ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a partner in a 10-person law firm and I regularly see prospective clients for initial consultations, which I provide at no charge. We do not take every case presented to us. When we decline a representation, do we have a duty to provide a non-engagement letter or to warn the person about statutes of limitations that may apply to his or her case? What is our risk of malpractice exposure, if we decline a representation although the person did have a viable claim and, if the person later pursues it on his/her own, finds that the claim is time-barred? Finally, if a prospective client provides me or one of my partners with confidential information during that initial consultation and I do not take the case, am I obligated to keep the person's confidential information confidential, and can information acquired that way create a conflict that would prohibit me from taking some future litigation? Recently, we had a situation where one of my partners met someone at a Friday evening cocktail party who talked with her about a potential litigation. By coincidence, I had met the opposing party and had set up a meeting in our office to take the case. We ended up deciding not to take on the matter which we thought was the only possible decision that we could make. Were we correct?

Sincerely,
W.E. Declined

Dear W.E. Declined:

Every attorney faces, at one time or another, the situation you describe. It is important to know that attorneys owe certain duties to prospective clients under the Rules of Professional Conduct and they should also be aware of any issues which may arise concerning the receipt of confidential information from a prospective client as well as the potential for imputation of conflicts of interests that almost certainly will come up in connection with such a representation.

Rules 1.18(a) defines a prospective client as "[a] person who discusses with a lawyer the possibility of forming a client lawyer relationship with respect to a matter…." Under the Rules, there is no specific duty to provide a non-engagement letter to a prospective client that does not retain an attorney, however, best practice suggests that the issuance of a non-engagement letter to the prospective client which you describe (who we'll refer to as "AA") is an appropriate way of confirming that an attorney-client relationship has not been created. In addition, the non-engagement letter should spell out any potential statute of limitations issues arising from AA's potential claim.

With regard to confidential information that the prospective client has communicated to the attorney, Rule 1.18(b) states: "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." Although Rule 1.9 does not expressly set forth duties owed to prospective clients, pursuant to Rule 1.9(a), "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." In essence, the duties owed to a prospective client under the Rules concerning information learned from the prospective client are treated similarly as those duties that would be owed by attorneys who receive information from a former client.

Furthermore, Rule 1.6(a) requires that "[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" except under certain specific circumstances as defined in Rule 1.6. Moreover, Rule 1.6(a) defines confidential information as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Whether or not an individual or entity retains an attorney, the duties owed by an attorney to preserve confidential information are of tremendous importance.

It is also stated in Rule 1.18(c) that

> [a] lawyer subject to paragraph (b) [of Rule 1.18] 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

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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matter, except as provided in paragraph (d) [of Rule 1.18]. 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) [of Rule 1.18].

Moreover, Rule 1.18(d) provides that

> [w]hen the lawyer has received disqualifying information as defined in paragraph (c) [of Rule 1.18], 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 firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; (ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm; (iii) the disqualified lawyer is apportioned no part of the fee therefrom; and (iv) written notice is promptly given to the prospective client; and (3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

It was entirely proper for your firm to pass on representing the opposing party that your partner had met at the cocktail party (we'll refer to the opposing party as "BB"). Rule 1.10(e) requires all lawyers to maintain "a written record of its engagements." With respect to prospective clients, the Rule states that "lawyers shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when: (1) the firm agrees to represent a new client; (2) the firm agrees to represent an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter." Although Rule 1.10(e) uses the words "proposed engagements" in contrast to Rule 1.18's use of the words "prospective client," it would seem that the best practice in the situation you describe would be to implement a system at your firm which records all such contacts in your firm's records to deal with a conflict as soon as possible and allow for screening.

Since you are part of a relatively smaller firm, setting up screening mechanisms to deal with potential conflicts of interest requires greater vigilance since information within a smaller firm environment could easily be communicated to all attorneys and staff of the firm. Comments [7B] and [7C] to Rule 1.18 contain an extensive discussion on the establishment of appropriate screening mechanisms, with a particular emphasis on establishing screening mechanisms in a small firm environment. One of the factors in determining if disqualification would be appropriate under Rule 1.18(c) is if the information learned from the prospective client would be "significantly harmful" to that prospective client. Although Rule 1.18(d) could potentially allow a firm to represent BB even if the information previously received from AA was significantly harmful to AA's interest, the fact that you are at a smaller firm would suggest that unless you established very clear and detailed screening mechanisms, it would be significantly more difficult to screen out any attorney who receives information from someone in AA's position who does not retain your firm.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Mathew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

My client is currently engaged in a child-support action against her former husband. She is trying to get $300/month more in child support.

At her deposition, my client testified that she had no income other than the support that her former husband was providing. I had been planning on negotiating with my adversary to see if we could settle the case before an upcoming child support hearing, and I had called my client for some final settlement authority.

On the call, my client told me that she now "remembers" something she "forgot" to mention at her deposition. Previously, she had testified that she had no other source of funds besides the child support she received. Now she remembers she had received $50,000 from her recently deceased uncle a few weeks before her deposition when his estate was distributed based on his will. She does not want me to tell her ex-husband or the court about the $50,000 since she wants her ex-husband to suffer for cheating on her during their marriage. Still, she's worried that the court might find out about the $50,000 since her uncle's will is a matter of public record. So, she'd settle for an additional $150/month.

Meanwhile, the private investigator I had previously hired just reported to me that the former husband's statement in his affidavit that he is unable to work because he is injured is false. In fact, the former husband has been working off the books as a messenger at the law firm of his attorney, Fraud U. Lent. By my calculation, if my client's former husband had reported the additional income, the court would order him to pay $300/month more in child support.

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17. Barr et al., *supra* note 1, § 36:271, at 36-25.

18. Siegel, *supra* note 2, § 262, at 460 (citing *Cogen Props. v. Griffin*, 78 Misc. 2d 936, 937-38, 358 N.Y.S.2d 929, 931 (Sup. Ct. Sullivan County 1974) (discontinuing original action because second action against defendants sought same relief as in original action)).

19. For more information on affirmative defenses, see Gerald Lebovits, *The Legal Writer, Drafting New York Civil-Litigation Documents: Part VIII — The Answer*, 83 N.Y. St. B.J. 96, 96 & 88 (July/Aug. 2011).

20. Siegel, *supra* note 2, § 263, at 461.

21. Barr et al., *supra* note 1, §§ 36:340–36:341, at 36-30.

22. *Id.* § 36:352, at 36-31.

23. *Id.* § 36:353, at 36-31 (citing *Coliseum Towers Assocs. v. County of Nassau*, 217 A.D.2d 387, 387, 637 N.Y.S.2d 972, 975 (2d Dep't 1996)).

24. *Id.* § 36:360, at 36-32.

25. *Id.* § 36:370, at 36-32.

26. *Id.* § 36:371, at 36-32.

27. *Id.* § 36:381, at 36-32.

28. *Id.* § 36:372, at 36-32.

29. *Id.* § 36:390, at 36-33.

30. *Id.* § 36:410, at 36-33, 36-34 (citing *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 961 (1969)).

31. *Id.* § 36:452, at 36-35.

32. The "relation back" doctrine: "When there are defendants whose interests in the action are 'united,' N.Y. C.P.L.R. 203(b) and (c) provide that service on one defendant within the limitations period can preserve the claims against other defendants who are added to the action after expiration of the statute of limitations. To be 'united' within the meaning of this statute, the interests of the defendants must be the same and exist without any hostility between them. To invoke this 'relation back' principle, the plaintiff must prove that: 1) both the claim asserted against the new party and the claim previously imposed against the original named defendant arose out of the same conduct, transaction or occurrence; 2) that the new party is 'united in interest' with the original defendant and, by reason of that relationship, can be charged with such notice of the commencement of the action that the new defendant will not be prejudiced in maintaining a defense on the merits, and 3) the new party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well." 16 Lee S. Kreindler, Blanca I. Rodriguez, David Beekman, David C. Cook, N.Y. Prac., New York Law of Torts, § 19:13 (Aug. 2011).

33. Barr et al., *supra* note 1, § 36:460, at 36-35.

34. Siegel, *supra* note 2, § 264, at 462.

35. *Corcoran v. Nat'l Union Fire Ins. Co.*, 143 A.D.2d 309, 311, 357 N.Y.S.2d 376, 378 (1st Dep't 1988) (finding that counterclaims and affirmative defenses concerned plaintiff's role and conduct as regulator of insurance company, rather than against plaintiff as liquidator).

36. *Latta v. Siefke*, 60 A.D.2d 991, 992, 401 N.Y.S.2d 937, 938 (4th Dep't 1978) ("[T]o permit a counterclaim against a parent for negligent supervision of her child would be contrary to the legislative policy . . . because it would result in imputing the parent's negligence to the child.").

37. *State of New York v. Jones*, 210 A.D.2d 469, 470, 620 N.Y.S.2d 1012, 1012 (2d Dep't 1994) ("[I]t was proper for the Supreme Court to dismiss the defendant's counterclaims against the State of New York.").

EDITOR'S MAILBOX

Editor's Note:

We received the following from Ken Kamlet, author of "Land Banking, TIF Amendments, and the Tax Cap," which appeared in the May 2012 Journal.

Tucked among the endnotes in my article on land banking, tax increment financing, and the tax cap, was the important news that, as part of this year's budget amendments, the Governor and legislative leaders amended the TIF law to correct its most glaring defect – by authorizing school districts to opt-in to and participate in TIF-funded redevelopment plans. *It is now up to the municipalities, developers, and attorneys who spent many years fighting for this change to make sure that this newly invigorated law is put to good use.* TIF financing is especially useful to pay for infrastructure improvements and site preparation costs on blighted properties – including brownfield sites (and Brownfield Opportunity Areas), land bank holdings, and flood-damaged infrastructure.

Kenneth S. Kamlet
Binghamton, NY

Gutekunst is a frequent speaker and author on issues relating to trial practice and alternative dispute resolution. She is a member of the Executive Committee, the National Task Force on Diversity in ADR and the Arbitration Committee of the International Institute for Conflict Prevention and Resolution (CPR). She also chairs the Advisory Council of the YWCA-NYC's Academy of Women Leaders. Between 1997 and 2005, Gutekunst served on the Governor's Temporary Judicial Screening Committee, the New York State Judicial Screening Committee and the First Department Judicial Screening Committee.

Gutekunst was born in western New York, was raised on Long Island and in the Glens Falls area and resides in Manhattan. Gutekunst received her undergraduate and master's degrees from Brown University and her law degree from Yale Law School.

Can I settle the case without admitting that my client had received the $50,000 from her uncle? If the case does not settle, and I am unable to convince my client not to correct her testimony, am I obligated to withdraw from her representation? Am I permitted to disclose the $50,000 to the court?

In addition, the other side has offered to pay $250/month in additional support. May I tell my adversary that I am aware that his client's affidavit is false to try to get $300/month?

May I tell Mr. Lent that I will not file a disciplinary grievance against him based on his role drafting the false affidavit if his client will just pay an additional $300/month instead of the $250/month that he offered on behalf of his client?

May I tell opposing counsel that my client will pursue criminal perjury charges against her former husband if her doesn't pay $300/month in child support?

Sincerely,
A. Lot Goingon