

II. Duties to Prospective Clients

Written by Sara Anne Hook, M.B.A., J.D.

When thinking about ethical issues for lawyers, it is always worthwhile to start by reviewing the relevant sections of the rules of professional conduct for the state or states where the lawyer is licensed to practice. In terms of duties to prospective clients for lawyers who practice in Indiana, the Indiana Rules of Professional Conduct provide some helpful guidance.

Indiana Rules of Court Rules of Professional Conduct

Including Amendments made through April 30th, 2015
(http://www.in.gov/judiciary/rules/prof_conduct/prof_conduct.pdf, accessed 10/21/15)

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 a 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.

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. 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 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. See Rule 1.0(e) for the definition of informed consent.

[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.

[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. See Rule 1.0(k) (requirements for screening procedures). 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.

[10] Paragraph (d) also applies to other lawyers in the firm with whom the receiving lawyer actually shared disqualifying information.

The ABA Model Rules of Professional Conduct address duties to prospective clients, with substantive information provided in the Comments. Note the references to other Rules, such as Rule 1.1, Rule 1.15 and Rule 1.10.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

(http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html, accessed 10/21/15)

Client-Lawyer Relationship

Rule 1.18 Duties To Prospective Client

- (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.
- (b) 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.
- (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; and
 - (ii) written notice is promptly given to the prospective client.

Client-Lawyer Relationship

Rule 1.18 Duties To 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 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.

[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." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[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 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 consultation 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 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. See Rule 1.0(e) for the definition of informed consent. 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.

[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. See Rule 1.0(k) (requirements for screening procedures). 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.

A number of bar associations have highlighted the ethical issues with prospective clients and provided guidance, including formal ethics opinions and informal advisory notes, on typical situations that the lawyer may face. For example, the Board of Overseers of the Bar in the State of Maine commented on the following scenario:

A prospective client (PC) met with Lawyer and at the end of the fairly lengthy initial intake PC made reference to a potential adverse party (AP) that Lawyer knows is a company her law firm represents. As a result, Lawyer declined taking on PC as a client. Because that declination means that PC never became Lawyer's actual client, may she now discuss with AP (or anyone else) any portions of that intake discussion?

The response was that:

No. Under MRPC Rule 1.18 (Duties to Prospective Client), all of the information discussed at the initial intake between PC and Lawyer must remain confidential. Rule 1.18(a) states that any "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." In this instance, it does not matter that PC did not become an actual client of Lawyer or her law firm. Under Rule 1.9(b), even when no client-lawyer relationship ever ensues with PC, Lawyer "...shall not use or reveal information learned in the consultation (with a prospective client)..." (Bar Counsel Notes: Confidences of/duties to Prospective Clients, http://www.mebarrowseers.org/attorney_services/bar_notes.html?id=638355, 2013, accessed 10/29/15).

Likewise, Hierschbiel identified confusion over the duty owed to prospective clients as one of the top ten myths about the rules related to handling confidential client information.

Myth #2: You owe no duty of confidentiality to prospective clients.

Oregon RPC 1.18 sets forth a lawyer's duties to prospective clients. When a person discusses with a lawyer the possibility of retaining the lawyer, the lawyer is prohibited from using or revealing any information gained during the consultation except when the information has become generally known or as the rules would otherwise allow. The fact that the prospective client is an adverse party to a current client, and the information provided would help the current client, does not give lawyers license to share the information. (Helen Hierschbiel, Top 10 Myths: The Duty of Confidentiality, *Oregon*

State Bar Bulletin, June 2019,
<https://www.osbar.org/publications/bulletin/09jun/barcounsel.html>, accessed 10/29/15)

An article by Eichenhorn in *CNA Professional Counsel* covers some of the potential risks when a lawyer declines to represent a new client. (Emily J. Eichenhorn, Rejecting risk while rejecting prospective representations. *CNA Professional Counsel*, May 2007,

http://www.jamisongroup.com/downloads/IP_RM_N_Rejecting_Risk_While_Rejecting_Prospective_Representations.pdf, accessed 10/29/15) She identifies the following risks posed by prospective clients, with suggestions for how to effectively manage these risks.

- Allegations of neglect or delay or negligence advice (including her recommendation to document that the representation was declined by using non-engagement letters)
- Breaches of confidentiality or conflicts of interest (limit information received, protection the confidentiality of the information that was received and record the contact with the prospective client in the conflicts database)

She also provides a checklist for a non-engagement letter and sample language.

Even before the advent of the Internet and other recent communication technologies, the cases make it clear that the burden is on the attorney to clarify the nature and terms of the legal representation. This not only includes the work that the law firm will do and the amount that will be charged, but when the attorney-client relationship begins and when it ends. In cases where the potential client believed that he or she had “hired” the attorney to handle a matter, but the attorney thought otherwise, the court has protected the potential client by finding that an attorney-client relationship did exist. In addition, courts have held that even without agreeing to take on a particular matter, the attorney is under a duty to advise the prospective client of statutes

of limitations that may be running and other issues that may impact the person's ability to safeguard his or her legal interests. Most commentators on legal ethics and best practices for law firms would recommend the use of representation letters and declination letters as well as letters to clients when cases are closed and matters are concluded.

The same care should be taken in clarifying the relationship when using the Internet or other communication technologies. For example, The Bar Plan, a legal malpractice insurance provider, has provided a number of good articles about how to avoid inadvertently forming an attorney-client relationship through a law firm's website, with the use of disclaimer as the first line of defense. Such a disclaimer should also appear with any of the attorney biographies and in response to any email messages that might be sent to the law firm. Also, the law firm's website should make it clear that only legal information is being provided, not legal services or legal advice, especially since law firm websites can be viewed by people in other states and countries where the lawyer may not be licensed. Here is an example of language provided at the bottom of a law firm's website: "This site and any information contained herein are intended for informational purposes only and should not be construed as legal advice. Seek competent counsel for advice on any legal matter. Woodard, Emhardt, Moriarty, McNett & Henry LLP cannot guarantee that the content of this website is complete or up to date."

(<http://www.uspatent.com/>, accessed 10/29/15) Disclaimers at the end of email messages should also be used:

This message and any attachments are from Redding Law and are covered by the Electronic Communications Privacy Act (18 U.S.C. 2510 et. seq.). This message, plus attachments, may contain legally privileged or confidential information intended only for the addressee. If you are not the addressee, or if this message has been addressed to you in error, you are not authorized to read, copy or distribute this message or any attachments. We ask that you delete this message and attachments (including all copies)

and notify us by return email or phone (317) 426-1316. Delivery of this message and any attachments to any person other than the intended addressee is unauthorized and is not intended in any way to waive any confidentiality or privilege. Additionally, mere receipt of this email does not, on its own, create an attorney client relationship and no such relationship should be inferred. **Redding Law, LLC**

The Bar Plan's publication, *The Advocate*, contains the following suggestions for what should be covered in a disclaimer: "1) No attorney-client relationship is created by the receipt by the lawyer of the potential client's information, and 2) No privilege or confidentiality attaches to the information." (Stiegemeyer, C.A. Law Firm Websites and Disclaimers. *The Advocate*, Spring/Summer 2008, pp. 1-2) This second provision speaks to the attorney's duty to prospective clients under the Rules of Professional Conduct and also helps to avoid a conflict of interest because of information that might be shared by the prospective client. (See also Eileen Libby, Websites may trigger unforeseen ethics obligations to prospective clients. *ABA Journal*, January 2011, pp. 22-23, http://www.abajournal.com/magazine/article/websites_may_trigger_unforeseen_ethics_obligations_to_clients/, accessed 10/29/15; Professional Ethics Committee, Who Is a Prospective Client? *Wisconsin Lawyer*, vol. 84, no. 9, Sept. 2011, <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=84&Issue=9&ArticleID=2373>, accessed 10/29/15)

A review of a recent application for malpractice insurance reveals the following questions:

16. Are Engagement letters or fee agreements utilized?
17. Are Declination (Non-Engagement) letters utilized?
18. Are termination or closing letters utilized?
22. Does your law firm have a website?

a. If yes, does the website contain a disclaimer to the effect that use of the website does not create an attorney-client relationship?

23. Does the law firm respond to solicitations for legal advice over the Internet?

a. If yes, is a conflicts check conducted prior to providing the legal advice?

26. Other than your own website, do you advertise on the Internet? If yes, provide web addresses.

In addition to the importance of using disclaimers, other aspects of law firm websites were identified by The Bar Plan as perhaps having ethical implications as well. (Tegtmeier, G. How your professional liability insurance carrier looks at your law firm website. *The Advocate*, Summer 2009, p. 1).

Does the website list additional attorneys who are not listed on the application (for malpractice insurance)?

Does the website list affiliations with other law firms?

Do the areas of practice set out in the website coincide with the application (for malpractice insurance) or does the firm list additional areas of practice on its website?

Does the overview of the firm, as stated on the website, coincide with the firm's application (for malpractice insurance)?

Does the website show lawyers licensed in states not listed in the application (for malpractice insurance), and the firm have offices in those states?

Does the website carry additional information, such as news and media coverage about the law firm, past settlements and verdicts obtained, additional legal resources or an FAQ's section (which could be construed as legal advice), links to other websites, or statements about the firm's approach to client relationships?

(See also Indiana Rules of Professional Conduct, Rules 7.1-7.5 about what kind of information is permissible on law firm websites and what is prohibited. However, note that a proposed revision of Rule 7.1 may permit more leeway in what information can be provided, eliminating the long list of prohibited statements in subsection 2 of the Rule and instead attempting to clarify when otherwise truthful statements would be considered misleading.) Also, Ellis makes it very clear that websites are considered law firm marketing/advertising. (Jennifer Ellis, *WordPress in One Hour for Lawyers: How to Create a Website for Your Law Firm*. Chicago: American Bar

Association, 2014). “There is no doubt that websites are marketing. Therefore, you must follow the ABA’s Model Rules pertaining to marketing and advertising and/or the rules adopted in your jurisdiction.... Please check your own jurisdiction’s rules, and keep in mind that a firm must follow all rules for all of the jurisdictions in which any of its lawyers are licensed.” (*Id.* at 115)

Among the ethical issues she covers in her book are:

- Honesty
- Expectations
- Domain names
- Office names
- Specialist and expert designations (see Indiana Rules of Professional Conduct)
- Comments, communication and the unauthorized practice of law (beware of forming a lawyer-client relationship by answering legal questions in too specific a manner. *Id.* at 117)
- Disclaimer – with suggested language (*Id.* at 118-119)
- Blogs
- Backing up the site and keeping copies
- Security, especially given concerns about hackers
- Keeping the website current
- Choosing safe plugins
- Using a scanner to check for malware

Although this discussion is primarily focused on law firm websites, attorneys should take special care in all of their communications with potential clients, especially potential clients that they might be interacting with through social media, email or other Internet-based technologies. There are special ethical rules related to the marketing and advertising of legal services. Indiana has updated its Rules of Professional Conduct to reflect the new ways of communication available to attorneys who want to delve beyond the traditional paper- and mail-based methods of reaching prospective clients and there are proposals to do so again [as presented at the ISBA House of Delegates meeting in October 2015, *see* proposed revisions to Rule 7.1 and Rule 7.2). In terms of social media, a lawyer also has to be mindful of the issues of “friending” people or assuming a different persona or identity in a manner designed to glean information or an unfair

advantage (See Section IV. Case Delays and Insufficient Client Communications). A number of Rules of Professional Conduct could be violated by inappropriate use of social media, including Rule 4.1 Truthfulness in Statements to Others, Rule 4.2 Communications with Persons Represented by Counsel, Rule 4.3 Dealing with Unrepresented Persons and Rule 4.4 Respect for the Rights of Third Persons, to name but a few.

A recent article by Gubbins provided some excellent suggestions for avoiding risks on the Internet, especially with social media activities. (Roberta M. Gubbins, Avoid Internet risk, keep your social media safe. *Michigan Bar Journal*, Oct. 2015, pp. 24-25).

1. Write only the truth.
2. Don't mention clients or their matters without their consent.
3. Avoid answering legal questions. As the author notes, "[a]nswering legal questions on social media sites can be dangerous. Individuals asking legal questions may interpret your responses as legal advice from you, their 'new lawyer,' whereas you don't view them as clients." The author goes on to caution: "Be aware that an initial consultation may result in the formation of a client-lawyer relationship even if you decline to undertake the representation." Also, even if this does not create a client-lawyer relationship, "confidences imparted in good faith cannot be used to the disadvantage of the prospective client, as provided by MRPC 1.7(b) and 1.9."
4. Keep sites up to date.
5. Be aware of what others say on your site.
6. Keep detailed records of what you post online.

The author concludes by observing that "[s]ocial networking sites can help you better serve your clients and bring in new business at a relatively low cost. But remember your ethical obligations when using these sites to protect yourself and your clients." (*Id.* at 25)

The same ethical considerations should apply when an attorney publishes a blog or participates in a forum. These ethical considerations should include civility, truthfulness, competence, confidentiality of client information and respect for third parties and the content of the blog should be based on thorough research. Moreover, the blog or forum should make it clear that this is the attorney's opinion only and should not be relied on as legal advice or the

provision of legal services. Attorneys should be particularly careful that their participation in blogs, forums, chat rooms and social media sites is not construed as advertising or solicitation in a way that would cause them to run afoul of the Rules of Professional Conduct.

Legal Ethics: Top Challenges



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Presenters

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