THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2006-2

TOPIC: Duties to Prospective Clients; Beauty Contests; Advance Conflict Waivers; Imputation of Conflicts; Screens.

DIGEST: A lawyer who participates in a "beauty contest" with a prospective client, but who ultimately is not retained by the prospective client, is not personally prohibited from later representing a client with materially adverse interests in a substantially related matter if the lawyer did not learn confidences or secrets of the prospective client during the beauty contest. If the lawyer learned confidences or secrets of the prospective client, the lawyer may nonetheless later represent a client with materially adverse interests in a substantially related matter: (a) if, before the beauty contest, the lawyer obtained the prospective client's advance waiver of any conflict that might result from the prospective client sharing confidences or secrets; (b) without an advance waiver, unless the confidences or secrets could be significantly harmful to the prospective client; or (c) if it can be established that the prospective client revealed confidences or secrets with no intention of retaining the lawyer, but for the purpose of disqualifying the lawyer's firm from later representing possibly adverse parties.

Moreover, even if the individual lawyer described above is personally prohibited from later representing a client with materially adverse interests in a substantially related matter, the presumption that other lawyers at the law firm have knowledge of the prospective client's confidences or secrets may be rebutted, under the circumstances discussed below, by using ethical screens.

CODE: DR 4-101; DR 5-108; EC 4-1.

QUESTION

May a law firm that participated in a beauty contest with a prospective client, but that ultimately was not retained by the prospective client, thereafter represent a client in a matter substantially related to the subject of the beauty contest, when the client's interests are materially adverse to the prospective client's interests?

OPINION

A. The Beauty Contest Scenarios

Consider the following situation. Company A (the "Prospective Client") is interested in suing Company B for breach of contract. In an effort to choose litigation counsel, the Prospective Client conducts a beauty contest involving several law firms, including Firm X. Assume the following two possible scenarios for the beauty contest:

> Scenario 1: Firm X presents its qualifications to represent the Prospective Client, and the Prospective Client does not divulge any confidences or secrets regarding its proposed lawsuit. [1]

> Scenario 2: Firm X presents its qualifications to represent the Prospective Client, and the Prospective Client divulges confidences and secrets regarding the underlying facts and legal theories supporting its proposed lawsuit.

Further assume that the Prospective Client ultimately decides not to retain Firm X to represent it in the lawsuit, and that Company B thereafter seeks to retain Firm X to defend it in the lawsuit. [2]

This opinion analyzes the ethical considerations applicable to law firms participating in beauty contests. The analysis applies equally to when a law firm holds a preliminary meeting with a prospective client that is not approaching other law firms for possible retention.

B. Attorney-Client Relationship

In today's legal environment, where individuals and corporations often conduct extensive searches for legal representation, a law firm must be mindful that participating in a beauty contest may, as discussed below, enmesh the firm in a disabling conflict of interest that would require it to decline to represent a client with materially adverse interests in a substantially related matter, or risk a court granting the prospective client's motion for disqualification. A law firm participating in a beauty contest would

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[1] "Confidences" and "secrets" are defined in DR 4-101. As used in this Opinion, these terms encompass confidential information divulged by the prospective client even though no actual attorney-client relationship has yet been formed.

[2] This opinion assumes that the Prospective Client does not consent to Company B's retention of Firm X.

be mistaken to believe that a court would nonetheless allow it to represent such a client because the beauty contest failed to result in the formation of an actual attorney-client relationship with the prospective client, evidenced by the signing of a retention agreement, by the rendering of services, or by the receipt of payment. Indeed, the formation of an actual attorney-client relationship is not a prerequisite to the disqualification of a firm that participated in a beauty contest.

The critical issues determining whether, following an unsuccessful beauty contest, a firm will be allowed to represent the client described above are whether the attorneys who participated in the beauty contest on behalf of the firm had access to confidences or secrets of the prospective client that could be significantly harmful to the prospective client and, if so, whether the firm (1) had obtained an adequate advance waiver from the prospective client before the beauty contest, or (2) established and acted in accordance with adequate procedures to rebut the presumption that those confidences or secrets were or will be shared with other attorneys in the firm.

C. The Individual Attorney

Whether Firm X, in the situation described above, is prohibited from representing Company B because one of its attorneys participated in the beauty contest with the Prospective Client involves two inquiries. The first is whether the attorney who participated in the beauty contest is personally disqualified from representing Company B.[3]

The Code of Professional Responsibility (the "Code") does not contain any provision directly informing this inquiry, or, more generally, addressing the duties that a lawyer owes to a prospective client. But certain Code provisions are nonetheless relevant. DR 4-101 provides that "[a] lawyer should preserve the confidences and secrets of a client." DR 5-108 imposes the same duty on a lawyer regarding the confidences and secrets of a former client. And Ethical Consideration 4-1 states that the obligation to preserve confidences and secrets is not limited to current or former clients, but also includes prospective clients: "[b]oth the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or *sought to employ the lawyer*." (emphasis added).

At the same time, it is important to recognize that a prospective client does not stand on entirely equal footing with a client. A lawyer's discussions with a prospective client are necessarily limited in both duration and detail, a lawyer must be able to obtain — without undue risk of disqualification — the information necessary to determine whether the representation is appropriate, and the lawyer or the prospective client or both may decide not to proceed any further. As the *Restatement (Third) of The*

[3] The second issue—whether the firm itself is disqualified—is discussed below in Section D.

Law Governing Lawyers (2000) (the "*Restatement*") cogently observed in explaining why the prospective client should receive some, but not all, the protections given to a client:

> [A] lawyer's discussions with a prospective client often are limited in time and depth of exploration, do not reflect full consideration of the prospective client's problems, and leave both prospective client and lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

Id. § 15 cmt. b.

We believe that the ABA Model Rules of Professional Conduct and the *Restatement* struck the appropriate balance in defining the duties owed to prospective clients. Under both Model Rule 1.18(b) and *Restatement* § 15(1)(a), a lawyer shall neither disclose nor make adverse use of confidential information learned from a prospective client. At the same time, in addressing whether a lawyer who participates in a beauty contest with a prospective client should later be personally disqualified from representing a client with materially adverse interests in a substantially related matter, Model Rule 1.18 provides that "[a] lawyer ... 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...." Similarly, Section 15(2) of the *Restatement,* entitled "A Lawyer's Duties to a Prospective Client," provides that "[a] lawyer ... may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer ... has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter...."[4]

The "significantly harmful" test sets the bar lower than in the case of a lawyer opposing a former client. Under Model Rule 1.9(a) and under *Restatement* § 132, as under DR 5-108(A), the bar against a lawyer acting adversely to a former client in a substantially related matter is automatic.[5]

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[4] *See also* ABCNY Formal Op. 2001-1 (adopting the "significantly harmful" test in the context of a law firm's receipt of an unsolicited e-mail containing confidential information)

[5] *See also* 1 Geoffrey C. Hazard and W. William Hodes, *The Law of Lawyering (3d ed. 2005),* § 21A.6, at 21A-15. ("Because the relationship between a prospective client and a lawyer by definition never reaches the stage where the duty of loyalty attaches with full force, however, Rule 1.18 imposes a less stringent regime on the lawyer than where actual clients and former (...continued)

Applying these principles to the scenarios described above, the attorney from Firm X who participated in the beauty contest should not be personally prohibited from representing Company B in Scenario 1 because that attorney did not receive any confidences or secrets from the Prospective Client during the beauty contest. *See, e.g., Interpetrol Berm., Ltd. v. Rosenwasser*, 1988 U.S. Dist. LEXIS 14307, at *7 (S.D.N.Y. Dec. 19, 1988) (in a pre-retention situation, the failure to proffer evidence that the attorney had access to confidences and secrets "is necessarily fatal to the disqualification motion"); *N.Y. Univ. v. Simon*, 498 N.Y.S.2d 659, 662 (Civ. Ct. N.Y. County 1985) (denying motion to disqualify "based on what is, in essence, movant's conclusion that the matters discussed were significant" without any showing that confidences and secrets were revealed).

But in Scenario 2, in which confidences or secrets of the Prospective Client are shared with the attorney, the attorney would be prohibited from representing Company B, except in the following three situations. First, the attorney from Firm X should be allowed to represent Company B unless the confidences or secrets the attorney had received from the Prospective Client could be significantly harmful to the Prospective Client in the litigation.

Second, the attorney from Firm X should be allowed to represent Company B if, before the beauty contest, the attorney obtained the Prospective Client's informed advance waiver of any conflict that might otherwise result from the Prospective Client sharing confidences or secrets with the attorney during the beauty contest. In order to maximize the likelihood of such a waiver being effective, a lawyer should consider having the waiver (1) in writing, (2) signed by the prospective client, (3) explain the preliminary nature of the beauty contest, (4) request that the prospective client not reveal any confidences or secrets during the beauty contest, and (5) state that, if the prospective client nonetheless divulges confidences or secrets, and the attorney is not retained by the prospective client, the prospective client waives any objection to (a) the attorney's later retention by a client whose interests may be materially adverse to the prospective client's interests, and (b) the attorney's use of the confidences and secrets in that representation. *See, e.g., Bridge Prods. Inc. v. Quantum Chem. Corp.*, 1990 U.S. Dist. LEXIS 5019, at *10-11 (N.D. Ill. Apr. 27, 1990) (placing the burden on the attorney to make clear that "the initial meeting was purely preliminary and that confidences would not necessarily be protected").[6]

Third, the attorney from Firm X should be allowed to represent Company B if it can be established that the Prospective Client revealed confidences or secrets

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clients are involved. Put another way, the protections afforded to prospective clients are not as extensive as those provided to 'real' clients.")

[6] For a discussion of the requirements for an effective advance waiver, *see* ABCNY Formal Op. 2006-1.

without any intention of retaining Firm X, but for the purpose of disqualifying Firm X from any later representation of possibly adverse parties.[7] In this case, the attorney from Firm X should not be prevented from representing Company B because the reasonable expectation of confidentiality underlying DR 5-108(A) and DR 4-101 is absent, given that the Prospective Client's purpose in meeting the attorney as part of the beauty contest was merely to preclude the attorney from representing Company B, as opposed to selecting counsel.

Model Rule 1.18 supports this conclusion. Under that Rule, a prospective client is "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship." Having had no intention of retaining the attorney from Firm X when conducting the beauty contest, the Prospective Client would not qualify as a true prospective client. *See also Restatement* § 15(1) (defining prospective client as "a person [who] discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter").

That the attorney from Firm X should not be disqualified from representing Company B when the Prospective Client uses the beauty contest as a "sword" is also supported by the Committee on Standards of Attorney Conduct of the New York State Bar Association (the "NYSBA Committee on Standards of Attorney Conduct"). Indeed, the NYSBA Committee on Standards of Attorney Conduct recently proposed Rule 1.18, entitled "Duties to Prospective Client," which is nearly identical to Model Rule 1.18, but which explicitly withholds the confidentiality protections of the rule from one who uses the beauty contest as an offensive tool. *See* Proposed New York Rule of Professional Conduct 1.18 (Sept. 30, 2005) ("Proposed Rule 1.18"). As the drafters of Proposed Rule 1.18 make clear in Comment 2, "a person who communicates with a lawyer for the sole purpose of preventing the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule."

D. The Law Firm

Even if the individual attorney from Firm X, who participated in the beauty contest with the Prospective Client, is prohibited from representing Company B in a substantially related matter, Firm X may still be able to represent Company B in that matter. Generally, a conflict which prohibits an individual attorney from representing a client will be imputed to other attorneys working at the law firm, creating a presumption of disqualification of every attorney at the firm. Thus, DR 5-105(D) provides that

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[7] Revealing confidences and secrets in a preliminary meeting for the purpose of disqualifying the law firm is known as "taint shopping." *See, e.g.*, Geoffrey C. Hazard, *Ethics, The Would-Be Client*, Nat'l L.J., Jan. 15, 1996 at A19 ("taint shopping describes the behavior in which someone purporting to be seeking legal assistance interviews a lawyer or law firm for the purpose of disqualifying them from future adverse representation.")

"[w]hile lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so...." Similarly, Model Rule 1.18 provides that "[i]f a lawyer is disqualified from representation ... no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter...."[8]

But the presumption that the other attorneys at the law firm have knowledge of the disabling confidences or secrets can be rebutted under certain circumstances. *See, e.g. Kassis v. Teacher's Ins. and Annuity Ass'n 695 N.Y.S.2d 515, 518* (1999) (stating that an "imputed disqualification is not an irrebuttable presumption. A per se rule of disqualification ... is unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of the former client's confidences and secrets. [...] [B]ecause disqualification of a law firm during litigation may have significant adverse consequences to the client and others, it is particularly important that the Code of Professional Responsibility not be mechanically applied.") (internal citations and quotation marks omitted); *U.S. Football League v. Nat'l Football League*, 605 F. Supp. 1448, 1466 (S.D.N.Y. 1985) ("The presumption of shared confidences is, however, rebuttable...").

We believe that, in this context, ethical screens are an appropriate means to rebut the presumption of shared confidences or secrets. To be sure, the Code specifically endorses the use of screens only in cases involving government attorneys and judges, *see* DR 9-101, but the Code's failure to mention screens to rebut the presumption of shared confidences or secrets in the context of prospective clients is not dispositive. After all, as stated earlier, the Code does not address duties to prospective clients. In addition, the courts have found screens to be effective in the context of prospective clients. *See, e.g., Cummin v. Cummin*, 695 N.Y.S.2d 346 (App. Div. 1999); *Interpetrol Berm., Ltd. v. Rosenwasser*, 1988 U.S. Dist. LEXIS 14307 (S.D.N.Y. Dec. 19, 1988). The courts have also endorsed the efficacy of screens to rebut the presumption that confidences or secrets were or will be shared within the firm in other settings, *see, e.g., Battagliola v. Nat'l Life Ins. Co.*, 2005 U.S. Dist. LEXIS 650 (S.D.N.Y. Jan. 19, 2005); *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270 (S.D.N.Y. 1994); *Papyrus Tech. Corp. v. N.Y. Stock Exch, Inc..*, 325 F. Supp. 2d 270 (S.D.N.Y. 2004); *Solow v. W.R. Grace*, 610 N.Y.S.2d 128 (1994); *Armstrong v. McAlpin*, 625 F.2d 433, 453 (2d. Cir. 1980) (en banc) (Newman, J., dissenting) ("I do not see why a Chinese Wall should be thought more impervious to information that originated from a government investigation

[8] Courts have also recognized the imputation of the conflict, *see, e.g., Battagliola v. Nat'l Life Ins. Co.*, 2005 U.S. Dist. LEXIS 650, at *43 (S.D.N.Y. Jan. 19, 2005); *Papyrus Tech. Corp. v. N.Y. Stock Exch., Inc.*, 325 F. Supp. 2d 270, 277-278 (S.D.N.Y. 2004), and have stated that "[t]he imputation rule is based upon the belief that when attorney-client confidences are disclosed to a member of the law firm, every other attorney in the law firm has the opportunity to ascertain the information gleaned from the disclosure." *Lott v. Morgan Stanley Dean Witter & Co. Long Term Disability Plan*, 2004 U.S. Dist. LEXIS 25682, at *13 (S.D.N.Y. Dec. 23, 2004).

than to information learned from a client with adverse interests"), *vacated*, 449 U.S. 1106 (1981).

This result is supported by the relevant sections of the Model Rules and of the *Restatement,* with which we also otherwise agree. Model Rule 1.18 explicitly recognizes the use of screens to rebut the imputation of the conflict of interest in the case of a prospective client:

> (d) [w]hen the lawyer has received disqualifying information ... representation is permissible if:
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> * * *
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> (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
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> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
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> (ii) written notice is promptly given to the prospective client.[9]

Moreover, the NYSBA Committee on Standards of Attorney Conduct, in its Proposed Rule 1.18, explicitly recognizes the efficacy of screens. *See* Proposed Rule 1.18 (d) (stating that the firm may still represent the client if the lawyer who received the disqualifying information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client and the disqualified lawyer "is timely screened from any participation in the matter....").

E. The Effective Screen

In assessing whether a law firm has effectively screened a personally prohibited lawyer from the rest of the firm, thus enabling the firm to represent a client

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[9] Similarly, the *Restatement* in this context allows the firm to represent a client adversely to the former prospective client, if "(i) any personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c)." *Restatement* at § 15(2)(a)(i).

with materially adverse interests to the prospective client in a substantially related matter, courts evaluate a number of factors:

- First, consideration is given to the timeliness of the firm's implementation of the screen. *See In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270, 274 (S.D.N.Y. 1994) (approving the use of screen to rebut the presumption that confidences were shared with other attorneys at the firm when firm instituted screen "as soon as [it] did discover the conflict", despite the fact that the conflict had arisen two months earlier); *Papyrus Tech. Corp. v. N.Y. Stock Exch., Inc.*, 325 F. Supp. 2d 270, 281 (S.D.N.Y. 2004) (presumption rebutted when firm "immediately established appropriate screening mechanisms" after it "received actual notice that ... confidences or secrets may have been disclosed...."); *Mitchell v. Metro. Life Ins. Co.*, 2002 U.S. Dist. LEXIS 4675, at *29 (S.D.N.Y. Mar. 20, 2002) (presumption not rebutted when firm implemented screen almost two months after conflict arose and "well after the time the firm had actual notice of the conflict").

- Second, a screen's efficacy may depend on the size of the firm, as courts can be skeptical of a screen's adequacy in small firms. *See In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. at 274 (screen approved for firm of over 400 attorneys); *Papyrus Tech. Corp.*, 325 F. Supp. 2d at 280 n.10 (affirming use of screen in firm of 50 attorneys while stating that "there exists no per se rule that a small-firm (to the extent that ... a fifty-member patent firm qualifies as small) cannot erect an effective screen."); *Decora Inc. v. DW Wallcovering Inc.*, 899 F. Supp. 132 (S.D.N.Y. 1995) (not allowing screen in firm of 44 attorneys); *Yaretsky v. Blum*, 1981 U.S. Dist. LEXIS 12624, at *15 (S.D.N.Y. Apr. 15, 1981) (not allowing screen in firm of less than 30 attorneys); *Crudele v. N.Y. City Police Dep't*, 2001 U.S. Dist. LEXIS 13779, at *13-14 (S.D.N.Y. Sept. 6, 2001) (declining to approve screen at 15-member law firm).

- Third, courts consider whether the personally prohibited lawyer works in proximity to the lawyers at the firm who will represent the client. *See Battagliola v. Nat'l Life Ins. Co.*, 2005 U.S. Dist. LEXIS 650, at *46 (S.D.N.Y. Jan. 19, 2005) (screen allowed when personally prohibited lawyer worked at a different office (New Jersey) than the attorneys handling the client's matter (New York)); *Decora Inc.*, 899 F. Supp. at 140 (not allowing screen when personally prohibited lawyer worked in same department as other attorneys representing client); *Yaretsky*, 1981 U.S. Dist. LEXIS 12624, at *15 (disallowing screen when personally prohibited lawyer worked in firm's health law section, which was also the section of the firm charged with handling case for client).

- Fourth, courts accord weight to affidavits submitted by (1) the personally prohibited lawyer stating that the lawyer has not shared the confidences or secrets with others at the firm, and (2) the other lawyers at the firm confirming that they have not received those confidences or secrets. *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. at 274; *Papyrus Tech. Corp.*, 325 F. Supp. 2d at 281.

- Fifth, the effectiveness of a screen may be lessened if the personally prohibited lawyer works on other matters with the lawyers representing the client. *Decora Inc.*, 899 F. Supp. at 140; *Mitchell*, 2002 U.S. Dist. LEXIS 4675, at *28.

- Last, the effectiveness of a screen may be questioned if the personally prohibited lawyer maintains files containing the confidences or secrets. *See In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. at 274.

CONCLUSION

To best position itself so as not to be precluded from representing a client with materially adverse interests in a matter substantially related to the subject of a beauty contest, a law firm should consider developing protocols for participating in these and similar preliminary meetings with prospective clients. Those protocols might include:

1. establishing a process whereby the risk of having any lawyer at the firm tainted is minimized, *e.g.*:

   a. by discussing with the prospective client the disqualification issues presented by participating in the meeting;

   b. by seeking an advance waiver from the prospective client; and

   c. by not obtaining confidences or secrets from the prospective client during the meeting.

2. having a written formal screening process in place that will effectively and immediately seal off the firm's personally prohibited lawyer (assuming a taint exists) from the other lawyers at the firm.