



30 Bank Street
New Britain, CT 06051
P (860) 223-4400
F (860) 223-4488

Standing Committee on Professional Ethics

December 15, 2021

INFORMAL OPINION 21-03
REFERRING ATTORNEYS' OBLIGATIONS TO PROSPECTIVE CLIENTS

The inquirers are two attorneys (“referring attorneys”) who, working through a bar organization committee (“the committee”), have put together a network of pro bono attorneys willing to represent a specific category of clients in a variety of legal matters. The referring attorneys have created a form for prospective clients to complete; they expect to use the form to facilitate obtaining from the clients sufficient information to make an appropriate match with an attorney in the network. The referring attorneys will not receive a fee for this service.

The referring attorneys anticipate that their primary role will be to obtain preliminary background information from each prospective client (via the client information form); assess the prospective client’s needs; and match the client with an appropriate attorney in the pro bono network. In some situations, the intake and screening process will result in a client match with an attorney employed at the non-profit organization that employs the attorneys conducting the intake. Such a match would occur when the client’s legal needs fit within the parameters of the non-profit organization’s funding and organizational purpose. Absent a referral to their own employer organization, the referring attorneys do not anticipate that their role will exceed the intake, screening, and matching functions. They expect to have little or no direct contact with the client after first obtaining the information necessary to assess the client’s needs and match the client with an attorney in the pro bono network, and then communicating to the client the matched pro bono attorney’s contact information.

The referring attorneys seek our opinion on the following questions:

1. Aside from cases where the client is matched with an associated attorney at the non-profit organization – i.e., when the referring attorneys are acting only in the intake and gatekeeper roles – would the referring attorneys be deemed to be acting as attorneys such that their interactions with the clients would be subject to the Rules of Professional Conduct?
2. If the referring attorneys are bound by the ethical rules in any communication with the clients, would the duty of confidentiality apply, even if neither they nor the non-profit organization establishes an attorney-client relationship with the client?
3. Is there any language that should be included on the client form, or any way in which the referral process should be structured, to protect the confidentiality of information provided to the attorneys in the matching process?

The short answer to the first two questions is that a lawyer who consults with a prospective client is acting as a lawyer and owes the prospective client the duty of confidentiality as to information conveyed to the lawyer even if a formal attorney-client relationship does not ensue. The answer to the third question is that the



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information obtained in the intake process is confidential and thus should be handled in the same way as any other client confidential information is handled.¹

As an initial matter, even where the attorney's role goes no further than to collect and assess information to make a determination about a match with a lawyer in the pro bono network, the conduct falls within Connecticut's definition of the practice of law. *See* Practice Book § 2-44A ("practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances and or objectives of that person . . . [and] includes . . . (1) Holding oneself out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents that such a person is either (a) qualified or capable of performing, or (b) is engaged in the business or activity of performing any act constituting the practice of law . . . [and] (2) Giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities . . .").

On the facts presented, the intake and screening lawyers are engaged in the practice of law in holding themselves out as lawyers, operating through a bar organization committee, for the purpose of assisting prospective clients of the pro bono network by assessing their legal needs and identifying an appropriate attorney in the network. Given that such conduct falls within the practice of law as defined in Connecticut, the conduct is subject to the Rules of Professional Conduct.

Rule 1.18 (Duties to Prospective Client) expressly addresses attorney obligations in this situation. As a preliminary matter, the Rule defines a "prospective client" as a "person who consults with a lawyer concerning the possibility of forming a client-lawyer relationship with respect to a matter." Rule 1.18(a).

Subsection (b) of Rule 1.18 provides that even if "no client-lawyer relationship ensues," the lawyer remains obligated to protect from disclosure any information learned from the prospective client. More specifically, the lawyer may not "use or reveal that information, except as Rule 1.9 would permit." Rule 1.9 (Duties to Former Clients), in turn, provides that a lawyer may not: (1) use client confidential information to the disadvantage of a former client (absent certain circumstances); or (2) reveal client confidential information "except as these Rules would permit or require . . ." Rule 1.9(c). For example, the Rules permit disclosure of confidential information where the client consents to such disclosure, or where disclosure is necessary to prevent certain criminal or fraudulent conduct. Rule 1.6(a), (b), (c)(1). *See also* Rules of Professional Conduct, Scope ("But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established."); Mark A. Dubois and James F. Sullivan, *Connecticut Legal Ethics and Malpractice* (3rd ed 2016) at §1-1:2 ("Under Rule 1.18, a 'prospective' client obtains the rights of a 'former' client as defined under Rule 1.9 for conflicts and confidentiality purposes.").

¹ The inquirers also ask a fourth question, concerning attorney-client privilege. Privilege issues do not implicate the Rules of Professional Conduct. Rather, they are matters of substantive and evidentiary law, and it is not within the Standing Committee's jurisdiction to express opinions on issues of law. CBA Informal Opinion 00-20 (declining to consider question of law concerning attorney client privilege). The question of whether the privilege will attach in any specific circumstance is not a question this Committee may address. *See* CBA Informal Opinion 99-38 ("The evidentiary question of the breadth and scope of the attorney-client privilege for a subpoenaed attorney's testimony concerning a former client is for a trial judge to decide.").



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In short, Rule 1.18 dictates that the intake lawyers are obligated to protect the confidentiality of information prospective clients provide to them even if the clients do not enter into a client-lawyer relationship with them or the non-profit where they are employed.

The Rules of Professional Conduct do not require the inclusion of specific language or notice on the intake form to establish that the information the client provides to the referring lawyers is protected as confidential: the confidentiality of the information arises out of the relationship between the prospective client and the lawyer. While the lawyers may include such language or notice on the form, the information the client provides is confidential per Rule 1.18, even without specific language. The Committee notes, however, that prospective clients may be more comfortable disclosing information if the form includes a statement that the information they provide in the intake process is confidential.

In the Committee's view, too, even where the prospective client does not give express consent to the disclosure of the intake information provided to the referring lawyers, the client's completion and submission of the intake form operates as the client's implied authorization for the disclosure of the client's information to the network lawyer accepting the client's matter as a pro bono referral. *See* Rule 1.6(a) (otherwise confidential information may be disclosed where client consents or where impliedly authorized). Even so, it may be prudent to include on the form notice (and therefore reassurance) to the prospective client that the referring lawyers will share the information the client provides only with the attorney to whom the service refers the client.

Finally, as is the case with any information learned from a client or prospective client, the referring attorneys have an obligation to ensure that the intake information *remains* confidential. Accordingly, the referring attorneys must take reasonable precautions to ensure that there is no inadvertent or unauthorized disclosure of, or unauthorized access to, information or documents the prospective clients have provided to them. *See* Rule 1.6(e).

THE COMMITTEE ON PROFESSIONAL ETHICS

Kim E. Rinehart

BY Kim Rinehart, Chair