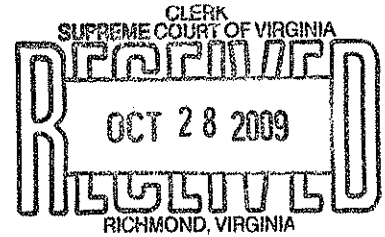


VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND



IN THE MATTER OF
SUPREME COURT RULES PART 6, § II,
RULE OF PROFESSIONAL CONDUCT 1.18

PETITION OF THE VIRGINIA STATE BAR

Jon D. Huddleston, President
Karen A. Gould, Executive Director
James M. McCauley, Ethics Counsel
Virginia State Bar
707 East Main Street
Suite 1500
Richmond, VA 23219
Phone (804) 775-0500
Fax (804) 775-0501

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10(g) of the Rules of this Court, and requests review and approval of proposed Rule of Professional Conduct 1.18, Part 6, § II, Rules of Virginia Supreme Court, as set forth below. The proposed rule was approved by a vote of 67 to 1 by the Council of the Virginia State Bar on October 16, 2009 (Record, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics ("Committee") has proposed Rule of Professional Conduct 1.18. Rule 1.18 will give guidance to Virginia lawyers as to their duties to prospective clients. Rule

1.18 distinguishes a prospective client,¹ to whom a duty of confidentiality is owed, from someone who unilaterally gives information to a lawyer with no reasonable expectation of forming an attorney/client relationship, to whom no duty is owed.²

At first blush, Rule 1.6 may seem to apply only in those instances in which a potential client actually hires a lawyer. Neither Rule 1.6 nor Rule 1.9, or their respective commentary, explicitly addresses any duties owed by a lawyer to a prospective client, nor do they offer any protection for pre-retention communications. However, the "Scope" section of the Rules of Professional Conduct specifically references application of Rule 1.6's duty of confidentiality vis-à-vis consultations. That

¹ A "prospective" client is a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter. See proposed Rule 1.18(a).

² Proposed Comment [2] states: "Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who 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, is not a "prospective client" within the meaning of paragraph (a).

section states, in pertinent part:

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. *But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.* (Emphasis added)

Moreover, judicial and ethics opinions have long held that communications between a prospective client and a lawyer are protected under the common law attorney-client privilege and the ethical duty of confidentiality under Rule 1.6. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005* at 381 (2006) (obligation to treat all communications with prospective client as confidential "is well-settled matter under the law of attorney-client privilege. . . .")³; ABA Formal Op. 90-358 (1990) ("Information imparted to a lawyer by a would-be client seeking representation is protected from

³ See also Thomas E. Spahn, *A Practitioner's Guide to the Attorney-Client Privilege and Work Product Doctrine* § 2-202 (2001); Restatement (3d) of *The Law Governing Lawyers* § 15 (2000).

revelation or use under Model Rule 1.6 even though the lawyer does not undertake representation or perform legal work for the would-be client."); Va. Legal Ethics Op. 1546 (1993) ("A potential client's initial consultation with an attorney may impart an expectation of confidentiality which must be protected by the attorney even where no formal attorney-client relationship is subsequently established."); Va. Legal Ethics Op. 1794 (2004) (communications between prospective client and lawyer at initial interview are protected under Rule 1.6); *Gay v. Lihuin Food Systems, Inc.*, 5 Cir. CL00121, 54 Va. 466, 468 (Isle of Wight County 2001) (confidential communications from a prospective client deserve protection under the ethics rule); *Joslyn v. Joslyn*, 23 Cir. CH03596 (Roanoke Co. 2003) (husband's lawyer disqualified based on initial consult wife had with same lawyer).

Under the current rules and ethics opinions, even if a lawyer-client relationship does not ensue, an initial interview with a prospective client triggers the duty of confidentiality under Rule 1.6 and potentially conflicts

the interviewing lawyer and any other lawyer associated with the firm from undertaking representation adverse to the interviewed prospective client.⁴ Alternatively, if a law firm has already undertaken representation of a client, but another lawyer in the firm interviews a prospective client whose interests are adverse to the existing client, absent consent, Rule 1.10 may require the firm to withdraw from representing the existing client.

In many instances, Rule 1.18 will avoid the imputed disqualification of a law firm resulting from an initial consult when a lawyer-client relationship does not ensue. The proposed rule allows the interviewing lawyer to be screened, thereby avoiding disqualification of the entire firm. The interviewing lawyer must take reasonable measures to control their exposure to disqualifying information, and written notice must be promptly given to the prospective client that the firm is employing a screen regarding their consultation and the procedures

⁴ Rule 1.10(a) imputes conflicts created by a lawyer's obligations under Rule 1.6 to all other lawyers in the same firm.

employed in the screening process.

If the requirements of proposed Rule 1.18 are followed, the conflicts and imputed disqualification of a law firm triggered by an initial consult will be significantly reduced.⁵ The proposed rule provides an additional protection to the law firm and members of the public seeking the law firm's services that is not available under the existing rules, particularly in those instances where a person contacts a lawyer or law firm merely for strategic elimination of the lawyer or law firm for that person's adversary. See, e.g., Legal Ethics Op. 1794 (2004) (discussing the practice of "blocking" in which a client goes from lawyer to lawyer to conflict them from representing their adversary). In sum, proposed Rule 1.18 provides a better balance between a prospective client's right to protection under Rule 1.6 and the adverse party's right of access to and choice of

⁵ Even proposed Rule 1.18 will not always prevent conflicts from being imputed to the other lawyers in the firm. For example, if the interviewing lawyer discusses a potential client's matter with other lawyers in the firm, establishing a screen as proposed by Rule 1.18 will not avoid the imputation of a conflict.

counsel.

Paragraph (b) of proposed Rule 1.18 identifies the lawyer's duty to treat all communications with a prospective client as confidential. This well-settled principle should be set out in a rule.

Paragraph (c) extends the application of Rule 1.9 (former client conflicts rule) to prohibit representation adverse to the prospective client in the same or substantially related matter. Unlike Rule 1.9, however, this proposed Rule does so only if the interviewing lawyer received information from the prospective client that could be "significantly harmful" to the prospective client in the later representation. This approach recognizes and encourages lawyers or their support staff to obtain limited information in a pre-retention situation to enable the lawyer to check for conflicts before proceeding further.

This treatment of pre-retention communications is justified because, prior to the representation decision, there is an inevitable period during which it is in the interest of the prospective client to share enough

information with the lawyer to determine whether there is a conflict of interest or simple incompatibility. The lawyer may learn very early in the consultation, for example, that the adverse party identified by the prospective client is an existing client of the interviewing lawyer's firm. If the discussion stops before "significantly harmful" information is shared, the law firm's existing client should not be denied counsel of its choice if a substantially related matter arises that is adverse to the prospective client. Consistent with Rule 1.10 of the current Rules of Professional Conduct, Paragraph (c) of proposed Rule 1.18 extends the prohibition of this rule to other lawyers in the law firm, unless the requirements of paragraph (d) are met.

Paragraph (d) makes clear that the prohibition imposed by proposed Rule 1.18 can be waived with informed consent, confirmed in writing, of both the prospective client and the client of the interviewing lawyer's firm on whose behalf the firm would act adverse to the interests of the prospective client.

In the event that "significantly harmful" information

is shared with the interviewing lawyer, the interviewing lawyer may be screened from any involvement in the subsequent matter but others in the law firm may represent the adverse party.

The bar believes that proposed Rule 1.18 strikes the correct balance between protecting the interests of the prospective client by protecting the confidentiality of information shared in a pre-retention communication with a lawyer and the interests of other clients whose choice of counsel should not be denied as a result of a contact by a prospective client.

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed Rule 1.18 at its meeting on March 26, 2009 (Record, Page 1). The Virginia State Bar issued a press release dated May 15, 2009, pursuant to Part 6, § IV, Paragraph 10(c)(iii) of the Rules of this Court (Record, Page 4). Pursuant to Part 6, § IV, Paragraph 10(d)(i), the Virginia State Bar issued a second press release dated August 24, 2009 (Record, Page 8). An e-mail dated August 24, 2009 was sent to Section Chairs of the

Virginia State Bar soliciting comment (Record, Page 12). Notice of the proposed rule was also published in the *Virginia Lawyer Register*, Vol. 57, No. 10 at pages 5-6 in the May 2009 issue, and Vol. 58, No. 2 at page 8 in the August/September 2009 issue (Record, Page 27); on the bar's website at <http://www.vsb.org/site/regulation/prop-rule-118> (Record, Page 30); and in the bar's E-News on July 31, 2009 (Record, Page 32).

The bar received nine comments, all in support of the proposed rule (Record, Pages 16 - 26). Those who submitted comments are as follows: 1) Barry Dorans, Esq. (May 18, 2009); 2) Kellam T. Parks, Esq. (May 18, 2009); 3) Jeffrey A. Sanborn, Esq. (May 20, 2009); 4) Cherise l'Anson Eveleigh, Esq. (May 22, 2009); 5) Brandon H. Zeigler, Esq. (May 22, 2009); 6) Samuel W. Meekins, Jr., Esq. (May 26, 2009); 7) Richard E. Biemiller, Esq. (May 28, 2009); 8) Bradfute W. Davenport, Jr., Esq. (June 1, 2009); and 9) Peter A. Andreoli, Chair, Ethics Committee, Local Government Attorneys of Virginia (June 15, 2009).

III. Proposed Rule Change

Rule 1.18 Duties To Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) 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, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) 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; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client; and

(ii) written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.

COMMENT

[1] 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 discussions 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. The principle of loyalty diminishes in importance if the sole reason for an individual lawyer's disqualification is the lawyer's initial consultation with a prospective new client with whom no client-lawyer relationship is formed, either because the lawyer detected a conflict of interest as a result of an initial consultation, or for some other reason (e.g., the prospective client decided not to retain the firm). Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who 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, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The client may disclose such information as part of the process of determining whether the client wishes to form a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations 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. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of

the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter and the lawyer believes that an effective screen could not be engaged to protect the client.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client and the lawyer reasonably believes that an effective screen will protect the confidential information of the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

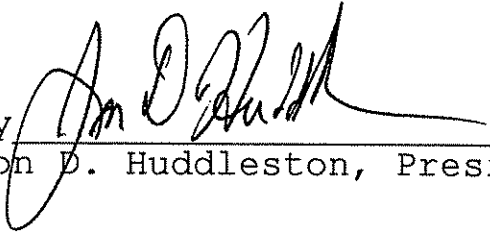
IV. CONCLUSION

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The proposed Rule 1.18 was developed and approved in compliance with the requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed Rule of Professional Conduct 1.18, Part 6, § II of the Rules of the Virginia Supreme Court for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

By 
Jon D. Huddleston, President

By 
Karen A. Gould, Executive Director

Dated this 27th day of October, 2009.