

Joint Committee on Attorney Standards

20150186

North Dakota Supreme Court
600 E Boulevard Ave
Bismarck, ND 58505-0530
Phone: (701) 328-2689
Fax: (701) 328-2092

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 29 2016

STATE OF NORTH DAKOTA

Hon. Dann E. Greenwood, Chair
51 Third St. E, Suite 202
Dickinson, ND 58601
Phone: (701) 227-3150

April 29, 2016

Honorable Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard
Bismarck, ND 58505-0530

Re: Rules of Professional Conduct - Proposed Amendments

Dear Chief Justice VandeWalle:

The Joint Committee on Attorney Standards recently recommended amendments to Rule 1.18 (Duties to Potential Clients) to the Supreme Court as part of a general rule amendment submission. The proposed amendments were adopted effective March 1.

During the Supreme Court's review of the proposed amendments to Rule 1.18, attention was drawn to the rule's focus on "potential" clients, which is a departure from ABA Model Rule 1.18, which governs duties to "prospective" clients. The Supreme Court subsequently referred the rule back to the Joint Committee for a consideration of whether comment language should be added to clarify the purpose in departing from the model rule formulation.

The focus in Rule 1.18 on "potential" clients is a result of amendments recommended by the Joint Committee in 2005 and subsequently adopted. The Committee, at that time, was considering numerous amendments to the Model Rules of Professional Conduct resulting from the ABA's Ethics 2000 rule review project. During its review of ABA Model Rule 1.18, Committee members noted the use of "prospective client" in (then new) Rule 7.3 of the Rules of Professional Conduct, which governed solicitation or "direct contact with prospective clients". There was concern that there may be a confusing and unintended result from the application in both rules to prospective clients. As a result, the Committee concluded that "potential client" was a more useful formulation in Rule 1.18, more clearly reflected the rule's focus, and more clearly differentiated circumstances governed by the rule from those governed by the limitations imposed by Rule 7.3 on solicitation of prospective clients.

Consequently, the interplay between Rule 1.18 and Rule 7.3 was the impetus for the different references in

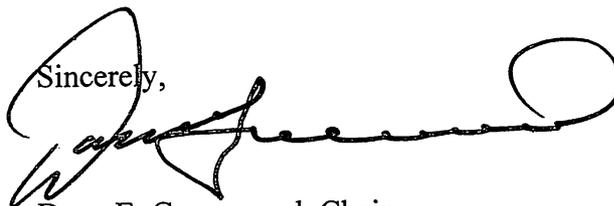
the two rules with respect to “potential” versus “prospective” clients. However, the Joint Committee recently recommended amendments to Rule 7.3, among many other rule amendments, resulting from its review of the ABA’s Ethics 20/20 rule review project. The amendments to Rule 7.3 were adopted effective March 1. The result of the amendments is that the focus of Rule 7.3 is no longer upon “prospective” clients. Rather, the rule now addresses “solicitation” as a targeted communication directed to a specific person regarding the provision of legal services.

At its February meeting, the Joint Committee reviewed the background related to Rule 1.18 and Rule 7.3 and the recently adopted amendments to Rule 7.3. In light of the changed focus in Rule 7.3, the Committee concluded there is no longer a substantive reason to continue application of Rule 1.18 to “potential” clients. The Committee concluded that reverting to the model rule language related to “prospective” clients is appropriate and would have the added advantage of benefitting from rule interpretations of like language in other jurisdictions. Additional technical amendments to Rule 1.7, Comment [5], and Rule 1.15, Comment [1], would also be necessary as these rule provisions were also amended in 2005 to reflect the use of “potential client” in Rule 1.18.

The Joint Committee approved the amendments for submission to the Supreme Court, pending review and comment by the SBAND Board of Governors as required by Administrative Rule 38, Section 3B. The Board of Governors has reviewed the Committee’s proposed amendments and, by a letter dated April 25, 2016, from Joe Wetch, SBAND President, has indicated its approval of the proposed amendments. A copy of the letter is included.

I am pleased to submit the Joint Committee’s proposed amendments to the Supreme Court for its consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Dann E. Greenwood", with a large, stylized flourish at the end.

Dann E. Greenwood, Chair
Joint Committee on Attorney Standards

DEG/

cc: Penny Miller, Clerk of the Supreme Court
Jim Ganje



State Bar Association of North Dakota

P.O. Box 2136 Bismarck, ND 58502
(701) 255-1404 • 1-800-472-2685 • Fax (701) 224-1621
www.sband.org • info@sband.org

Tony J. Weiler • *Executive Director*

April 25, 2016

Hon. Dann E. Greenwood
Judge of the District Court
51 Third St. E., Ste. 202
Dickinson, ND 58601

Re: Joint Committee on Attorney Standards

Dear Judge Greenwood,

I am in receipt of letters from the Joint Committee on Attorney Standards dated March 2, 3, and 4. Each letter contained Rules modified by the JCAS, and sent to the State Bar Association's Board of Governors under Administrative Rule 38 for review and comment.

The Board met this past Saturday, and reviewed the proposed changes to the Rules of Professional Conduct and to the Admission to Practice Rules. The Board discussed each suggested change and has no substantive comments in opposition. In fact, the Board passed three separate motions approving the changes explained by, and attached to, each of your separate letters.

The Board of Governors and I thank you and your committee for all the hard work you do.

Sincerely,

A handwritten signature in cursive script that reads "Joseph A. Wetch Jr.".

Joseph A. Wetch Jr.
President

PROPOSED AMENDMENTS

1 RULE 1.18 DUTIES TO ~~POTENTIAL~~ PROSPECTIVE CLIENT

2 (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship
3 with respect to a matter is a ~~potential~~ prospective client.

4 (b) Even when no lawyer-client relationship ensues, a lawyer who has learned information from a
5 ~~potential~~ prospective client shall not use or reveal that information, except as Rule 1.9 would permit
6 with respect to information of a former client.

7 (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to
8 those of a ~~potential~~ prospective client in the same or a substantially related matter if the lawyer
9 received information from the ~~potential~~ prospective client that could be significantly harmful to that
10 person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from
11 representation under this paragraph, no lawyer in a firm with which that lawyer is associated may
12 knowingly undertake or continue representation in such a matter, except as provided in
13 paragraph (d).

14 (d) When the lawyer has received significantly harmful information, representation is permissible
15 if:

16 (1) both the affected client and the ~~potential~~ prospective client have given consent; or

17 (2) the lawyer who received the information took reasonable measures to avoid exposure to more
18 significantly harmful information than was reasonably necessary to determine whether to represent
19 the ~~potential~~ prospective client and notice is promptly given to the ~~potential~~ prospective client.

20 Comment

1 Definition of Potential Prospective Client

2 [1] Potential Prospective clients, like clients, may disclose information to a lawyer, place documents
3 or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with
4 a potential prospective client usually are limited in time and depth and leave both the potential
5 prospective client and the lawyer free (and sometimes required) to proceed no further. Hence,
6 potential prospective clients should receive some but not all of the protection afforded clients.

7 [2 A person becomes a potential prospective client by consulting with a lawyer about the possibility
8 of forming a client-lawyer relationship with respect to a matter. Whether communications, including
9 written, oral, or electronic communications, constitute a consultation depends on the circumstances.
10 For example, a consultation is likely to have occurred if a lawyer, either in person or through the
11 lawyer's advertising in any medium, specifically requests or invites the submission of information
12 about a potential prospective representation without clear and reasonably understandable warnings
13 and cautionary statements that limit the lawyer's obligations, and a person provides information in
14 response. See also Comment [4]. In contrast, a consultation does not occur if a person provides
15 information to a lawyer in response to advertising that merely describes the lawyer's education,
16 experience, areas of practice, and contact information, or provides legal information of general
17 interest. Such a person communicates information unilaterally to a lawyer, without any reasonable
18 expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer
19 relationship, and is thus not a "potential prospective client".
20 Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is
21 not a "potential prospective client".

22 Initial Consultation

23 [3] It is often necessary for a potential prospective client to reveal information to the lawyer during
24 an initial consultation prior to the decision about formation of a client-lawyer relationship. The
25 lawyer often must learn such information to determine whether there is a conflict of interest with an

1 existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b)
2 prohibits the lawyer from using or revealing information, except as permitted by Rule 1.9, even if
3 the client or lawyer decides not to proceed with the representation. The duty exists regardless of how
4 brief the initial conference may be. A lawyer is not prohibited from revealing to an existing client
5 that an opposing party has contacted the lawyer seeking representation.

6 [4] In order to avoid acquiring significantly harmful information from a potential client, a lawyer
7 considering whether or not to undertake a new matter should limit the initial consultation to only
8 such information as reasonably appears necessary for that purpose. Where the information indicates
9 that a conflict of interest or other reason for non-representation exists, the lawyer should so inform
10 the potential prospective client or decline the representation. If the potential prospective client wishes
11 to retain the lawyer, and if consent is allowed under Rule 1.7(c), then consent from all affected
12 present or former clients must be obtained before accepting the representation.

13 [5] A lawyer may condition a consultation with a potential prospective client on the person's consent
14 that no information disclosed during the consultation will prohibit the lawyer from representing a
15 different client in the matter. If the agreement expressly so provides, the potential prospective client
16 may also consent to the lawyer's subsequent use of information received from the potential
17 prospective client.

18 [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from
19 representing a client with interests adverse to those of the potential prospective client in the same
20 or a substantially related matter unless the lawyer has received from the potential prospective client
21 information that could be significantly harmful if used in the matter.

22 [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule
23 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains consent from both
24 the potential prospective and affected clients. Obtaining the client's consent in writing is the
25 preferred practice. Lack of a writing may make it difficult to prove client consent if a dispute arises

1 later. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and
2 notice is promptly given to the potential prospective client.

3 [8] Notice, including a general description of the subject matter about which the lawyer was
4 consulted generally should be given as soon as practical.

5 [9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a
6 potential prospective client, see Rule 1.1. For a lawyer's duties when a potential prospective client
7 entrusts valuables or papers to the lawyer's care, see Rule 1.15.

8 Rule 1.18 amended effective 03/01/97, 08/01/06, 03/01/16,_____.

9 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
10 on 11/08/85, 01/31/86 and 03/15/86; Minutes of the Joint Committee on Attorney Standards
11 Meetings of 09/15/95, 12/01/95, 06/11/96; 02/27/04; 04/16/04, 03/18/05, 06/14/05, 09/09/05,
12 06/10/2014, 09/12/14, 02/26/16.

**PROPOSED AMENDMENTS - RULE 1.7, RULES OF PROFESSIONAL CONDUCT;
COMMENT [5]**

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

.....

Comment

.....

Lawyer's Personal Interests

1 [5] A lawyer is required to exercise independent professional judgment in advising a client. A lawyer
2 is required to decline representation of a client if the lawyer's own financial, business, property or
3 personal interests are likely to affect adversely the advice to be given or services to be rendered to
4 a potential prospective client. If the probity of a lawyer's own conduct in a transaction is in serious
5 question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly,
6 when a lawyer has discussions concerning possible employment with an opponent of the lawyer's
7 client, or with a law firm representing the opponent, such discussions could materially limit the
8 lawyer's representation of the client. In addition, a lawyer may not allow related business interests
9 to affect representation, for example, by referring clients to an enterprise in which the lawyer has an
10 undisclosed financial interest. See Rule 1.8 for specific rules pertaining to a number of personal
11 interest conflicts, including business transactions with clients. See also Rule 1.10.

12

13 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
14 on 08/17/84, 09/13/84, 10/19/04, 12/14/84, 02/08/85, 03/11/85/ 04/26/85, 01/31/86, and 03/15/86;
15 and Minutes of the Joint Committee on Attorney Standards on 02/28/03, 03/18/05, 06/14/05,
16 02/26/16.

**PROPOSED AMENDMENTS - RULE 1.15, RULES OF PROFESSIONAL CONDUCT,
COMMENT [1]**

**RULE 1.15 SAFEKEEPING PROPERTY AND PROFESSIONAL LIABILITY INSURANCE
DISCLOSURE**

.....

1 Comment

2 [1] A lawyer should hold property of others with the care required of a professional fiduciary. All
3 property that is the property of clients or third persons, including potential prospective clients, must
4 be kept separate from the lawyer's business and personal property. Monies that are the property of
5 clients or third persons, including potential prospective clients, must be held in one or more interest
6 bearing trust accounts. Separate trust accounts may be warranted when administering estate monies
7 or acting in similar fiduciary capacities. The determination of whether funds of a client or third
8 person could be invested to provide a positive net return to the client rests in the sound judgment of
9 each lawyer or law firm.

10

11 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
12 on 04/26/85 and 08/23/85; and Revised by the State Bar Association of North Dakota on 08/29/86
13 and approved by the Board of Governors on 09/06/86; Minutes of the Joint Committee on Attorney
14 Standards on 11/14/03, 03/18/05, 06/14/05, 09/09/05, 06/10/08, 09/19/08, 11/07/08, 12/01/08,
15 03/19/10, 06/15/10, 09/16/11, 12/09/11, 02/26/16.