DISTRICT OF COLUMBIA BAR

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The Steering Committee
Of The
Corporation, Finance And Securities Law Section
D.C. Bar

November 29, 2005

Garland Pinkston, Jr., Clerk
District of Columbia Court of Appeals
500 Indiana Avenue, NW, Sixth Floor
Washington, DC 20001

Re: Proposed District of Columbia Bar Ethics Rule 1.18

Dear Mr. Pinkston:

This submission is being made on behalf of the Steering Committee of the Section on Corporation, Finance and Securities Law (the "Steering Committee") of the D.C. Bar Association (the "DC Bar") in response to the request for comment by the District of Columbia Court of Appeals on the comprehensive amendment to the District of Columbia Rules of Professional Conduct recommended by the Board of Govenors of the DC Bar ("Board of Governors"). This comment specifically addresses proposed Ethics Rule 1.18, Duties to Prospective Client (the "DC Bar Rule"). The Steering Committee has approved the submission of these comments. The views expressed herein represent only those of the Steering Committee and not those of the D.C. Bar, the Board of Governors, or the Section on Corporation, Finance and Securities Law.

The Steering Committee agrees, in general, with the objectives of the Board of Governors and DC Bar's Rules of Professional Conduct Review Committee, which reported on the recommended amendments, in clarifying this important area of client representation regarding a lawyer's duties to a prospective client. We understand from the excellent explanation of the DC Bar Rule that careful consideration was given to the efficacy and clarity of ABA Model Rule 1.18 (the "ABA Rule"), which provided the model for the proposed DC Bar Rule.

Requirement that Information Be Significantly Harmful

The major concern of the Steering Committee is with respect to the proposed changes to paragraph (c), which change is also reflected in paragraph (d). Following

is the relevant text of paragraph (c) of the ABA Rule marked to show the changes proposed in the DC Bar Rule. Additional language is underlined; deleted language is in brackets.

> (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] a confidence or secret from the prospective client [that could be significantly harmful to that person in the matter], except as provided in paragraph (d).

We support the proposal to replace the word "information" with the words "a confidence or secret." This change would clarify that, although a prospective client may have provided information to the lawyer that could be considered harmful to the prospective client (as provided in the ABA Rule), if that information is not confidential or secret (*i.e.,* the information was generally known or available through other means), the lawyer should not be disqualified from representing another client in the same or a substantially related matter.

We believe, however, that the words "that could be significantly harmful to that person in the matter" should not be deleted from the paragraph. While this language may not, as indicated in the explanation to the proposed DC Bar Rule, have provided needed clarity in the context of the ABA Rule's use of the word "information," the language takes on new meaning and is necessary in the context of the Board's revised language. Even though a prospective client may have revealed information that is considered a confidence or secret, we believe that it cannot be assumed that the confidence or secret relates to that specific matter or that the confidence or secret would be harmful to the prospective client. In fact, we believe that it would not be unusual for a prospective client, in certain contexts, to reveal information that may be beneficial to the person even though the information is not yet a matter of public knowledge. Further, while we agree that a lawyer may appropriately seek to limit a prospective client's revelation of information, a client may nonetheless disclose all sorts of confidential and secret information that may not, however, be material or germane to that or a similar matter.[1]

We are concerned that an overly broad application of the proposed DC Bar Rule would increase the difficulty for a prospective client to obtain representation by the attorney of their choice because the attorney had a conversation with a prior potential client. Even if the prospective client agreed to waive the conflict, the prior

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[1] For example, the confidential information revealed may be personal in nature, whereas the matter may relate to a business issue.

prospective client may not agree to do so in furtherance of their own interests – or may simply not be responsive to the attorney's request for a waiver.

We, therefore, urge the Court to reinsert the language "that could be significantly harmful to that person in the matter" in order to require that there be a nexus between the revelation and the new matter and a standard for considering whether the confidence or secret is harmful to the person in the context of that matter. Consistent with this recommendation, we believe that paragraph (d) should be revised as follows: "When the lawyer has received a disqualifying confidence or secret from the prospective client as determined pursuant to paragraph (c), representation is permissible if . . . ."[2]

* * *

We hope that these comments will be helpful to the Court in its development of the final version of the proposed DC Bar Rule. We would be pleased to discuss any aspects of these comments with the members of the Court or its staff. Questions may be directed to Charles R. Mills at (202) 778-9096 or to the Steering Committee Chair, Arthur Cohen at (202) 371-7892.

The Steering Committee of the Corporation, Finance and Securities Law Section of the District of Columbia Bar

cc: Ellen M. Jakovic
Liaison, Board of Governors

Charles R. Mills
Steering Committee Member

[2] This text follows the structure of the relevant ABA Rule language.

Rule 1.18 – Duties to Prospective Client

Explanation of Proposed Changes

The D.C. Rules currently do not have a separate rule equivalent to ABA Model Rule 1.18 concerning a lawyer's duties to prospective clients. D.C. Rule 1.10(a), Comments [7]-[9] to D.C. Rule 1.10, and D.C. Bar Legal Ethics Committee Opinion 279, however, do address some issues relating to prospective clients. In the Committee's view, this significant subject should be addressed comprehensively in the Rules, and the Committee recommends adopting a version of Model Rule 1.18 to provide useful consistency with the Model Rules.

The Committee's recommendation differs from the ABA Model Rule in some, relatively minor, respects. The Committee's proposal requires personal disqualification if a lawyer receives a confidence or secret from the prospective client, and not (as the Model Rule provides) only if the lawyer received information "that could be significantly harmful" to the prospective client; the Committee concluded that the approach in the Model Rules gives insufficient protection to prospective clients and that the "significantly harmful" standard is difficult to apply. Consistent with the current Comments to Rule 1.10 and with D.C. Bar Legal Ethics Committee Opinion 279, the Committee's proposal allows lawyers in a firm to represent clients in a matter in which a prospective client has provided confidences or secrets to other lawyers in the firm, provided that the affected client and the prospective client consent and the disqualified lawyer is timely screened; the Committee considered unnecessary and inappropriate the additional requirement in ABA Model Rule 1.18(d) that the personally disqualified lawyer have limited exposure to disqualifying information.

Redline Showing Proposed Changes

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 permitted by Rule 1.6.

(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 a confidence or secret from the prospective client, 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 a confidence or secret from the prospective client, representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, or

(2) the disqualified lawyer is timely screened from any participation in the matter.

COMMENTS

[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 was ever 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. Such information is generally protected by Rule 1.6, even if the client or lawyer decides not to proceed with the representation. *See* Rule 1.6, Comment [9]. Paragraph (b) of Rule 1.18 prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.6. The duty to protect confidences and secrets exists regardless of how brief the initial conference may be. The prohibition against use or disclosure of information received from the prospective client may in turn cause the individual lawyer to be disqualified pursuant to Rule 1.7(b)(4) from representing a current or future client of the firm adverse to the prospective client because that lawyer's inability to use or disclose information from the prospective client may adversely affect that lawyer's professional judgment on behalf of the current or future client of the firm whose interests are adverse to the interests of the prospective client.

[4] In order to avoid acquiring confidences and secrets from a prospective client, a lawyer considering whether or not to undertake a new matter may limit the initial interview only to information that does not constitute a confidence or secret, if the lawyer can do so and still determine whether a conflict of interest or other reason for non-representation exists. An individual lawyer of the firm who obtains information from a prospective client is permitted by Rule 1.6(a) to disclose that information to other persons in the lawyer's firm, but any such dissemination may cause additional individual lawyers of the firm to be personally disqualified. If a firm wishes to keep open the screening option under paragraph (d)(2) which permits lawyers who are not personally disqualified to represent clients in the same or substantially related matters, the firm must limit and control dissemination of information obtained from the prospective client. Where the information from the prospective client indicates that any 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 informed 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. For the definition of "informed consent," *see* Rule 1.0(e). 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 confidences and secrets from the prospective client. ABA Model Rule 1.18 provides for personal disqualification only if the information received by the lawyer could be significantly harmful if used in the matter, but the trigger in D.C. Rule 1.18 is receipt of any confidence or secret because of the interest in more broadly protecting the prospective client and the difficulty of determining whether use of the information would be significantly harmful to the prospective 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 of both the prospective and affected clients. In the alternative, imputation may be avoided under paragraph (d)(2) if all disqualified lawyers are timely screened. *See* Rule 1.0(l) (requirements for screening procedures). When a firm may wish to rely on paragraph (d)(2) to avoid imputed disqualification of the firm as a whole, it should take affirmative steps – as soon as an actual or potential conflict is suspected – to prevent a personally disqualified lawyer from disseminating any information about the potential client that is protected by Rule 1.6, except as necessary to investigate potential conflicts of interest, to any other person in the firm, including non-lawyer staff. Any lawyer in the firm who actually receives, directly or indirectly, protected information provided by a prospective client is disqualified. Unlike ABA Model Rule 1.18, this Rule does not condition use of screening on the taking of

reasonable measures by the personally disqualified lawyer to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; that is because the screen protects the prospective client regardless of the amount of information received by the personally disqualified lawyer, and this standard may be difficult to apply in practice. This Rule does not prohibit the screened lawyer from receiving any part of the fee, in contrast to ABA Model Rule 1.18, because the substantial administrative burden of complying with such a prohibition exceeds any marginal benefit.

[8] This Rule, unlike ABA Model Rule 1.18, does not require notice to the prospective client that lawyers in the firm who are not personally disqualified are representing a client adverse to the prospective client in the same or substantially related matters subject to the screening requirement, because the lack of such a notice requirement under the prior D.C. Rule concerning prospective clients (Rule 1.10(a)) did not prove problematic and it is not clear that the notice requirement materially advances any significant interest of the prospective client.

[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.

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One Page Summary of the Proposed Public Statement by the Steering Committee of the Corporation, Finance and Securities Law Section to the District of Columbia Court of Appeals Regarding Proposed District of Columbia Bar Ethics Rule 1.18

On November 9, 2005, a majority of the Steering Committee of the Corporation, Finance and Securities Law Section approved sending a letter to the District of Columbia Court of Appeals commenting on proposed Ethics Rule 1.18 (Duties to Prospective Client) of the District of Columbia Bar. Proposed Ethics Rule 1.18 is among the comprehensive amendments to the District of Columbia Rules of Professional Conduct recommended by the Board of Governors of the DC Bar that are pending before the Court for comment, review and approval. The Steering Committee previously sent a comment letter dated May 17, 2005 that contained the same substantive points to the Rules of Professional Conduct Review Committee in connection with its preparation of the recommended amendments. The views expressed in these letters represent only those of the Steering Committee and not those of the D.C. Bar, the Board of Governors, or the Section on Corporation, Finance and Securities Law.

The Steering Committee's letter states its major concern relates to the proposed changes to paragraph (c) of proposed Rule 1.18, which changes are also reflected in paragraph (d). The relevant text of the DC Bar's proposed paragraph (c), marked to show the changes from the ABA model rule (additional language is underlined; deleted language is in brackets) is as follows:

> (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] a confidence or secret from the prospective client [that could be significantly harmful to that person in the matter], except as provided in paragraph (d).

The Steering Committee's letter supports the proposed Rule's replacement of the word "information" in the ABA model rule with the words "a confidence or secret." The Steering Committee's letter states that this change would clarify that, although a prospective client may have provided information to the lawyer that could be considered harmful to the prospective client (as provided in the ABA Rule), if that information is not confidential or secret (*i.e.,* the information was generally known or available through other means), the lawyer should not be disqualified from representing another client in the same or a substantially related matter.

The Steering Committee's letter also states its opposition to the deletion of the words "that could be significantly harmful to that person in the matter." The letter explains that, even though a prospective client may have revealed information that is considered a confidence or secret, it cannot be assumed that the confidence or secret relates to that specific matter or that the confidence or secret would be harmful to the prospective client. Further, the letter states that while a lawyer may appropriately seek to limit a prospective client's revelation of information, a client may nonetheless disclose all sorts of confidential and secret information that may not be material or germane to that or a similar matter.

Steering Committee of the Corporation, Finance and Securities Law Section