

Prospective Clients – Neither Fish Nor Fowl

***The Ethics and Risk Management of
Casual Contacts, Cold Calls, and Preliminary Consultations***

One of the anomalies of law practice is that prospective clients don't owe you a dime, but you owe them quite a bit – specifically confidentiality and competence. A new ABA Model Rule of Professional Conduct defines prospective client as a person who discusses with a lawyer the possibility of forming an attorney-client relationship with respect to a matter. More than one lawyer has faced a conflict of interest disqualification motion because of a long ago casual contact, a quick telephone call, or brief office consultation with a prospective client in which representation was declined. Others have paid large malpractice claims because of careless advice when discussing with prospective clients whether they had a viable claim.

The purpose of this article is to provide an overview of the professional responsibility and malpractice issues dealing with nonclients in that in-between category of not yet a client, but seeking legal advice. Talking to them could be a waste of time, or lead to the gold mine case we all dream about. How does a lawyer reasonably learn enough information to determine whether to enter an attorney-client relationship without risking allegations by former prospective clients of conflicts of interest or malpractice? In attempting to answer this question my goal is to leave you with a working lawyer's appreciation of the issues and some useful prospective client risk management guidelines.

The Status of Prospective Clients in Kentucky

Professional conduct rules do not cover the formation of the attorney-client relationship because it is a matter of substantive law. Probably for this reason the version of the ABA Model Rules of Professional Conduct on which Kentucky's rules are based did not include a rule on prospective clients. The only reference to prospective clients in the Model Rules then in effect was in the introductory Scope section which provided that prospective clients are owed certain duties including confidentiality. When the Kentucky Supreme Court implemented our version of the Model Rules in 1990, however, the Scope section was not included. Thus, Kentucky's Rules of Professional Conduct are silent on prospective clients.

What Kentucky does have in the way of ethics guidance is a 1987 KBA ethics opinion that adopted the majority view that prospective clients are owed professional duties. In KBA E-316 the Ethics Committee was asked whether a firm could represent the party adverse to a former prospective client if no confidences and secrets were obtained that could be used to the advantage of the adverse party. In answering yes to the inquiry the Committee cautioned:

“... a lawyer may be precluded from accepting employment adverse to a prospective client who did not retain the lawyer, if the prospective client revealed to the lawyer confidences and secrets about a matter in a good faith effort to secure legal counsel.”

As early as 1931 Kentucky case law recognized that prospective client communications are protected by the attorney-client privilege.ⁱ In 1997 the Kentucky Supreme Court in *Lovell v. Winchester*ⁱⁱ again considered the responsibilities of a lawyer dealing with a person seeking legal advice with a view to obtaining legal services. The case concerned a motion to disqualify an attorney for a conflict of interest. He had had an initial consultation with the moving party about the matter, but declined representation. He later accepted the other side of the matter. When a motion was made to disqualify him for a conflict of interest, he argued that he recalled nothing about the consultation. In rejecting this argument the Court relied on the Kentucky Rules of Evidence establishing when the attorney-client privilege applies. The Court held:

Having considered the arguments of both parties, we grant the writ of mandamus. KRE 503 (a)(1) defines a client as “a person ... who is rendered professional legal services by a lawyer, *or who consults a lawyer with a view to obtaining professional legal services from the lawyer.*” (emphasis added). This definition makes it clear that an individual who consults a lawyer is entitled to the privilege even though representation does not subsequently occur. In this case, it is uncontradicted that Appellants consulted King with the intention of employing him to represent them in their suit against Kidd.

Unquestionably, once the initial consultation transpired, Appellants became “clients’ under the definition in KRE 503(a)(1) and the attorney-client privilege attached. After King retained the documents pertaining to the case for a month, the presumption arises that he became knowledgeable of their contents and that he learned confidential information relevant to the case. This gives rise to a conflict of interestⁱⁱⁱ

The Court embellished its decision with these observations on how initial consultations can lead to the formation of attorney-client relationships:

Consultation with a lawyer may ripen into a lawyer/client relationship that precludes the lawyer from later undertaking a representation adverse to the individual who consulted him. The lawyer/client relationship can arise not only by contract but also from the conduct of the parties. Courts have found that the relationship is created as a result of the client's reasonable belief or expectation that the lawyer is undertaking the representation. Such a belief is based on the conduct of the parties. The key element in making such a determination is whether confidential information has been disclosed to the lawyer.^{iv}

The Court then applied the principles of the former client conflict of interest rule^v to the case, added an appearance of impropriety test, and concluded the appearance of impropriety in this case warranted disqualification to protect the reasonable expectations of former clients and present clients.

Interestingly, the Court began its opinion by finding that the appellant qualified to claim the attorney-client privilege because the appellant had consulted the lawyer with a view to obtaining the lawyer's legal services and to that extent was a client – never using the term prospective client.^{vi} The case could have been decided on that holding alone, but the opinion went on to cover the formation of the attorney-client relationship, former client conflicts, and protecting former clients and present clients from the appearance of impropriety. I leave to your judgment what the essential holdings of the Court in *Lovell* were. What is clear for the purposes of this article is that the Court recognized that a lawyer has a duty of confidentiality when a person consults the lawyer with a view to obtaining legal services even though the lawyer is ultimately not retained to represent that person, *i.e.*, the person becomes a former prospective client. This duty of confidentiality can create a disqualifying conflict of interest when the lawyer represents other clients.

Neither *Lovell* nor KBA E-316 delineates the kind or amount of confidential information that reasonably can be obtained from prospective clients without creating a disqualifying conflict of interest. The most helpful guidance I found for this purpose was ABA Formal Ethics Opinion 90-358 (1990) in which the Ethics Committee suggested this four-step approach in avoiding conflicts of interest issues with prospective clients:

1. Identify conflicts of interest before undertaking representation in any matter.
2. Limit information from a would-be client to that which is necessary to check for conflicts.
3. When practicable get a waiver of confidentiality.
4. As soon as a conflict of interest is identified or the would-be client's representation not undertaken for another reason, screen the lawyer with information relating to the representation from disclosing it within the firm.^{vii}

Recent Developments in Prospective Client Rules

Recognizing the gap in ethics guidance on prospective clients, the ABA in 2002 adopted Model Rule 1.18 Duties To Prospective Client. It neatly encapsulates the principles evolving from case law on prospective client conflict disqualification motions^{viii} and closely parallels §15, A Lawyer's Duties to a Prospective Client, of the American Law Institute's *Restatement of the Law Governing Lawyers* (2000). Model Rule 1.18 provides:

- (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 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.

The key points to note are:

- No matter how brief the consultation, any information learned by the lawyer can only be revealed as Rule 1.9(c), Conflict of Interest: Former Client, allows.
- The trigger for a disqualifying conflict of interest is when the lawyer receives information that could be “significantly harmful” to the prospective client.
- Comment 5 to the rule permits, with the prospective client’s informed consent, conditioning consultation with the understanding that information revealed to the lawyer will not preclude the lawyer from representing a different client in the matter.
- Waiver of a conflict of interest is permissible with the written informed consent of the affected client and the former prospective client.
- Prospective client conflicts of interest are imputed to other members of a firm, but screening is permissible to overcome the disqualification.

Model Rule 1.18 would work well in Kentucky, but it is academic unless and until the Supreme Court makes it part of our rules. Even so, I think it is useful as general guidance considering the ambiguous status of prospective clients under our current professional conduct rules. Particularly helpful is the “significantly harmful” standard for gauging when too much confidential information is obtained in a preliminary consultation. The Supreme Court proved prescient in *Lovell* by analyzing the case in part in terms of former client conflicts, because the real problem is with former prospective clients. This is some indication that the Court might be open to a prospective client rule of professional conduct.

Prospective Client Malpractice

The malpractice risk in a prospective client relationship is described succinctly in *Legal Malpractice* as follows:

The [*prospective client*] relationship arises when a person provides information to a lawyer in the reasonable belief that the information is confidential and will be used only for evaluating the legal merits of the person's claim, defense or needs. The attorney may also assume a duty of care. Thus, liability can be incurred for negligently advising a client not to proceed with the case or action or for the manner in which the [*prospective*] client is referred to another attorney. (footnotes omitted)^{ix}

The *Restatement of the Law Governing Lawyers* describes the duty of care owed to prospective clients more fully:

When a prospective client and a lawyer discuss the possibility of representation, the lawyer might comment on such matters as whether the person has a promising claim or defense, whether the lawyer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within which action must be taken and, if the representation does not proceed, what other lawyer might represent the prospective client. Prospective clients might rely on such advice, and lawyers therefore must use reasonable care in rendering it. The lawyer must also not harm a prospective client through unreasonable delay after indicating that the lawyer might undertake the representation. What care is reasonable depends on the circumstances, including the lawyer's expertise and the time available for consideration

If a lawyer provides advice that is intended to be only tentative or preliminary, the lawyer should so inform the prospective clients. Depending on the circumstances, the burden of removing ambiguities rests with the lawyer, particularly as to disclaiming conclusions that the client reasonably assumed from their discussion, for example whether the client has a good claim.^x

The key to appreciating the malpractice risk in any situation is to be clear about the status of the person with whom you are communicating. Are they a nonclient, prospective client, or client? The key to managing the risk is to know the duties owed to persons in each status. Because of the ambiguous position of prospective clients, it is important to keep foremost in mind that confidentiality and competence is owed them and to have a prospective client loss prevention strategy.

Managing the Risk

Casual Contacts

The bane of a lawyer's existence is the casual contact with a person looking for free legal advice -- "I have this friend who..." or "Just one quick question." This can happen on a street corner, at a party, or in your front yard. I especially like the technique of the lawyer who told me at a CLE that he responds to legal questions at a party by saying, "I'd like to answer your question, but I'm drunk at the moment. Why don't you come into the office tomorrow?" He added, they never do.

Some lawyers have a just say no policy and refuse to discuss legal questions in public. Others as a matter of good public relations will answer by providing only generic legal information, *e.g.*, "The clerk's office in the courthouse is where you can find out more about filing requirements for..." But they are careful not to say anything that could be construed as legal advice. Some lawyers take the risky approach of answering questions more specifically believing this is necessary to get new clients. In developing a risk management strategy in dealing with casual contacts consider:

- The more said to persons making casual contacts the greater the risk that it will be misconstrued as legal advice for their situation or that you are now their lawyer. A policy of not answering casual contact questions is bullet proof, but may cut off new business. In the interest of developing the situation one approach is to explain that legal questions are seldom simple and require a thorough analysis before specific answers can be given. Then suggest an office consultation. If that is declined, you have not been abrupt and know that in all likelihood this was not missed new business.
- The best practice is to document every casual contact made that involves any discussion of legal questions. It can be short, but should include the date, name of casual contact, gist of what was discussed, and any disclaimers communicated at the time. Many lawyers use a numbered consultation form for this purpose. In many cases it may be necessary to send a letter of nonengagement to make it clear that no attorney-client relationship was formed. This may seem laborious, but it is the proverbial ounce of prevention.
- Whatever you do – don't wing it. Have a strategy on how much you will say during casual contacts and stick to it. If you are consistent, you will have a much better chance of remembering what was said, and more important, what was not said.

Cold Telephone Calls^{xi}

A necessary, but often frustrating, aspect of providing legal service to the public is fielding numerous telephone calls throughout the day that can mean important new business or just someone looking for free legal advice. There is an art to risk managing telephone calls to be sure that new business is encouraged, time is not wasted, and unintended attorney-client relationships with malpractice exposure are avoided. Michael M. Bowden in “How To Handle Phone Inquiries From Potential Clients”^{xii} recommends office procedures that screen all incoming calls, get the caller’s contact information, get the names of other parties involved in the matter, and establish when the inquiry becomes a consultation. Bowden makes these risk management points:

- A good screening technique is for a well trained secretary or paralegal to weed out calls concerning matters the lawyer does not want to take, provide the caller with information of the type of service the firm offers, explain typical fee arrangements, and ask the caller to make an office appointment or schedule a return call from the lawyer. If the caller is interested, contact information and names of other persons involved in the matter are then obtained. It should be made clear to callers that they are not yet clients of the lawyer – only the lawyer can accept the matter.
- Lawyers receiving calls directly should first get contact information and the names of other persons involved before discussing any facts. Since a complete conflict check cannot be done until after the call, limit the initial discussion to the essential information necessary to evaluate whether to pursue the retention. A good practice is to have a telephone consultation form pad on your desk to record this information during the call. Assign each call a consultation number and file the consultation sheet chronologically in a binder. Send a nonengagement letter if you choose not to take a matter and file it with the consultation sheet.
- The hardest part is controlling when a prospective client telephone call turns into an attorney-client relationship. Since the relationship may be implied from the circumstances without express lawyer acceptance of a matter, it must be made clear to a caller that a matter is not accepted simply because the lawyer takes the call. Some lawyers never give advice in response to a cold call. Others will if someone they know referred the caller or the caller is a current or former client. Sometimes you just have to go with your intuition, but complete the consultation sheet and get the contact information. Don’t forget that advice given to a prospective client during a preliminary consultation exposes a lawyer to a malpractice claim even if it is later decided not to take the matter. Avoid giving statute of limitations advice. If it appears that some limitation period is about to expire, inform the caller of that possibility and urge consultation with another

lawyer immediately. Keep advice to a minimum until you have accepted the matter.

Preliminary Office Consultations

Obviously, the best environment to conduct prospective client consultations is in your law office where routine client intake and conflict check procedures can be followed. Individuals making casual contacts and telephone inquiries with matters that have potential for developing into an attorney-client relationship should be encouraged to make an office appointment rather than discussing the matter in detail in public or over the telephone.

The risk management considerations for preliminary office consultations are in principle the same as for casual contacts and telephone inquiries. Be sure that client intake procedures obtain only the minimum amount of information necessary to conduct a conflict of interest check before discussing any details with a prospective client. Then only learn the minimum information you need to decide whether to accept the matter.

Some jurisdictions permit waiver agreements with prospective clients providing that any confidential information disclosed in a preliminary consultation will not preclude representation of another party in the same or related matter. These agreements typically are not used for routine client intake, but on a case-by-case basis. They should be used when there is concern that the prospective client is actually “taint shopping,” *i.e.*, attempting to disqualify the firm from representing another party in the matter.^{xiii} I am unable to locate any Kentucky authority that addresses use of preliminary consultation waiver agreements. Accordingly, proceed with caution, but with informed client consent to a waiver agreement, there is no apparent reason why this procedure should not be acceptable in Kentucky.^{xiv}

Always use letters of nonengagement for declined representations that are best sent by certified mail, return receipt requested. I guarantee that a former prospective client with a complaint or claim never receives nonengagement letters sent by regular mail. A typical letter:

- Thanks the prospective client for making the personal contact, calling, or coming into the office.
- Includes the date and subject matter of the consultation.
- Provides clearly that representation will not be undertaken.
- Repeats any legal advice or information given -- making sure that it complies with the applicable standard of care.
- Advises that there is always a potential for a statute of limitations or notice requirement problem if the matter is not promptly pursued elsewhere. *Providing specific statute of limitations times should be avoided because of the limited information typically received in a preliminary consultation. If, however, it appears that a limitations period will expire in a short period of time, the*

declined prospective client should be informed of this concern and urged to seek another lawyer immediately.

- Advises that other legal advice be sought.
- Avoids giving an exact reason for the declination, why the claim lacks merit, or why other parties are not liable.
- Encourages the person to call again.

Negligent Referral of Prospective Clients^{xv}

Many lawyers do not appreciate that declining a matter and referring a prospective client to another lawyer may result in malpractice liability. This is true even though the referring lawyer receives no fee and has no further participation in the representation. A preliminary consultation with a prospective client is sufficient to create a duty to exercise ordinary care and skill when referring that person to another lawyer. The applicable standard of care is based on the nature of the declined representation.

Often it will be enough to confirm that the recommended lawyer is licensed to practice law in Kentucky. Licensure gives rise to a presumption that the lawyer is competent and possesses the requisite character and fitness. If the declination is because the matter requires special skill or knowledge, the referring lawyer must be careful to ascertain that the suggested lawyer has the necessary competence. If the matter requires immediate action, the referring lawyer should advise that the new lawyer be consulted expeditiously. Recommending the right lawyer without cautioning that prompt action is necessary can also be a negligent referral.

Larry Bodine in “The Right Way To Refer A Case^{xvi}” advises that to limit your malpractice exposure:

- Keep no fee.
- Do not supervise the receiving attorney.
- Get proof that the receiving attorney is indeed a specialist in the legal matter, for example, by checking with the state bar association and other attorneys.
- Expressly advise your client [*or prospective client*] in writing that your role has ended.
- Ascertain that the receiving attorney has malpractice insurance in an adequate amount.

To avoid the problem altogether some lawyers will not make a referral recommendation or only provide a list of several lawyers. Others only refer declined prospective clients to lawyer referral services and legal aid offices. The point is to recognize the exposure and make well-considered referral recommendations.

Conclusion

I see more and more ethics opinions and case reports concerning prospective clients. For example, the West Virginia Supreme Court just overruled a disqualification order in a criminal case using much the same analysis as *Lovell*. The Oregon Supreme Court recently disciplined a lawyer for losing or inadvertently destroying papers obtained from a prospective client with whom the lawyer had never even spoken. The Court ruled that a lawyer owed the same duty to safeguard property to a prospective client that is owed to a client, comparing this extension of duty to that of extending confidentiality to prospective clients. Given the gap in guidance available to Kentucky lawyers to avoid prospective client problems such as these, perhaps it is time for our Bar to consider Model Rule 1.18 for adoption.

ⁱ *Goode v. Commonwealth*, 44 S.W.2d 301 (1931).

ⁱⁱ 941 S.W.2d 466 (1997).

ⁱⁱⁱ *Id.* at 467.

^{iv} *Id.* at 468.

^v SCR 3.130 (1.9) Conflict of Interest: Former Client.

^{vi} In *Jaggers v. Shake*, 37 S.W.3d 737(2001) the Supreme Court cited *Lovell*, referring to the appellant as a “potential client.”

^{vii} The opinion includes a thorough analysis of prospective client issues and hypothetical illustrations of conflict situations.

^{viii} For a good overview of case law on prospective clients see Lawyer-Client Relationship: Prospective Clients, ABA/BNA Lawyers’ Manual on Professional Conduct at 31:151.

^{ix} *Mallen & Smith, Legal Malpractice*, 5th ed. (2000), §14.3, Vol.2, p.544.

^x §15, Comment *e*, A Lawyer’s Duties to a Prospective Client, *Restatement of the Law Governing Lawyers* (2000).

^{xi} This section is a modification of the article “Fielding Telephone Inquiries” that appeared in the Summer 2000 Lawyers Mutual Insurance Company of Kentucky Newsletter

^{xii} *Lawyers Weekly USA*, 99 LWUSA 1046 (11/15/99).

^{xiii} Confidentiality waivers are often used in so called “beauty contest,” when a major client interviews several firms to compete for representation. See Agran, *The Treacherous Path To The Diamond- Studded Tiara: The Ethical Dilemmas In Legal Beauty Contest*, 9 *Georgetown Journal of Legal Ethics* 1307 (1996).

^{xiv} To be entirely safe an inquiry to the KBA Ethics Hotline is recommended.

^{xv} This section is a modification of the article “Negligent Referral To Other Lawyers” that appeared in the Spring 1996 Lawyers Mutual Insurance Company of Kentucky Newsletter

^{xvi} *Lawyers Weekly, USA* 94 LWUSA 329 (4/11/94).