization will often require further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are. Under Rule 1.13(b), once the lawyer learns of action, omission, or planned activity on the part of an "officer, employee, or other person associated with the organization . . . that is a violation of a legal obligation to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interests of the organization." Even if the underlying facts regarding the violation or potential violation are already well established and require no additional inquiry, determining what is "reasonably necessary" and in the "best interest of the organization" will commonly involve additional communication and investigation.[31]

Recent ABA guidance and opinions support this approach. Concern that individuals might use the services of U.S. lawyers for money-laundering and terrorist financing prompted the ABA House of Delegates to adopt in 2010 the *ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* ("Good Practices Guidance"). The Good Practices Guidance advocates a "risk-based approach" to avoid assisting in money laundering or terrorist financing, according to guidelines developed by the Financial Action Task Force on Money Laundering ("FATF").[32] Recommended measures

[30] *See In re* Konnor, 694 N.W. 2d 376 (Wis. 2005) (failure to investigate concern that rents owed to estate were being misappropriated).

[31] *See* MODEL RULES R. 1.13 cmts. [3] & [4]. Rule 1.13(b) was added after a series of high profile financial accounting scandals in the early 2000s. AM. BAR ASS'N TASK FORCE ON CORPORATE RESPONSIBILITY (2003), *reprinted in* 59 BUS. LAW. 145, 166–70 (2003). Other law may also create a duty to inquire. The Sarbanes-Oxley Act of 2002 creates a duty for the "chief legal officer" to conduct an "appropriate" investigation in response to another lawyer's report of "evidence of a material violation" by the company. 17 C.F.R. § 205.3(b)(2) (2012); *see also In re* Kern, 816 S.E. 2d 574 (S.C. 2018) (discussing obligations of securities lawyers); U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS § 9-28.720 (quality of internal investigation can affect eligibility for "cooperation credit"); Cohen, *supra* note 26, at 129–30 (discussing obligations of securities lawyers).

[32] *See* GOOD PRACTICES GUIDANCE, *supra* note 7, at 2. A "risk-based approach" is generally "intended to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified . . . [H]igher risk areas should be subject to enhanced procedures, such as enhanced client due diligence ("CDD") . . . ." *Id.* at 8. The report continues: "This paper [identifies] the risk categories and offer[s] voluntary good practices designed to assist lawyers in detecting money laundering while satisfying their professional obligations." *Id.*

include "examining the nature of the legal work involved, and where the [client's] business is taking place."[33]

ABA Formal Opinion 463 addresses efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the international financing system from criminal activity arising out of worldwide money-laundering and terrorist financing activities. Observing that "the Rules do not mandate that a lawyer perform a 'gatekeeper' role," especially in regards to "mandatory reporting" to public authorities "of suspicion about a client," Opinion 463 nevertheless identifies the Good Practices Guidance as a resource "consistent with the Model Rules" and with Informal Opinion 1470.[34] It also reinforces the duty to investigate in appropriate circumstances. Specifically, Opinion 463 states that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . *[P]ursuant to a lawyer's ethical obligation to act competently, a duty to inquire further may also arise*. An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are *essential prerequisites* for accepting a new matter or continuing a representation as new facts unfold."[35]

A lawyer's reasonable judgment under the circumstances presented, especially the information known and reasonably available to the lawyer at the time, does not violate the rules. Nor should a lawyer be subject to discipline because a course of action, objectively reasonable at the time it was chosen, turned out to be wrong with hindsight.[36]

IV. Other Obligations Incident to the Duty to Inquire

If the client refuses to provide information or asks the lawyer not to evaluate the legality of a transaction the lawyer should explain to the client that the lawyer cannot undertake the representation unless an appropriate inquiry is made. If the client does not agree to provide

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[33] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 463, at 2 (2013) (summarizing GOOD PRACTICES GUIDANCE).

[34] *Id.*

[35] *Id*. at 2–3 (emphasis added); *see also id.* at 2 n.10 ("The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any 'beneficial owner' of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives.").

[36] In numerous contexts of evaluating attorney conduct, courts and regulators have warned against hindsight bias. *See* Woodruff v. Tomlin, 616 F.2d 924, 930 (6th Cir. 1980) ("[E]very losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight."); *In re* Claussen, 14 P.3d 586, 593–94 (Or. 2000) (en banc) (declining to discipline lawyer who aided client in converting insurance policy to cash while client's bankruptcy petition was pending; lawyer did not know client would abscond with money and cannot be judged by a standard of "clairvoyance" that reflects the knowledge of "hindsight"); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 (2018) ("Under the knowledge standard of Rule 1.2(d), a lawyer is not deemed to 'know' facts, or the significance of facts, that become evident only with the benefit of hindsight."); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2005-05 (2005) (in handling of "'thrust upon' concurrent client conflicts a lawyer who does balance the relevant considerations in good faith should not be subject to discipline for getting it wrong in hindsight"); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2001-100 (2001) (the propriety of accepting stock as payment of legal fees for a start-up "should be made based on the information available at the time of the transaction and not with the benefit of hindsight").

information, then the lawyer must decline the representation or withdraw.[37] If the client agrees, but then temporizes and fails to provide the requested information, or provides incomplete information, the lawyer must remonstrate with the client. If that fails to rectify the information deficit, the lawyer must withdraw. Indeed, proceeding in a transaction without the requested information may, depending on the circumstances, be evidence of the lawyer's willful blindness under Rule 1.2(d).[38] If the client agrees, provides additional information, and the lawyer concludes that the requested services would amount to assisting in a crime or fraud, the lawyer must either discuss the matter further with the client, decline the representation, or seek to withdraw under Rule 1.16(a).[39]

In general, a lawyer should not assume that a client will be unresponsive to remonstration. However, if the client insists on proceeding with the proposed course of action despite the lawyer's remonstration, the lawyer must decline the representation or withdraw.[40] The lawyer may have discretion to disclose information relating to the representation under Model Rule 1.6(b)(1)-(3).[41]

If the lawyer needs information from sources other than the prospective client and can obtain that information without disclosing information protected by Rules 1.6 and 1.18, the information should be sought. If the lawyer needs to disclose protected information in order to analyze the transaction, the lawyer must seek the client's informed consent in advance. [42] If the client will not consent or the lawyer believes that seeking consent will lead to criminal or fraudulent activity, the lawyer must decline the representation or withdraw.[43]

If an inquiry would result in expenses that the client refuses to pay, the lawyer may choose to conduct the inquiry without payment or to decline or discontinue the representation.

Overall, as long as the lawyer conducts a reasonable inquiry, it is ordinarily proper to credit an otherwise trustworthy client where information gathered from other sources fails to resolve the issue, even if some doubt remains.[44] This conclusion may be reasonable in a variety of

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[37] As discussed below, under Rule 1.2(c) a lawyer cannot assent to an unreasonable limitation on the representation even if the client seeks or insists upon such a limitation and offers consent.

[38] *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5 ("[A] client's refusal to authorize and assist in an inquiry into the lawfulness of the client's proposed conduct will ordinarily constitute an additional, and very significant, 'red flag.'").

[39] MODEL RULES R. 1.2 cmt. [13] ("If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law . . . the lawyer must consult with the client regarding the limitations on the lawyer's conduct.").

[40] *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6 ("If it becomes clear during a lawyer's representation that the client has failed to take necessary corrective action, and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, Rule 1.16(b)(1) mandates that the lawyer withdraw from representation."). For a discussion of the obligation to withdraw upon learning that a lawyer's services have been used to further a fraud, see ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992).

[41] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6.

[42] MODEL RULES R. 1.0(e) ("'Informed consent' denotes 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.").

[43] MODEL RULES R. 1.16(c)(2).

[44] *See* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5.

circumstances. For example, the lawyer may have represented the client in many other matters. The lawyer may know the client personally, professionally, or socially. The business arrangements and other individuals or parties involved in the transaction may be familiar to the lawyer.

Finally, Rule 1.2(c) permits a lawyer to "limit the scope of [a] representation if the limitation is reasonable under the circumstances and the client gives informed consent." Permitted scope limitations include, for example, that the client has limited but lawful objectives for the representation, or that certain available means to accomplish the client's objectives are too costly for the client or repugnant to the lawyer.[45] Any limitation, however, must "accord with the Rules of Professional Conduct and other law," including the lawyer's duty to provide competent representation.[46] In the circumstances addressed by this opinion, a lawyer may not agree to exclude inquiry into the legality of the transaction.

V. Hypotheticals

The following hypotheticals are intended to clarify when circumstances might require further inquiry because of risk factors known to the lawyer. Some are drawn from the Good Practices Guidance, an important resource for transactional lawyers detailing how to conduct proper due diligence as well as how to identify and address risk factors in the most common scenarios in which a lawyer's assistance might be sought in criminal or fraudulent transactions.[47]

Further inquiry would be required in the first two examples because the combination of risk factors known to the lawyer creates a high probability that the client is engaged in criminal or fraudulent activity.

#1: A prospective client has significant business connections and interests abroad. The client has received substantial payments from sources other than his employer. The client holds these funds outside the US and wants to bring them into the US through a transaction that minimizes US tax liability. The client says: (i) he is "employed" outside the US but will not say how; (ii) the money is in a "foreign bank" in the name of a foreign corporation but the client will not identify the bank or the corporation; (iii) he has not disclosed the payments to

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[45] *See* MODEL RULES R. 1.2 cmt. [6] ("A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.")

[46] *See id.* cmt. [7] ("an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation"); *id.* cmt. [8] ("All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law.").

[47] The analysis of the hypotheticals that follows draws on the GOOD PRACTICES GUIDANCE but should not be read to support the conclusion that any isolated risk factor identified in the GOOD PRACTICES GUIDANCE necessarily creates a duty to inquire in all matters in which it may be present. The question is whether a reasonable lawyer under the specific circumstances would be obliged to conduct further inquiry. The Committee further cautions that circumstances that render a specific jurisdiction or other factor "high risk" can change. On the one hand, if new circumstances presenting a greater risk arise the lawyer should take appropriate action, and may need to seek advice on what, if any, action is required. On the other hand, new circumstances may support acceptance or continuation of the representation by showing that, upon inquiry, the high-risk designation is inaccurate or inapplicable to the matter.

his employer or any governmental authority or to anyone else; and (iv) he has not included the amounts in his US income tax returns.[48]

#2: A prospective client tells a lawyer he is an agent for a minister or other government official from a "high risk" jurisdiction[49] who wishes to remain anonymous and would like to purchase an expensive property in the United States. The property would be owned through corporations that have undisclosed beneficial owners. The prospective client says that large amounts of money will be involved in the purchase but is vague about the source of the funds, or the funds appear to come from "questionable" sources.[50]

If, on the same facts as #2, the client assures the lawyer that information will be provided but does not follow through, the lawyer must either withdraw or again discuss with the client the need for the information to continue in the representation, seek an explanation for the delay, and withdraw if the explanation the client offers is unsatisfactory. If the information provided is incomplete — e.g., information that leaves the identity of the actual funding sources opaque — the lawyer must follow the same course: withdraw or again discuss with the client the need for the information to continue in the representation, seek an explanation for the delay, and withdraw if the explanation offered is unsatisfactory.[51]

In examples #3 through #5 below, the duty to inquire depends on contextual factors, most significantly, the lawyer's familiarity with the client and the jurisdiction.

#3: A general practitioner in rural North Dakota receives a call from a long-term client asking her to form a limited liability company for the purpose of buying a ranch.[52]

#4: The general practitioner in rural North Dakota receives a call from a new and unknown prospective client saying that the client just won several million dollars in Las Vegas and needs the lawyer to form a limited liability company to buy a ranch.[53]

#5: A prospective client in New York City asks a general practitioner in a mid-size town in rural Georgia to provide legal services for the acquisition of several farms in rural Georgia. The prospective client tells the lawyer that he has made a lot of money in hedge funds and now wants to diversify his investments by purchasing these farms but says he doesn't want his purchases to cause a wave of land speculation and artificially inflate local prices. He wants

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[48] This hypothetical is drawn from ABA Comm. on Ethics & Prof'l Responsibility, Informal Opinion 1470, which concludes that a lawyer must conduct further inquiry.

[49] For information about "high risk" jurisdictions, see GOOD PRACTICES GUIDANCE, *supra* note 7, at 15–16.

[50] This hypothetical is based on *In re* Jankoff, 81 N.Y.S.3d 733, 734 (N.Y. App. Div. 2018) (public censure imposed on stipulated facts), and *In re* Koplik, 90 N.Y.S.3d 187 (N.Y. App. Div. 2019) (same).

[51] *See supra*, Section IV.

[52] This hypothetical is drawn from GOOD PRACTICES GUIDANCE, *supra* note 7, at 8, and should not require further inquiry regarding the legitimacy of the transaction assuming prior matters have not involved abuse of the attorney-client relationship on the part of the client. It is likely, of course, that some inquiry into other details will be necessary to handle the transaction competently.

[53] This hypothetical is drawn from GOOD PRACTICES GUIDANCE, *supra* note 7, at 8, and requires further inquiry.

to wire money into the law firm's trust account over time for the purchases. He asks the lawyer to create a series of LLCs to make strategic (and apparently unrelated) acquisitions.[54]

VI. Conclusion

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in a transaction or other non-litigation matter the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness or conscious disregard of available facts. Accordingly, where there is a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer must inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require further inquiry to help the client avoid crime or fraud, to advance the client's legitimate interests, and to avoid professional misconduct. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after that inquiry based on information reasonably available at the time does not violate the rules.

[54] This hypothetical is drawn from AMERICAN LAW INSTITUTE, ANTI-MONEY LAUNDERING RULES AND OTHER ETHICS ISSUES 450-51 (2017) and requires further inquiry.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 492 **June 9, 2020**

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]

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[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."

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[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

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[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,

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[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 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 client . . . .[19]

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

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[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]

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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

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[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*

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[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]

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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.

Guidance Issued on Lawyers' Duties Regarding Clients' Criminal Behavior

The American Bar Association's Model Rule of Professional Conduct 1.2(d) ("Model Rule") prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent.

By **Thomas G. Wilkinson Jr. and Douglas B. Fox**

The American Bar Association's Model Rule of Professional Conduct 1.2(d) (model rule) prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. The text of the model rule states:

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

The rule sounds simple enough, and plainly suggests that a lawyer must have actual knowledge of a client's intended or ongoing criminal or fraudulent conduct before other professional duties may be triggered, such as the lawyer refusing to act on the client's behalf or withdrawing from the representation. This reading is consistent with Model Rule 1.0(f), which states that to "know" something "denotes actual knowledge of the fact in question." Model Rule 1.0(f) clarifies that a person's knowledge may be inferred from the circumstances.

On April 29, the ABA Standing Committee on Ethics and Professional Responsibility (Ethics Committee) issued Formal Opinion 491 to provide additional guidance on this topic. The formal opinion expressly applies only to transactional matters, and not to litigation. The opinion does not explain why the guidance was not intended to apply more broadly to litigation matters, or what other analysis might apply in that context. However, by its terms, Model Rule 1.2(d) is not limited to transactional matters. Indeed, Comment [12] to Model Rule 1.2(d) specifically notes that the Rule "does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise."

The Ethics Committee recognized that the model rule's requirement of actual knowledge of a client's intended or ongoing criminal or fraudulent conduct could be viewed as an invitation to a lawyer to turn a blind eye toward the client's improper conduct. As the U.S. Supreme Court recently discussed, actual knowledge means "exactly what it says." See *Intel Investment Policy Committee v. Sulyma,* 140 S. Ct. 768 (2020) (construing an ERISA provision found at 29 U.S.C. Section 1113(2)). "To have 'actual knowledge' of a piece of information, one must in fact be aware of it." At common law, the Supreme Court noted:

Legal dictionaries give "actual knowledge" the same meaning: "real knowledge as distinguished from presumed knowledge or knowledge imputed to one." Ballentine's Law Dictionary 24 (3d ed. 1969); accord, Black's Law Dictionary 1043 (11th ed. 2019) (defining "actual knowledge" as "direct and clear knowledge, as distinguished from constructive knowledge").

The Supreme Court noted that, in contrast, "the law will sometimes impute knowledge—often called "constructive" knowledge—to a person who fails to learn something that a reasonably diligent person would have learned."

What, then, does the rule require of practitioners? May a lawyer ignore troublesome facts to avoid acquiring actual knowledge of a client's intended criminal or fraudulent scheme?

The formal opinion explains that where a lawyer has actual knowledge of a client's intended criminal or fraudulent conduct, the lawyer's responsibility is clear under the model rules: the lawyer must not provide legal advice in furtherance of the improper conduct, and may be required to withdraw from the representation. Where facts already known to the lawyer are so strong as to constitute actual knowledge of criminal or fraudulent activity, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. A lawyer "must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct ...."

Going further, the Ethics Committee explained that if the "facts before the lawyer indicate a high probability that a client seeks to use the lawyer's services for criminal or fraudulent, activity," then the lawyer is obligated to inquire further, to ensure that the representation will not aid the client in engaging in criminal or fraudulent conduct. The opinion thus equates "willful blindness" with "actual knowledge." A lawyer may not willfully ignore facts that trigger the obligation to make further inquiry. If further inquiry is necessary to make a determination about the client's intended conduct, the lawyer may need to ask the client whether there is some misapprehension regarding the relevant facts. After further consultation, if there is no misunderstanding and the client persists, the lawyer must withdraw from representation pursuant to Rule 1.16. What constitutes suspicion sufficient to trigger further inquiry will depend on the circumstances. A determination that there is no need for further inquiry, on the other hand, will depend largely on the background facts, including the lawyer's familiarity with the client or the jurisdiction where the legal work is to be performed.

The formal opinion notes that model rules other than Model Rule 1.2(d) may trigger an obligation on the part of the lawyer to make further inquiry of his or her client. The model rules concerning duties of competence, diligence, communication, honesty and withdrawal may also oblige the lawyer to inquire further of the client to understand the client's objectives and intent. Additionally, other formal opinions, such as ABA Formal Opinion 463, address a lawyer's "gate-keeping" function, and the potential need for further investigation. Formal Opinion 463 concerned the lawyer's duties to protect the international finance system from criminal activity constituting money laundering and terrorist financing. One can imagine other circumstances where, either under a lawyer's gate-keeping function under Formal Opinion 463 or the requirements of Formal Opinion 491, further factual inquiry of a client might be warranted. These could include circumstances where, for example, a lawyer becomes aware of facts suggesting that the client intends to make a fraudulent insurance claim (a fraudulent COVID-19 insurance claim could be a current concern).

A recent disciplinary proceeding in New York provides a good example of the need for further inquiry when the facts demand it. *In the Matter of Robert L. Rimberg,* No. 2017-06111 (2d Dept. NY App. Div., June 3, 2020), the New York Grievance Committee issued an opinion and order suspending a lawyer from practice for three years, after a client came to his office with $1 million in cash, told the lawyer that the money was "clean," and asked the lawyer to distribute the money to various accounts. The lawyer later testified that he "didn't feel good about it" but proceeded to assist the client nonetheless. Later, the money was determined to have been "drug money." The Grievance Committee quoted the judge who sentenced the lawyer for illegal activity that the lawyer "should have known that the money was from an illegal source" because "people usually don't walk into an office with a million dollars in cash."

Other examples cited in the formal opinion include circumstances where:

- A prospective client has significant business interests abroad, and has received substantial payments from sources other than his employer. Those funds are held outside the US, but client wants to bring them to the US through a transaction that minimizes tax liability. The client tells you that he is employed outside of the United States, but does not say how, the money is in a foreign bank, but the client will not identify the bank, client has not disclosed the payments to his employer or anyone else, and has not included the amounts on his US tax return.

- A prospective client says he is an agent for a minister or other government official from a "high risk" jurisdiction and wants to buy a piece of property on behalf of an anonymous party. The client wants the property to be owned by undisclosed beneficial owners, and the source of the funds is vague or questionable.

The Ethics Committee also noted that a lawyer should not be subject to discipline where, under the circumstances, and under the facts available to the lawyer, the lawyer's judgment was reasonable at the time. As long as the lawyer conducts a reasonable inquiry, where necessary pursuant to the Formal Opinion, the lawyer has performed his or her duty under the Model Rule 1.2(d), "even if some doubt remains." Of course, the corollary is that the lawyer may be required to decline the representation or withdraw where the model rule requires further inquiry and "the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction ...." Lawyers who receive indications that the client may be involved in planning or perpetrating a fraud or criminal conduct using the lawyer's services should conduct further inquiry and, where necessary, secure the advice of ethics counsel.

Thomas G. Wilkinson Jr. and Douglas B. Fox *are members of Cozen O'Connor's legal profession practice group. Wilkinson twilkinson@cozen.com is a member of the ABA Standing Committee on Professionalism and is a past chair of the Pennsylvania Bar Association legal ethics and professional responsibility committee. Fox dfox@cozen.com is conflicts counsel at the firm and is a member of the Pennsylvania Bar Association's professional liability committee and civility in the profession committee.*

Division of Fees Between Discharged Counsel and Successor Counsel in Contingent Fee Cases

Sarah Sweeney*
Thomas G. Wilkinson

When a client terminates, *without cause*, its legal representation in a contingent fee matter and subsequently retains new counsel from a different firm, the Rules of Professional Conduct related to the division and disbursement of fees impose certain requirements on the successor attorney. The American Bar Association recently issued Formal Opinion 487[1] (the "ABA Opinion") to identify the applicable rules, and to clarify the duties owed to the client by the successor attorney.

The ABA Opinion explains that Model Rule 1.5(e) (or its state equivalent) has no application to the division of fees in cases of successive representation.[2] Such situations are governed by Rule 1.5(b)-(c), which require the successor counsel to "notify the client, in writing, that a portion of any contingent fee earned may be paid to the predecessor attorney."

Specifically, Rule 1.5(b) requires attorneys to communicate the rate or basis of legal fees, and Rule 1.5(c) requires that the written fee agreement include the method of determining the fee. Both subsections are designed to ensure that the client has a clear understanding of the total legal fee, how it will be computed, and when and by whom it will be paid. When a client replaces its original counsel with new counsel in a contingent fee matter, the discharged attorney may have a claim for fees under *quantum meruit* or pursuant to a clause in the contingency fee agreement; and the successor counsel's failure to communicate to the client the existence of such claim would run afoul of Rule 1.5(b)-(c). Therefore, even if the exact amount or percentage (if any) owed to the first attorney is unknown at the time, it is incumbent on the successor attorney to advise a contingency

[1] ABA Formal Opinion 487 (Fee Division with Client's Prior Counsel), June 18, 2019.
[2] Model Rule 1.5(e) applies to the division of fees between lawyers of different firms who are representing the client concurrently or who maintain joint ethical and financial responsibility for the matter as a whole. *See* cmt. [2].

client of the existence and effect of the predecessor attorney's claim for fees as part of the terms and conditions of the engagement from the outset.

While the foregoing ABA guidance is reasonable, Model Rule 1.5(b) and (c) do not provide the most compelling basis to obligate successor counsel to advise the client of predecessor's possible fee claim. As explained in Pennsylvania Bar Association Formal Opinion 2020-200: Obligations of Successor Contingent Fee Counsel to Advise Client of Potential Obligations to Prior Counsel, "[a] contingent fee agreement that fails to mention that some compensation may be due to, or claimed by, the predecessor counsel in circumstances addressed by this opinion is inconsistent with Rules 1.4(b) and 1.5(c)," which "mandate that successor counsel provide written notice that compensation may be claimed by Lawyer 1, and explain the effect of that claim on Lawyer 2's contingent fee."[3] Pennsylvania Rule 1.4(b) is identical to Model Rule 1.4(b).

The role of the successor attorney with respect to the discharged attorney's claim for fees should also be set forth in the engagement agreement. The ABA Opinion advises that the engagement agreement should expressly state whether the issue is one to be decided between the discharged attorney and the client or, alternatively, whether the successor attorney will represent the client in connection with the resolution of prior counsel's fee interest. If the latter, the successor attorney must obtain the client's informed consent to the conflict of interest arising from his/her dual role "as counsel for the client *and* a party interested in a portion of the proceeds." (emphasis in original) In many situations, the fees paid to the discharged and successor attorneys may not affect the client's ultimate recovery, and the client may make an informed decision to leave the matter for the two attorneys to determine amongst themselves. In resolving any such dispute, both attorneys

[3] *See also* Philadelphia Bar Ass'n Professional Guidance Comm. Op. 2004-1 ("In discharging the inquirer's obligations under Rule 1.1 (Competence) and Rule 1.4 (Communication), the Committee recommends that the inquirer have a thorough discussion with the client about the potentials for a fee and/or cost claim by the discharged attorney, and how such a claim, if made, might affect the inquirer's representation of that client and/or the client's ultimate distribution, if there is any recovery in the client's case.").

remain bound by Rule 1.6 confidentiality or pursuant to any confidentiality provisions in any underlying settlement agreement.

Upon recovery, the successor attorney must comply with Rule 1.15(d) by notifying the discharged attorney of the receipt of funds. However, client consent is required prior to disbursement of any fees that may be payable to the discharged attorney.[4] If there is a disagreement about the discharged attorney's claim or the amount owed, the successor attorney must hold the disputed fees in a client trust account under Rule 1.15(e) until the dispute is resolved.

The Disciplinary Board of the Supreme Court of Pennsylvania ("Board") has proposed that the guidance in the ABA Opinion be incorporated into the comment supporting Pennsylvania Rule of Professional Conduct 1.5 governing fees. Recognizing that the ABA Opinion is not binding precedent, the Board's published notice for comment dated December 7, 2019 stated that the ABA Opinion represents "helpful guidance to successor counsel and predecessor counsel in this common situation. The original lawyer in a contingency-fee matter will often assert a lien on the proceeds. But if the client retains new counsel, that client may not understand there is a continuing obligation to pay the original lawyer for the value that lawyer contributed or was entitled to under the original fee agreement."

The Board has proposed amending Comment [4] of Rule 1.5 to expressly reference the ABA Opinion. The comment period has expired, so practitioners should proceed on the assumption that the Board's recommendation will likely be approved by the Supreme Court. While adoption of the new proposed comment will not make compliance with all aspects of the Opinion mandatory, practitioners would be wise to include a written notice to clients that a portion of the fee may be claimed by predecessor counsel. In addition, successor counsel should confirm in writing any undertaking to resolve the prior counsel's fee interest. Since the ABA Opinion characterizes this as

[4] *See* Model Rule 1.5(a).

involving a conflict of interest requiring the client's informed consent to a waiver, the successor firm should also confirm that consent in writing. In this respect the Opinion goes further than previous bar association ethics guidance in Pennsylvania.

Inclusion of an express reference to an ABA or other ethics opinion in the text of a comment to a disciplinary rule is highly unusual. An alternative would have been to instead include a concise summary of that guidance. The Board presumably felt it appropriate to supplement the guidance on this important topic to lawyers handling contingent fee cases because lawyers often fail to engage in earnest efforts to resolve the respective fee interests promptly after successor counsel is retained, leaving the unsuspecting client exposed to complications, potential litigation and delays over the allocation of fees and costs following an award or settlement.

When asked by a prospective client to replace the client's counsel in a pending contingency fee case, attorneys and firms should be mindful of the duties imposed by the ABA Opinion on successor counsel, as well as the specific Rules of Professional Conduct in the relevant jurisdiction and any other applicable substantive law or authority. In many cases compliance with the new guidance will require updating contingent fee agreements, as well as ensuring the client is adequately informed of the prior counsel's ongoing fee interest and how it will be addressed in the event of a recovery.

* Sarah Sweeney (ssweeney@cozen.com) is professional responsibility and compliance counsel at Cozen O'Connor. She serves as Co-Chair of the Philadelphia Bar Association Professional Guidance Committee. Thomas G. Wilkinson (twilkinson@cozen.com) is a leader of the Legal Professionals practice group at the firm. He is a member of the Professional Guidance Committee and the ABA Standing Committee on Professionalism.

ABA Issues New Guidance on Lawyers' Ethical Duties to Prospective Clients

By Sarah Sweeney and Thomas G. Wilkinson

The ABA Standing Committee on Ethics and Professional Responsibility (the committee) recently issued Formal Opinion 492 (the opinion),[1] in which the committee offers helpful guidance on navigating the duties to prospective clients under Model Rule 1.18. Attorneys and conflict-avoidance software alike tend to focus on conflicts of interest with current and former clients and may disregard the risks associated with prospective clients with whom an attorney-client relationship is ultimately never formed. The opinion serves as an important reminder to attorneys that prospective clients are indeed owed certain duties and that even a short consultation that does not lead to a retention could disqualify the lawyer – and even the lawyer's entire firm – from undertaking a future representation of a different person or entity.

The duties described in Rule 1.18 apply to prospective clients. 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." The comments clarify what does – and what does not – constitute a consultation. Comment [2] explains that "a consultation is likely to have occurred if a lawyer ... 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." On the other hand, a consultation has *not* occurred within the meaning of the rule if a person unilaterally provides information to an attorney, such as through an unsolicited email seeking legal help.[2] To be accorded prospective client status, a person must have consulted with the attorney in good faith about the possibility of forming an attorney-client relationship.[3] So under the current rule, Tony Soprano's calculated effort to conflict out the best divorce attorneys in North Jersey from representing his wife Carmela by conducting multiple consultations and revealing information would have fallen short. Tony was not consulting with the attorneys in good faith.[4]

During an initial consultation, it is necessary for the prospective client to disclose certain information to the attorney so that the attorney can determine whether she can competently represent the client in the particular matter and whether there are any conflicts of interest that may preclude the representation. Any such information obtained by the attorney during the consultation must be kept confidential to the same extent as information obtained from a former client under Rule 1.9.[5] However, as noted in comment [1], while prospective clients receive *some* of the protections afforded to clients, they are not entitled to *all* of the protections. Rule 1.18(c) illustrates this most clearly by introducing a new standard for what is loosely considered the duty of loyalty.

Pursuant to Rule 1.18(c), an attorney is prohibited from representing someone with materially adverse interests in a substantially related matter only if the prospective client revealed information that could be *significantly harmful* to the prospective client in that matter. Like its counterparts, the Rule 1.18(c) prohibition on future representations is imputed to the lawyer's entire firm; however, this is "less exacting than the corresponding restriction on representations that are materially adverse to a former client" for which the prohibition against representing another party in a substantially related matter is "automatic."[6] The opinion offers several examples, pooled from various sources, of the type of information that is typically viewed as "significantly harmful" within the meaning of the rule:

> "[F]or instance, views on various settlement issues including price and timing; personal accounts of each relevant event and prospective client's strategic thinking concerning how to manage the situation; ... a presentation by a corporation seeking to bring an action of the

1 Obligations to Prospective Clients: Confidentiality, Conflicts and "Significantly Harmful" Information (June 9, 2020).

2 See Model Rule 1.18 cmt. [2].

3 Model Rule 1.18 cmt. [2] (stating "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'"); see also Pa. R. Prof'l. Cond. 1.18 cmt. [2] ("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 entitled to the protections of paragraphs (b) or (c) of this Rule. A person's intent to disqualify may be inferred from the circumstances.").

4 A lawyer who advises a client to contact other lawyers on a pretextual basis to disqualify them from representation of an adversary may be deemed to engage in prohibited conduct prejudicial to the administration of justice under Rule 8.4(d). *O Builders & Assocs. Inc. v. Yuna Corp.*, 19 A.3d 966 (N.J. 2011).

5 Model Rule 1.18(b).

6 N.Y. City Ethics Op. 2013-1 (2013).

> underlying facts and legal theories about its proposed lawsuit[;] ... sensitive personal information in a divorce case; premature possession of the prospective client's financial information; knowledge of settlement position; [and] a prospective client's personal thoughts and impressions regarding facts of the case and possible litigation strategies[.]"[7]

Notably, "significantly harmful" information "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."[8]

Even if an attorney obtains disqualifying information during a consultation with a prospective client, Rule 1.18(d) provides exceptions that, if satisfied, will permit the attorney – or other attorneys in his or her firm – to undertake a subsequent adverse representation. The attorney who obtained disqualifying information is free to undertake the representation of another party in that matter if both the affected client and the prospective client provide informed consent, confirmed in writing.[9] Comment [5] notes that a lawyer may condition a consultation upon the prospective client's informed consent that nothing "disclosed during the consultation will prohibit the lawyer from representing a different client in the matter" and that "[i]f the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client." Unlike in analogous situations involving a former client, a prospective client cannot prevent other lawyers in the firm from undertaking a subsequent adverse representation so long as the attorney minimized the disclosures provided in the initial consultation, the attorney is timely screened, and notice is timely provided to the prospective client.[10] In other words, the prospective client's consent is *not* required.[11]

Although prospective clients are not afforded protection to the same extent as "full-fledged" clients, attorneys should be mindful that even minimal consultations with prospective clients who provide information in good faith for the purpose of potentially forming an attorney-client relationship impose certain duties and requirements. Lawyers would be wise to minimize the amount of confidential information obtained during such consultations and, where practicable, seek the prospective client's agreement that the attorney will not be precluded from the subsequent representation of other clients with potentially conflicting interests. In the event that disqualifying information is obtained, the lawyer should promptly implement effective screening to ensure that the lawyer's personal disqualification will not be imputed to the rest of the law firm.

Sarah Sweeney (ssweeney@cozen.com) is professional responsibility and compliance counsel at Cozen O'Connor. She serves as co-chair of the Philadelphia Bar Association Professional Guidance Committee. Thomas G. Wilkinson (twilkinson@cozen.com) is a member of the Legal Professionals practice group at the firm. He is a past chair of the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee and a member of the ABA Standing Committee on Professionalism.

7 ABA Formal Op. 2020-492 (2020) (internal citations omitted); see Sershen v. Cholish, 2009 U.S. Dist. LEXIS 96223 at 4 (M.D. Pa. Oct. 15, 2009) (stating that "[s]ignificantly harmful information is a necessary pre-requisite to disqualification under Rule 1.18[,]" and denying motion to disqualify because movant failed to specify any such significantly harmful information).

8 Id. (citing *O Builders & Assocs. Inc. v. Yuna Corp.*, 19 A.3d 966 (N.J. 2011) (denying motion to disqualify).).

9 Model Rule 1.18(d)(1).

10 Model Rule 1.18(d)(2) & cmt. [8].

11 See N.C. Ethics Op. 2003-8 (2003).