

ETHICS OPINION

010830

FACTS: After consulting with a woman about potential representation for a divorce, something triggered a memory of a letter the attorney had received a year earlier. The letter was from the woman's husband, had no return address and said:

Dear [Attorney]:

My name is [Husband]. I met you at the divorce proceedings of [former client of attorney's]. My wife and I are currently working very hard to save our marriage and are undergoing intensive counseling. I am currently expecting the best, but preparing for the worst. I have a four year old daughter and I [am] very concerned that if my wife and I can't work things out that I am in a compromised position as the father, and with an interesting 'mental health' history I may need a very good attorney. I have heard many good things about you from [the former client] and others and I want to put you on "standby" retainer.

At this moment, what I can deposit is \$75 in cash, but I can pay more soon.

I am not including a return address and I cannot have you write me at my home or office at this time. I have been trying to reach you by phone and will continue trying. I will write soon with a post office box # that you write me at.

Thank you for keeping this confidential. I hope to give you more information soon. Any contact from you at this time could really "blow" the work my wife and I are doing at this time.

Thank you!

The husband never contacted attorney. Attorney did not deposit the money in his trust account because he did not believe that the husband was his client. Attorney decided that if the husband ever contacted him that he would then return the cash or discuss retention in the usual fashion. Attorney later attempted unsuccessfully to identify the husband in the telephone book, but learned from the wife that while the husband listed his first name in the phone book, he typically used his middle name. Attorney concluded that the husband had used his middle name in the correspondence. This was not a situation attorney could have avoided with screening mechanisms.

QUESTIONS PRESENTED:

1. Can attorney represent the wife?
2. What, if anything, can attorney tell the wife about the husband's letter?

SHORT ANSWERS:

1. The attorney is not automatically disqualified from representing the wife as a result of the husband's letter. However, attorney should exercise the cautions described in the discussion below before agreeing to represent wife.
2. It depends on the circumstances as they develop. The Rules do not prohibit the use of information obtained in an initial consultation to the disadvantage of the would-be client if the information is generally known.

DISCUSSION:

Although the Montana Rules of Professional Conduct do not deal explicitly with prospective clients, some of the basic duties owed to clients are also owed to prospective clients during the period of uncertainty. Specifically, the Rules addressing confidentiality and conflict of interest apply here where, at best, the husband intended to retain Attorney as his counsel. At worst, the husband intended to subvert the Rules of Professional Conduct to preclude Attorney's representation of the wife.

Information imparted to a lawyer by a would-be client seeking legal representation is protected from revelation or use under Rule 1.6 even though the lawyer does not undertake representation of or perform legal work for the would-be client. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 358 (1990) , Restatement (Third) of the Law Governing Lawyers §15 (1998). The authorities unanimously agree that for purposes of assessing rights of clients and lawyers in relation to each other, a prospective client is in most respects essentially indistinguishable from a client, but only if the consultation was a bona fide attempt to obtain counsel. Geoffrey C. Hazard, Jr., and W. William Hodes, *The Law of Lawyering* §2.3 (3rd ed. 2001). Also key to the determination is whether confidential information has been disclosed to the lawyer or whether the information is general or public in nature.

If the person disclosing information to the lawyer was not genuinely seeking legal services from the lawyer, but instead had the purpose of disqualifying the lawyer from being engaged by an opposing party--a practice referred to as "taint shopping,"-- then the information disclosed does not fall under the protection of the confidentiality or former client rules. Geoffrey C. Hazard, Jr., and W. William Hodes, *The Law of Lawyering* §13.9: "Courts have had little difficulty seeing through this ruse, typically holding that inasmuch as the consultation was not for the purpose of obtaining legal services, any information disclosed did not fall under the protection of the confidentiality or former client rules. [Citing *Hughes v. Paine, Webber, Jackson and Curtis, Inc.*, 565 F. Supp. 663 (N.D. Ill. 1983).]"

If the initial consultation is bona fide, the restraints on conflict of interest found in Rule 1.7 and Rule 1.9 potentially preclude the representation. The pertinent portion of these Rules prohibit a lawyer from representing a client, "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person...unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents

after consultation." (In the instant case, the Attorney's responsibilities lie with the husband as a third person as the husband did not create an attorney-client relationship with his letter. The wife is the putative client from whom consent must be obtained after consultation.)

Whether the husband was taint shopping is not determinable given the facts presented. That said, the issues become 1) whether the husband can argue he conveyed confidential information and 2) what, if any, information the Attorney can convey to the wife concerning the husband's letter to obtain her consent to the conflict. The key element in making a determination as to when a consultation ripens into a relationship precluding a lawyer from undertaking an adverse representation is whether confidential information has been disclosed to the lawyer.

The husband can potentially claim that he conveyed confidential information when he wrote: "I [am] very concerned that if my wife and I can't work things out that I am in a compromised position as the father, and with an interesting 'mental health' history I may need a very good attorney."

Under these circumstances, it is appropriate for attorney to explain to the wife that the husband had written a letter to attorney where the husband might have gotten the impression he had retained attorney. It would not be appropriate for the attorney to discuss the contents of the letter. Instead, the attorney should explain to the wife that attorney's representation possibly creates a conflict of interest that could lead to the attorney's disqualification because of the potentially confidential information contained in the letter. The attorney should also explain the possible additional expense of litigation connected with a motion to disqualify. The attorney and the wife, faced with the choice that attorney may not be able to represent either the wife or the husband, can, if both attorney and wife (and particularly the wife) choose to go forward, explore the issues involved in the divorce. If, in this discussion, the wife's disclosures clearly establish that the husband's insecurities over his acknowledged mental health issues are already known by or previously disclosed to her, the attorney may represent the wife. The Rules do not prohibit the use of information obtained in an initial consultation to the disadvantage of the would-be client of information relating to the representation if the information is generally known. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 358 (1990).

If the wife discloses nothing that suggests she knows of her husband's mental health history, then attorney should review Comment 5 to Rule 1.7. This Comment sets forth the standard for determining whether it is proper to obtain a client's consent to otherwise impermissible representations as "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Application of this standard to this hypothetical leads us to believe that the wife's consent would be irrelevant, that confidential information has been conveyed and that the conflict cannot be overcome.

CONCLUSION:

There is an element of risk to the attorney if he chooses to represent the wife in this case. However, the attorney can, if interested, represent the wife if the attorney can establish that the information conveyed to him in the letter was not confidential and if the wife agrees to proceed

after appraisal of the fact that the attorney's representation may be challenged in a motion to disqualify.

THIS OPINION IS ADVISORY ONLY