

# THE COURTS

## Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

### PART V. PROFESSIONAL ETHICS AND CONDUCT [204 PA. CODE CH. 81]

#### Amendments to the Pennsylvania Rules of Professional Conduct Relating to Duties to Prospective Clients

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Pennsylvania Supreme Court that it amend the Pennsylvania Rules of Professional Conduct to add a new Rule 1.18, as set forth in Annex A, relating to duties to prospective clients.

The existing Rules of Professional Conduct are essentially silent on whether a lawyer has any professional responsibilities to a person who consults with the lawyer about possible representation in a matter, but no client-lawyer relationship is subsequently formed.

Proposed Rule 1.18 clarifies that a lawyer who consults with a prospective client must treat the information learned during the consultation as confidential information that may not be revealed except as allowed by the exceptions to the lawyer's duty of confidentiality. The proposed Rule essentially codifies existing case law and Section 15 of the American Law Institute's *Restatement of the Law Governing Lawyers* (2000) with respect to the duty of confidentiality owed to prospective clients. Also, the consulted lawyer is disqualified from representing an adverse party if the lawyer received information from the prospective client "that could be significantly harmful to that person" if used to represent the adverse party in the same or a substantially related matter. The proposed Rule essentially treats the discussion with a prospective client for conflict purposes as subject to the conflict of interest provisions of Pa.R.P.C. 1.9(a) and (b) relating to former clients, except that the prohibition against subsequent adverse representation is limited to circumstances where the lawyer received information that would be significantly harmful to the prospective client in the matter. See ABA Ethics Opinion 90-358.

Paragraph (2) of the Comment reflects an amendment proposed by the Committee on Ethics and Professional Responsibility of the Pennsylvania Bar Association. As proposed to be adopted in Pennsylvania, paragraph (2) will explain that a person who communicates information to a lawyer, without any reasonable expectation that a client-lawyer relationship will be formed, is not a "prospective client" under the Rule. By way of example, a person who sends an unsolicited e-mail to numerous lawyers summarizing a case and requesting that the receiving lawyer's firm take over the case would not be entitled to protection of the Rule. Paragraph (2) has also been revised to clarify that a person who participates in an initial consultation or communicates information to a lawyer with the intent to disqualify the lawyer from an adverse representation is not a "prospective client" and is not entitled to the protections under the Rule. Finally, a sentence is proposed to be added to paragraph (2) stating that a person's intent to disqualify a lawyer may be inferred from the circumstances. This language parallels

the language in Pa.R.P.C. 1.0 in the definitions of "belief" or "believes" and "knowingly," "known" or "knows" in paragraphs (a) and (f) under that Rule.

The prohibition on subsequent representation adverse to the prospective client applies not only to the lawyer who was consulted, but is also imputed to the lawyer's law firm, with two exceptions. The first exception allows for a later adverse representation if both the affected client and the prospective client have given "informed consent." The proposed Rule also permits another lawyer in the firm to undertake a later representation adverse to the prospective client so long as the lawyer who was consulted, but not engaged, is screened from any participation in the adverse representation in the same way screening is permitted under Pa.R.P.C. 1.10(b). Screening is permitted to avoid imputation so long as the consulted lawyer took reasonable steps to avoid exposure to more information than was necessary to determine whether to represent the prospective client.

The Board believes that new Rule 1.18 properly imposes a duty of confidentiality to a prospective client. 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 that the party adverse to the prospective client is already a client of the firm. If the discussion stops before "significantly harmful" information is shared, the lawyer's other client should not be denied counsel of its choice in either that or a substantially related matter. The Board believes that screening should be permitted in this context (as it is allowed in the lateral hire context under Rule 1.10) because imputation of conflicts in this situation would place an undue burden on the interests of clients in retaining counsel of choice, especially when the other client is either a regular client of the firm or already is being represented by the law firm in the matter. Prospective clients are adequately protected by the requirement that the prohibited lawyer must have acted reasonably to limit the lawyer's exposure to confidential information.

Interested persons are invited to submit written comments regarding proposed Pa.R.P.C. 1.18 to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, First Floor, Two Lemoyne Drive, Lemoyne, PA 17043, on or before October 29, 2004.

*By The Disciplinary Board of the  
Supreme Court of Pennsylvania*

ELAINE M. BIXLER,  
*Secretary of the Board*

#### Annex A

### TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

#### PART V. PROFESSIONAL ETHICS AND CONDUCT

##### Subpart A. PROFESSIONAL RESPONSIBILITY

#### CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

##### Subchapter A. RULES OF PROFESSIONAL CONDUCT

#### CLIENT-LAWYER RELATIONSHIP

#### § 81.4. Rules of Professional Conduct.

##### Rule 1.18. Duties to Prospective Clients.

(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 which may be significantly harmful to that person 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, or;

(2) all of the following apply:

(i) the disqualified lawyer took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;

(ii) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) 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, such as an unsolicited e-mail or other communication, to a lawyer, without any reasonable expectation that a client-lawyer relationship will be established is not a "prospective client" within the meaning of paragraph (a). 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.

(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. 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 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)(ii) 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 description of the screened lawyer's prior representation 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.

[Pa.B. Doc. No. 04-1848. Filed for public inspection October 8, 2004, 9:00 a.m.]

# Title 231—RULES OF CIVIL PROCEDURE

## PART I. GENERAL

[231 PA. CODE CH. 2950]

**Amendment of Rule 2959 Governing Confession of Judgment; No. 419 Civil Procedural Rules; Doc. No. 5**

### Order

*Per Curiam:*

*And Now*, this 28th day of September, 2004, Pennsylvania Rule of Civil Procedure 2959 is amended by the promulgation of new subdivision (g) to read as follows.

Whereas prior distribution and publication of this amendment would otherwise be required, it has been determined that immediate promulgation is required in the interest of justice and efficient administration.

This order shall be processed in accordance with Pa.R.J.A. 103(b) and shall be effective immediately.

## Annex A

### TITLE 231. RULES OF CIVIL PROCEDURE

#### PART I. GENERAL

#### CHAPTER 2950. CONFESSION OF JUDGMENT FOR MONEY

**Rule 2959. Striking Off or Opening Judgment. Pleadings. Procedure.**

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**(g)(1) A judgment shall not be stricken or opened because of a creditor's failure to provide a debtor with instructions imposed by an existing statute, if any, regarding procedures to follow to strike a judgment or regarding any rights available to an incorrectly identified debtor.**

**(2) Subdivision (g)(1) shall apply to (1) judgments entered prior to the effective date of subdivision (g) which have not been stricken or opened as of the effective date and (2) judgments entered on or after the effective date.**

[Pa.B. Doc. No. 04-1849. Filed for public inspection October 8, 2004, 9:00 a.m.]