CASE NO.: 11-CR-0300

IN THE JUSTICE'S COURT OF ELKO TOWNSHIP
IN AND FOR THE COUNTY OF ELKO, AND THE STATE OF NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

TONI COLLETTE FRATTO,

Defendant.

OPPOSITION TO THE STATE OF NEVADA'S MOTION IN LIMINE CONCERNING THE ADMISSIBILITY OF TONI FRATTO'S STATEMENT TO LAWYERS

COMES NOW, Defendant TONI COLLETTE FRATTO, by and through her attorneys of record, John P. Springgate, Esq., and David Lockie, Esq., Lockie and Macfarland, Ltd., and submits her Opposition to the State's Motion in Limine addressing the admissibility of Toni Fratto's statement to John Ohlson and Jeffrey Kump on April 22, 2011.

FACTUAL BACKGROUND

The State has included within its Motion, at Item 3, Page 5 and following, a briefly redacted version of the "setup" to the tape recording, being the initial comments between Ms. Fratto, Mr. Ohlson and Mr. Kump.

According to the Motion, Ohlson and Kump met with Ms. Fratto and her parents on March 17, 2011. At that time, apparently, Ms. Fratto reiterated her prior statements to police regarding a lack of involvement in the events in issue.

Mr. Ohlson avers in his affidavit that after that meeting on March 17, 2011, he and Mr. Kump were advised that Ms. Fratto wished to speak to them again. (Ohlson Affidavit, Item 5).

That meeting was arranged in Mr. Kump's office in Elko, Nevada. Ms. Fratto was brought to the office by Kip Patten, Kody Patten's father, as her parents were out of town. Ms. Fratto is 18 years old, and a student in high school. While Mr. Ohlson states in his affidavit that he wished to avoid " an inference that she was influenced by Kip Patten," the simple fact that it was Mr. Patten who brought her over to the office, at a time when her parents were not present, and in fact were out of town, and arranged the meeting itself, leads directly to an inference that she was influenced by Mr. Patten's father. Ms. Fratto's parents will testify that in fact, after the first meeting in March, that they did not desire for her to speak further with attorneys Ohlson or Kump.

Further substantiating the misrepresentations to Ms. Fratto which lead to this statement are the allegations by Mr. Ohlson that 1. she was directly told that what she said was evidence, and 2. They would be obliged to turn the tape over to the police. (See Ohlson Affidavit Page 6, Item 6, and re: law enforcement, Item 9.) It is frankly, unbelievable, that in a matter of such importance, so important that it would justify being tape recorded, that the most important portions of the conversation, to wit, that it was evidence, and it would be turned over to the police and could lead to her incarceration, are both **absent** from the tape.

The State has included and incorporated the relevant portions of the redacted transcript for purposes of this hearing, pages 5-8. In that transcript, what does Toni Fratto say?

Fratto: Can I ask a question real quick question?

Ohlson: Sure

Fratto: Um, will you guys be able to represent me?

Ohlson: You know, I don't know what your're going to say. And depending on what you're going to say, we may or may not be able to if your interests conflict with Kody's. If we are not able to represent you, we will get counsel for you.

It is clear that Mr. Fratto is seeking counsel. The attorneys are considering her representation, subject to a conflict.

Fratto: Then would I need to get my own attorney first?

Ohlson: We'll get a lawyer for you but you don't need to. Right now it's just a conversation between us and a statement that you're making to us. We're not law enforcement.

Later on Ms. Fratto asks:

Fratto: Ok. Are your best interests to help me and Kody, or ...

Ohlson: We're Kody's lawyers and were hired and we're retained by the State to represent him and his interests. It is not our intention to do anything bad to you.

Obviously, these statements are a) untrue, and b) conflict with the alleged statements Ms. Fratto made off the tape, or that Mr. Ohlson made prior to the tape starting, and overbore her legitimate question and concerns about whether or not Ohlson and Kump could represent her, and whether or not she would need to get her own independent attorney first.

POINTS AND AUTHORITIES

Under NRS 49.045, a "client" means a person . . . "who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." The general rule of privilege under NRS 49.045 is that the client has the privilege to refuse to disclose, and to prevent any other person from disclosing, his confidential communications between the client and client's lawyer, which are "made for the purpose of facilitating the rendition of professional legal services to the client."

> The attorney client privilege is the oldest of the privileges for confidential communications known to the common law. *Upjohn Company v. United States,* 449 U. S. 383, 389, 66 L. Ed. 2d, 584, 101 S. Ct. 677 (1981), citing *8 J. Wigmore Evidence,*

Section 2290 (McNaughton rev. 1961). The common law is expressly incorporated into Nevada Law insofar as consistent with Federal and State Constitutional and Positive Enactments. NRS 1.030.

Tahoe Regional Planning Agency v. McKay, 769 F. 2d 534 (1985) Fn. 11.

> Implicit in the protection against testimonial compulsion is recognition of the importance of attorney/client confidentiality. As the Supreme Court observed nearly a century ago, 'legal assistance can only be safely and readily availed of when free from the consequences or apprehension of disclosure.'" *Hunt v. Blackburn*, 128 U. S. 464, 470, 32 L. Ed. 488, 9 S. Ct. 5 (1888); accord Upjohn, 449 U.S. At 389.

Tahoe Regional Planning Agency v. McKay, Id. at 540.

In the case of *Sloan v. State Bar*, 102 Nev. 436, 726 P.2d 330 (1986), the Nevada Supreme Court held that:

> Under this rule [SCR 179], Sloan [the attorney] was justified in believing that he was prohibited from divulging information he received from his client indicating that the client had already committed a crime.

Former SCR 179, in effect at the time, provided as follows:

> It is the duty of a member of the state bar to preserve his client's confidences and his duties outlast lawyer' employment. The obligation to represent the client with an undivided fidelity not to divulge his secrets or consequences forbids also the subsequent acceptance of employment from others in matters adversely affecting any interest of the former client and concerning which he has acquired confidential information, unless he obtains the consent of all concerned.

It seems fairly obvious that the duty of confidentiality is not breached merely because Ms. Fratto's communication concerns a crime already committed. *Sloan, supra.*

IS TONI FRATTO A CLIENT?

> An attorney-client relationship may be implied "when 1) a person seeks advice or assistance from an attorney; 2) the advice or assistance songht pertains to matters within the attorney's professional competence; and, 3) the attorney

> expressly or impliedly agrees to give or actually gives the desired advice for assistance.'"
>
> See also *People v. Bennett,* 810 P. 2d 661, 664 (Colorado 1991); *Stewart v. State*, 118 Id. 932, 801 P. 2d 1283, 1285 (Idaho 1990). Furthermore, the attorney/client relationship "may be established through preliminary consultations even thought the attorney is never formally retained and the client pays no fee." [citations].

Todd v. State, 113 Nev. 18; 931 P.2d 721 (1997).

In the *Todd* case, while Todd was in jail he had disclosed certain important facts to attorney Sam Bull in regards to representing him. Mr. Bull inexplicably sent his handwritten notes regarding those conversations to the sentencing judge in advance of Mr. Todd's sentencing, leading to a remand for new sentencing in front of a new judge, finding the Bull had "impliedly agreed to consider the case and render the advice sought."

In this case, it is clear even from the preliminary comments that Fratto is consulting the lawyers with regards to matters within their area of competence, and is seeking their advice. "Will I need a lawyer? Can you represent me? Should I get my own lawyer?" These are attorney-client communications.

The *People v. Bennet* case, 810 P.2d 661, (Colo. 1991), cited in *Todd*, above, found that the attorney-client relationship is "established when it is shown that the client seeks and received the advice of the lawyer on the legal consequences of the client's past or contemplated actions." The court held that the relationship may be inferred from the conduct of the parties and that the proper test is a subjective one and an important factor is whether the client believes that the relationship existed. *Stewart v. State*, also cited therein, held that the attorney/client relationship can be established when the attorney is sought for assistance in matters pertinent to his profession. Holding in that matter that " it is apparent that the Appellant consulted Mr. Matson for legal

advice concerning the charges against him." In that habeas case, the State had eavesdropped on attorney client communications in the jail, and obtained the names of possible trial witnesses. Habeas was granted, due to the breach of confidentiality, even though Matson was never formally hired.

California has held that there is a "fiduciary relationship" existing between a lawyer and a client which extends to preliminary consultation "by a prospective client with a view to retention of the lawyer, although actual employment does not result." *Martin v. United States District Court*, 410 F. 3d 1104, (9th Cir. 2005). The Ninth Circuit went on as follows:

> There is nothing anomalous about applying the privilege to such preliminary consultations. Without it, people could not safely bring their problems to lawyers unless the lawyers had already been retained.

The Ninth Circuit interestingly went on as follows:

> The privilege does not apply where the lawyer has specifically stated that he would not represent the individual and in no way wanted to be involved in the dispute, but the law firm did not do that in this case - it just made it clear that it did not represent the submitter yet. Under *People v. Speedee Oil Change Systems, Inc.*, when the communication between a lawyer and possible client proceeds "beyond initial or peripheral contacts" to acquisition by the lawyer of information that would be confidential were there to be representation, the privilege applies.

410 F. 3d 1104, at 111-112.

In the instant case, blindingly absent from the tape recording is any clear statement from Ohlson or Kump, where they say "No, we will not be able to represent you." Instead, there's a pattern of equivocation and dancing around the truth, clearly made in an effort to get Ms. Fratto to make a statement to them.

TONI FRATTO IS A " PROSPECTIVE" CLIENT

The State has cited many of the important rules but it has missed the obvious, which is

Nevada Rule of Professional Conduct 1.18, Duties to Prospective Client. That rule reads as follows:

> A) A person who discussed with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> B) Even when no client-lawyer relationship ensues, a lawyer who had discussions with a prospective client shall not use or reveal information learned in the consultation . . .
>
> C) A lawyer subject to paragraph B 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, except as provided in paragraph D. [Informed Consent preferably in writing].

The ABA comments to the Model Rules of Professional Conduct, 2004, particularly the comments to 1.18 (adopted by Nevada, above) notes that it is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a lawyer/client relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the lawyer is willing to undertake.

Subsection (B) of the Model Rule prohibits the lawyer from revealing that information, except as provided by Rule 1.9, even if the lawyer and the client decide not to proceed with the representation. The duty exists regardless of how brief the initial conference may be. Comment 4 is pertinent herein: "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose." Where the

information indicates that a conflict of interest or another reason for non-representation exists, the lawyer should so inform the prospective client or decline representation.

In the instant case, the legitimate question to Ms. Fratto might well have been "Why did you come here?" "What do you intend to talk about?", or even, "Are you going to tell us that you were there?", which would not deliver any further information but it would make it clear that there was an absolute conflict, and that the elicited information would also implicate her.

This rule of a duty of confidentiality to a prospective client even applies to agents of lawyers. See, for example, Opinion 346 of the DC Bar, attached as an exhibit, where the would-be client comes to Lawyer A to speak about the case. Lawyer A asks for permission to call Lawyer B to discuss it, whereupon Lawyer B learns that they have a conflict. Lawyer B is held to have a duty of confidentiality, because the first lawyer was the agent of the client.

DC Bar Opinion 346, Feb 2009.

Similarly, the New Jersey Commission on Professional Ethics has held that there is an obligation to maintain confidentiality to a prospective client, which would even prohibit a firm from advising an existing corporate client that one of the corporation's employees had contacted the law firm seeking representation in a law suit against the corporation. The duty of confidentiality to a prospective client exists *even where there is already an existing representation of the adverse party.* The implications to this case are clear: the attorneys cannot use the information on behalf of Mr. Patten in any way. They certainly cannot disclose it.

Lastly, the Restatement (3rd) of the law governing lawyers from the American Law Institute (2000) at Section 14 provides as follows:

Formation of a Lawyer/Client Relationship: A relationship of client and lawyer\ arises when:

1) a person manifests to a lawyer the persons intent that the lawyer provide legal service for the person; and either

A) the lawyer manifests to the persons consent to do so; or,

B) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide these services;

They also note therein as follows:

> The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer. . . . A client/lawyer relationship can arise even if the client's consent to enter into the relationship is not fully formed. Discussion, item C.

The analysis in this matter is fairly straight forward. Attorney-client privilege protects attorney and client communications even though the attorney does not explicitly agree to enter into the relationship, if the client has a reasonable belief that the attorney is acting directly or indirectly as the attorney, and on that basis, discloses confidential information to that attorney. *U. S. v. Dennis*, 843 F. 2d 652, (2nd Cir 1988). The *Dennis* court notes that if an attorney declines representation, the potential client could not reasonably thereafter expect confidentiality. In a conflict of interest, an attorney's representation of two clients will not deprive either client of the privilege. *Eureka Investment Corp. NV v. Chicago Title Insurance*, 743 F. 2d, 732, DC Cir. (1984). The privilege protects the clients confidential information to an attorney, whether made by written or oral statement, if it is made for the purpose of obtaining legal advice or services. *U. S. v. DeFonte*, 441 F. 3d 92 (2nd Cir 2006).

Here, the attorney, with over 30 years of criminal law experience, could have easily and explicitly told Ms. Fratto "No. I represent Kody Patten and I cannot represent you." Had he said this on the record in the agreement, it would be clear. But he did not do so. Instead they meet privately, without Kip Patten, or Ms. Fratto's parents, and obtain sensitive and confidential information which implicates Ms. Fratto. There is not, on the record, even an inquiry as to the nature of the information, or whether it would be exculpatory of Mr. Patten, as opposed to inculpatory of her. Instead, it is apparent that every attempt is made by the attorneys to avoid the direct answer to her questions about representation, and to obtain the information. Ms. Fratto's belief in the confidentiality of her statements was abused by both attorneys. She is a prospective client pursuant to the Nevada Rules, her confidences are entitled to be protected, and the attorney/client privilege must attach. Accordingly, the State's Motion in Limine must be denied.

DATED this 15 day of June, 2011.

JOHN P. SPRINGGATE, ESQ.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of THE LAW OFFICES OF JOHN SPRINGGATE, and that on this date I personally served at Reno, Nevada, a true copy of the within **OPPOSITION TO THE STATE OF NEVADA'S MOTION IN LIMINE CONCERNING THE ADMISSIBILITY OF TONI FRATTO'S STATEMENT TO LAWYERS** telefaxed to:

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_____ for mailing by first class mail, postage prepaid

_____ by personal delivery

__X__ by telefax

_____ by placing a true copy thereof for collection and delivery by Reno/Carson Messenger Service on this date.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 15th day of June, 2011.

Christine L Lott

EXHIBIT LIST

1. ABA Model Rules of Prof. Conduct, 2004,
Comment to Rule 1.18

2. DC Bar Assn,
Ethics Opinion 346 (Feb 2009)

3. Advisory Comm. on Prof. Ethics
NJ, Opinion 695, 3/29/2004,
175 N.J.L.J. 1393

4. Restatement of the Law, 3d, (2000)
The American Law Institute

EXHIBIT 1

EXHIBIT 1

ABA Model Rules of Professional Conduct (2004)

Comment - Rule 1.18

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

[2] Not all persons who communicate information to a lawyer are entitled

to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

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

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior

independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

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

EXHIBIT 2

EXHIBIT 2

Opinion 346

The Required Elements for Triggering a Duty of Confidentiality to a Prospective Client

When a lawyer with whom a prospective client has consulted receives permission from the prospective client to speak with other counsel who the lawyer believes may be better suited to handle the case, any client information conveyed by the first lawyer during such a discussion with the second lawyer should be treated by the second lawyer as confidential even though he never speaks directly with the prospective client.

Applicable Rules:

- Rule 1.6 (Confidentiality of Information)
- Rule 1.18 (Duties to Prospective Client)

Inquiry

A would-be client comes to Lawyer A to speak with her about taking on his case. After listening to the prospective client's story, Lawyer A determines that she is not in a position to be of assistance. However, Lawyer A believes that a different lawyer would be better suited to meet the prospective client's needs. Lawyer A asks the prospective client whether he would like her to call Lawyer B on his behalf to discuss the possibility of Lawyer B taking on the representation, and the prospective client says "yes." Lawyer A calls Lawyer B, who works at a different firm, and explains the person's predicament. After hearing the story from Lawyer A, Lawyer B determines that he has a conflict of interest and cannot represent the person. The question is whether Lawyer B has a duty to safeguard the information that Lawyer A communicated to him.

D.C. Rule 1.18, which became effective in February 2007, defines a lawyer's obligations to a person with whom a lawyer discusses the possibility of representation, but who does not become the lawyer's client. The rule recognizes a new category of persons, "prospective clients," and states that "[e]ven 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 permitted by Rule 1.6." (Emphasis added). The uncertainty in this inquiry arises because Lawyer B never had direct "discussions with a prospective client." His only discussions were with Lawyer A.

Discussion

We analyze this inquiry under two alternate theories: (1) That the duty of confidentiality to would-be clients exists in Rule 1.6 and therefore is not dependent on the definition of a "prospective client" in Rule 1.18; and (2) the requirement of *a discussion* in Rule 1.18 is met because Lawyer A is an agent of the prospective client. We believe that under both theories, Lawyer B owes a duty of confidentiality.[1]

1. Confidentiality to Would-Be Clients Under Rule 1.6

ABA Model Rule 1.18 was adopted in 2002 as part of the ABA Ethics 2000 project. D.C. Rule 1.18(a), which is identical to

Model Rule 1.18(a), provides: "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." The confidentiality component of the rule (as distinct from its provision relating to conflicts of interest) was intended to codify the existing obligation of a lawyer under Model Rule 1.6 to a person with whom the lawyer had a preliminary consultation of some sort, but who never entered into an attorney-client relationship.[2] Indeed, ABA Ethics Opinion No. 90-358, written 12 years before the adoption of Rule 1.18, states:

> Information imparted from a would-be client seeking legal representation is protected from revelation or use under Model Rule 1.6 even though the lawyer does not undertake representation of or perform work for the would-be client.

Similarly, Comment [9] to D.C. Rule 1.6 recognizes this obligation under D.C. Rule 1.6. The Comment states:

> Principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Although most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so, *the duty of confidentiality imposed by this rule attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established.* Other duties of a lawyer to a prospective client are set forth in Rule 1.18. (Emphasis added.)

See also Restatement (Third) of the Law Governing Lawyers §15.

Because the duty of confidentiality owed to persons who do not become clients exists in Rule 1.6 and in Rule 1.18, we need not rely solely on the language of Rule 1.18, which requires a discussion between a person and a lawyer. Comment [9] to D.C. Rule 1.6 clarifies that the duty of confidentiality is triggered "when [a] lawyer agrees to consider whether a client-lawyer relationship shall be established."[3]

The Committee concludes therefore, that a duty of confidentiality is owed by the second lawyer under Rule 1.6, notwithstanding the language of Rule 1.18, because the second lawyer presumably agreed to consider the possibility of a client-lawyer relationship when he spoke with the first lawyer.

2. Communications From Agents of Clients

Alternatively, we assume for purposes of further analysis that the requirement of a discussion with the would-be client, as stated in Rule 1.18(a), must be met in order for the duty of confidentiality to attach. Under that assumption, the requirement would be met if the first lawyer was considered to be the agent of the would-be client in speaking with the second lawyer.

In assessing the confidentiality of communications with clients in connection with the attorney-client privilege, courts have often recognized that clients sometimes speak to their lawyer through agents.[4] This can include interpreters, family members and business agents, provided that under the circumstances, the agent is someone who the client trusts to maintain the confidentiality of the communications. This concept is recognized in the Restatement (Third) of The

Law Governing Lawyers §70(f). Under that section, the Restatement addresses the circumstances under which a person can speak to a lawyer as a client's agent and have the communication fall within the attorney-client privilege. That section states:

> **A client's agent for communication.** A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence. Factors that may be relevant in determining whether a third person is an agent for communication include the customary relationship between the client and the asserted agent, the nature of the communication, and the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice.

The Restatement provides three illustrations: (1) A client is arrested and barred from speaking to his counsel and so asks his friend to convey a message to his lawyer; (2) a client does not speak English and uses an interpreter to speak to the lawyer; and (3) a client uses his personal secretary to provide information to his lawyer.

In *In Re Lindsay*, 158 F.3d 1263, *cert. denied*, 525 U.S. 996 (1998), the D.C. Circuit addressed whether Deputy White House Counsel Bruce Lindsay acted as President Clinton's agent in speaking with the President's private counsel regarding the president's personal legal issues. The court did not decide whether the use of an agent as intermediary need be "reasonably necessary" in order to retain the privilege because it found that by adding his own legal analysis Mr. Lindsay could not be deemed a mere intermediary. In rejecting the privilege under these circumstances, the court reasoned that "the attorney-client privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *Id.* at 1281 (quoting *In Re Sealed Case*, 676 F.2d 793, 807 n.44 (D.C. Cir. 1982)) (quoting *In Re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979)).

We believe that the intermediary principle applies to a lawyer's ethical obligation of confidentiality under Rule 1.6 and Rule 1.18 as well, but without the same need to so strictly limit its applicability. The reason for the distinction is that in the context of attorney-client privilege, as with any evidentiary privilege, there is the important countervailing demand from a party in a legal proceeding for evidence which may be relevant. Unless applying an exception under Rule 1.6 (c), (d) or (e), a lawyer's duty of confidentiality, on the other hand, should be broadly interpreted in order to ensure that client expectations are met. *See* Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* §9.7 (3d ed.) stating:

> Because the ethical obligation of confidentiality is broader [than the attorney-client privilege], lawyers ordinarily should operate on the presumption that essentially no unfavorable client information may be disclosed without the client's consent.

Because the first lawyer was an agent of the prospective client, the second lawyer must treat the discussion with the first lawyer as confidential under Rule 1.18.

Conclusion

When a prospective client consents to having a lawyer speak to a second lawyer on his behalf regarding the possibility of establishing an attorney-client relationship, the second lawyer has an obligation under Rules 1.6 and 1.18 to treat the communication as confidential, even if the second lawyer never speaks directly with the prospective client.

Given the importance of maintaining confidentiality of any information received by the first lawyer, it is advisable that the first lawyer disclose at the outset of the conversation with the second lawyer that the purpose of the discussion is to consider taking on a new case for someone, and to limit initial disclosures to the essential facts until it can be determined whether the second lawyer has a conflict of interest.

Published: February 2009

1. [Return to text] Under either theory, the substance of the duty of confidentiality is governed by Rule 1.6.
2. [Return to text] What is substantively new in Model Rule 1.18 is that a lawyer's duties to prospective clients with respect to conflicts of interest are defined. Before the new rule, courts were left to determine whether one or more consultations created an attorney-client relationship or no relationship at all. *See Derrickson v. Derrickson*, 541 A.2d 149 (D.C. 1988), in which the court, in ruling on a motion to disqualify a party's counsel, had to determine whether a single consultation of about one hour, taking place eight years earlier and which the lawyer contended he had no recollection of, created a lawyer-client relationship. The court found no attorney-client relationship and therefore no conflict of interest.
3. [Return to text] Whether that formulation also triggers the conflict of interest features of Rule 1.18(c) is a separate question not addressed in this Opinion.
4. [Return to text] The more common situation of non-lawyers who are assisting the lawyer serving as the *lawyer's* agent in receiving confidential communications from a client is also a related but separate issue, not addressed in this Opinion.

EXHIBIT 3

EXHIBIT 3

Duty to keep information received from prospective client confidential; prospective clients and conflicts

175 N.J.L.J. 1393

March 29, 2004

13 N.J. L. 762

April 5, 2004

Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

Opinion 695

Duty to keep information received from

prospective client confidential; prospective

clients and conflicts.

A New Jersey law firm inquires whether it has an obligation to advise an existing corporate client that one of the corporation's employees contacted the law firm seeking representation in a lawsuit against the corporation. A related question is whether the firm may continue to represent its corporate client after receiving unsolicited information from a potential adverse party who contacted the firm as a prospective client.

First, we conclude that new R.P.C. 1.18, effective January 1, 2004, applies, prohibiting use or revelation of information from a prospective client. Moreover, we find that even prior to new R.P.C. 1:18, a duty of confidentiality equivalent to that set forth in the new rule is applicable. Under R.P.C. 1.6(a) the firm has a duty of confidentiality to the individual who sought its assistance, precluding disclosure of the identity of the inquiring individual, the fact of the individual's contact, and any information received in connection with the contact. R.P.C. 1.6(a) sets forth a broad duty of confidentiality, more extensive than the testimonial attorney-client privilege, extending to any "information relating to representation of a client," and then sets out a series of exceptions, none applicable to the current inquiry. For discussion of the breadth of the duty under R.P.C. 1.6(a), see generally In re Opinion 544, 103 N.J. 399 (1986). We recognize that by its express terms the 1.6(a) duty of confidentiality extends only to a "client". Nonetheless, we deem it essential to provide the communication of information from a prospective client with the same cloak of protection furnished to actual clients.

As explained below, the first part of the inquiry touches upon important issues concerning access to legal services, and we approach the question in that light. A typical potential client seeking legal assistance has a reasonable expectation that any information provided to a lawyer in order for the lawyer and the client to decide whether representation is to be provided will be kept in confidence, and will not be used

In any way against the potential client if representation is not provided. While this precise point has not been explicitly addressed in prior New Jersey ethics opinions, it is well settled nationally that a potential client's reasonable expectations of confidentiality are the determining factor in finding the attachment of the duty.

Brief reflection reveals the importance of preserving confidentiality in this context. The same considerations that underlie the attorney-client privilege and confidentiality in more traditional cases of extended representation – the need for a client to be able to communicate freely with an attorney without fear of later disclosure, retribution or other adverse effect from the communication itself - exist with equal force in the case of a potential client initially seeking or applying for services. If the subject matter of that applicant's communication may be freely disclosed to a third party, simply because no extended or ongoing attorney-client relationship ensued, the chilling effect on such prospective client communications would be substantial, crippling, and an unacceptable hindrance to the public's ability to gain access to attorneys.

These considerations are especially compelling in the context of services, especially limited assistance, provided by non-profit organizations to people of moderate means. Studies nationally and in New Jersey have documented the difficulties such individuals have in obtaining lawyers. See Legal Needs and Civil Justice: A Survey of Americans, American Bar Association (1994); Legal Problems, Legal Needs, Legal Services of New Jersey Poverty Research Institute (2002). Concerns about closing this legal assistance gap have led the American Bar Association and many states, including New Jersey, to encourage development over the past decade of many forms of limited legal assistance, such as hotlines, "unbundled" legal services and pro se assistance, often accompanied by special rules of court and professional ethics. See generally Handbook on Limited Scope Legal Assistance, American Bar Association Section of Litigation (2003). Protection of the confidentiality of information received from prospective clients, and clients who receive only limited assistance (i.e., one-time advice or very brief service), is a central tenet of such limited assistance initiatives.

This duty of confidentiality, however, does not preclude the inquiring firm from continuing to represent its ongoing corporate client. Now R.P.C. 1:18(b) continues a prohibition against representation of a client adverse to a former prospective client, not the case in the present inquiry, where the firm represented a client prior to the contact by a new prospective client. We conclude that, assuming that all information received from the prospective client is kept confidential and completely shielded from any firm personnel engaged in the representation of the corporate client, such corporate representation may continue. Consistent with this conclusion, no firm personnel engaged in the communication with the prospective client may be involved in any corporate representation which relates in any way to that prospective client; such personnel must be completely screened. Since the prospective client never became an actual client of the firm, the conflict principles set forth in R.P.C. 1.7 are not otherwise implicated. We note, however, that for the various limited legal assistance vehicles described above, an attorney-client relationship is formed once such limited legal assistance is provided, and R.P.C. 1.7 would then apply.

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EXHIBIT 4

EXHIBIT 4

Case Citations

Chapter 2 - The Client-Lawyer Relationship

Topic 1 - Creating a Client-Lawyer Relationship

Restat 3d of the Law Governing Lawyers, § 14

§ 14 Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section sets forth a standard for determining when a client-lawyer relationship begins. Nonetheless, the various duties of lawyers and clients do not always arise simultaneously. Even if no relationship ensues, a lawyer may owe a prospective client certain duties (see § 15; § 60 & Comment *d* thereto). A lawyer representing a client may perform services also benefiting another person, for example arguing a motion for two litigants, without owing the nonclient litigant all the duties ordinarily owed to a client (see § 19(1)). Even if a relationship ensues, the client may not owe the lawyer a fee (see § 17 & Comment *b* thereto; § 38 & Comment *e* thereto; *Restatement Second, Agency § 16*). When a fee is due, the person owing it is not necessarily a client (see § 134). Moreover, a client-lawyer relationship may be more readily found in some situations (for example, when a person has a reasonable belief that a lawyer was protecting that person's interests; see Comment *d* hereto) than in others (for example, when a person seeks to compel a lawyer to provide onerous services). In some situations--for example, when a lawyer agrees to represent a defendant without knowing that the lawyer's partner represents the plaintiff--a lawyer is forbidden to perform some duties for the client (continuing the representation) while nevertheless remaining subject to other duties (keeping the client's confidential information secret from others, including from the lawyer's own partner).

When a client-lawyer relationship arises, its scope is subject to the principles set forth in § 19(1), and its termination is governed by §§ 31 and 32. Agency and contract law are also applicable, except when inconsistent with special rules applicable to lawyers. The scope of responsibilities may change during the representation.

b. Rationale. The client-lawyer relationship ordinarily is a consensual one (see *Restatement Second, Agency § 15*). A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services. The consent requirement, however, is not symmetrical. The client may at any time end the relationship by withdrawing consent (see §§ 31, 32, & 40), while the lawyer may properly withdraw only under specified conditions (see §§ 31 & 32). A lawyer may be held to responsibility of representation when the client reasonably relies on the existence of the relationship (see Comment *e*), and a court may direct the lawyer to represent the client by appointment

(see Comment *g*). Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant. Agreement between client and lawyer likewise defines the scope of the representation, for example, determining whether it encompasses a single matter or is continuing (see § 19(1); § 31(2)(c) & Comment *h*). Even when a representation is continuing, the lawyer is ordinarily free to reject new matters.

c. The client's intent. A client's manifestation of intent that a lawyer provide legal services to the client may be explicit, as when the client requests the lawyer to write a will. The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer. The client may hire the lawyer to work in its legal department. The client may demonstrate intent by ratifying the lawyer's acts, for example when a friend asks a lawyer to represent an imprisoned person who later manifests acceptance of the lawyer's services. The client's intent may be communicated by someone acting for the client, such as a relative or secretary. (The power of such a representative to act on behalf of the client is determined by the law of agency.) No written contract is required in order to establish the relationship, although a writing may be required by disciplinary or procedural standards (see § 38, Comment *b*). The client need not necessarily pay or agree to pay the lawyer; and paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else, for example, when an insurance company designates a lawyer to represent an insured (see § 134).

The client-lawyer relationship contemplates legal services from the lawyer, not, for example, real-estate-brokerage services or expert-witness services. A client-lawyer relationship results when legal services are provided even if the client also intends to receive other services. A client-lawyer relationship is not created, however, by the fact of receiving some benefit of the lawyer's service, for example when the lawyer represents a co-party. Finally, a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising.

A client-lawyer relationship can arise even if the client's consent to enter into the relationship is not fully informed. The lawyer should, however, consult with the client about such matters as the benefits and disadvantages of the proposed representation and conflicts of interest. On consultation in general, see § 20. A lawyer who fails to disclose such matters may be subject to fee forfeiture, professional discipline, malpractice liability, and other sanctions (see §§ 15, 20, 37, 48, 121, & 122).

d. Clients with diminished capacity. Individuals who are legally incompetent, for example some minors or persons with diminished mental capacity, often require representation to which they are personally incapable of giving consent (see *Restatement Second, Agency § 20*). A guardian for such an individual may retain counsel for the incapacitated person, subject in some instances to court approval. A court also may appoint counsel to represent an incompetent party without the party's consent. A person of diminished capacity nevertheless may be able to consent to representation, and to become liable to pay counsel, under the doctrine of "necessaries" (see § 31, Comment *e*; § 39; *Restatement Second, Contracts § 12*, Comment *f*). Representing a client of diminished capacity is considered in § 24 (see also § 31, Comment *e* (client's incompetence does not automatically end lawyer's authority)).

e. The lawyer's consent or failure to object. Like a client, a lawyer may manifest consent to creating a client-lawyer relationship in many ways. The lawyer may explicitly agree to represent the client or may indicate consent by action, for example by performing services requested by the client. An agent for the lawyer may communicate consent, for example, a secretary or paralegal with express, implied, or apparent authority to act for the lawyer in undertaking a representation.

A lawyer's consent may be conditioned on the successful completion of a conflict-of-interest check or on the negotiation of a fee arrangement. The lawyer's consent may sometimes precede the client's manifestation of intent, for example when an insurer designates a lawyer to represent an insured (see § 134, Comment *f*) who then accepts the representation. Although this Section treats separately the required communications of the client and the lawyer, the acts of each often illuminate those of the other.

Illustrations:

1. Client telephones Lawyer, who has previously represented Client, stating that Client wishes Lawyer to handle a pending antitrust investigation and asking Lawyer to come to Client's headquarters to explore the appropriate strategy for Client to follow. Lawyer comes to the headquarters and spends a day discussing strategy, without stating then or promptly thereafter that Lawyer has not yet decided whether to represent Client. Lawyer has communicated willingness to represent Client by so doing. Had Client

simply asked Lawyer to discuss the possibility of representing Client, no client-lawyer relationship would result.

2. As part of a bar-association peer-support program, lawyer A consults lawyer B in confidence about an issue relating to lawyer A's representation of a client. This does not create a client-lawyer relationship between A's client and B. Whether a client-lawyer relationship exists between A and B depends on the foregoing and additional circumstances, including the nature of the program, the subject matter of the consultation, and the nature of prior dealings, if any, between them.

Even when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so (see § 14(1)(b); see also § 51(2)). In many such instances, the lawyer's conduct constitutes implied assent. In others, the lawyer's duty arises from the principle of promissory estoppel, under which promises inducing reasonable reliance may be enforced to avoid injustice (see *Restatement Second, Contracts § 90*). In appraising whether the person's reliance was reasonable, courts consider that lawyers ordinarily have superior knowledge of what representation entails and that lawyers often encourage clients and potential clients to rely on them. The rules governing when a lawyer may withdraw from a representation (see § 32) apply to representations arising from implied assent or promissory estoppel.

Illustrations:

3. Claimant writes to Lawyer, describing a medical-malpractice suit that Claimant wishes to bring and asking Lawyer to represent Claimant. Lawyer does not answer the letter. A year later, the statute of limitations applicable to the suit expires. Claimant then sues Lawyer for legal malpractice for not having filed the suit on time. Under this Section no client-lawyer relationship was created (see § 50, Comment c). Lawyer did not communicate willingness to represent Claimant, and Claimant could not reasonably have relied on Lawyer to do so. On a lawyer's duty to a prospective client, see § 15.

4. Defendant telephones Lawyer's office and tells Lawyer's Secretary that Defendant would like Lawyer to represent Defendant in an automobile-violation proceeding set for hearing in 10 days, this being a type of proceeding that Defendant knows Lawyer regularly handles. Secretary tells Defendant to send in the papers concerning the proceeding, not telling Defendant that Lawyer would then decide whether to take the case, and Defendant delivers the papers the next day. Lawyer does not communicate with Defendant until the day before the hearing, when Lawyer tells Defendant that Lawyer does not wish to take the case. A trier of fact could find that a client-lawyer relationship came into existence when Lawyer failed to communicate that Lawyer was not representing Defendant. Defendant relied on Lawyer by not seeking other counsel when that was still practicable. Defendant's reliance was reasonable because Lawyer regularly handled Defendant's type of case, because Lawyer's agent had responded to Defendant's request for help by asking Defendant to transfer papers needed for the proceeding, and because the imminence of the hearing made it appropriate for Lawyer to inform Defendant and return the papers promptly if Lawyer decided not to take the case.

The principles of promissory estoppel do not bind prospective clients as readily as lawyers. Clients who are not sophisticated about how client-lawyer relationships arise should not be forced to accept unwanted representation or to pay lawyers for unwanted services. Nevertheless, promissory estoppel may bind a person who has not requested a lawyer's services. That may occur, for example, when a person has regularly retained a lawyer to prepare and file certain reports, knows that the lawyer is preparing and filing the next report, and accepts the benefit of the lawyer's services without warning the lawyer that they are unwanted. Also, a person's knowing acceptance of the benefits of a lawyer's representation, when the person could have chosen not to accept them, may constitute consent by ratification. If an employer, for example, notifies an employee that it has arranged for a lawyer to represent the employee in a prosecution arising out of the employment, and the employee confers with the lawyer and takes no action when the lawyer purports to speak for the employee in court, the employee has ratified the relationship. The client may end the relationship by discharging the lawyer (see §§ 32 & 40).

f. Organizational, fiduciary, and class-action clients. When the client is a corporation or other organization, the organization's structure and organic law determine whether a particular agent has authority to retain and direct the lawyer. Whether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons and entities is a question of fact to be determined based on reasonable expectations in the circumstances (see Subsection (1)). Where appropriate, due consideration should be given to the unreasonableness of a claimed expectation