



# ISBA Professional Conduct Advisory Opinion

---

**Opinion No. 12-18**  
**July 2012**

**Subject:** Prospective Clients; Conflicts of Interest

**Digest:** An attorney may not encourage a client to engage in the practice known as “taint shopping,” whereby a prospective client meets with an attorney for the sole purpose of disqualifying the attorney from representing an opponent. An attorney who participates in an initial consultation with a prospective client, but who is not retained by the prospective client, is not prohibited from later representing a client with materially adverse interests in the same or in a substantially related matter if: (a) before the consultation, the attorney obtained the prospective client’s informed consent of any conflict that might arise from the information disclosed by the prospective client; (b) even in the absence of an informed consent, the attorney did not receive information that could be significantly harmful if used in the matter; or (c) the attorney can establish that the prospective client revealed information to the attorney with no intention of retaining the attorney.

**References:** Illinois Rules of Professional Conduct 1.0(e), 1.2(d), 1.6, 1.7, 1.9, 1.18, 4.4(a), 8.4

Illinois Rules of Professional Conduct 1.18, Comments 2-6

Illinois Rules of Professional Conduct 4.4, Comment 1

Restatement (Third) of the Law Governing Lawyers, sec. 15

ABA Formal Op. 90-358 (1990)

ISBA Op. 12-05 (2012)

ISBA Op. 95-4 (1995)

Montana Bar Ethics Op. 010830 (2000)

Virginia Legal Ethics Opinion 1794 (2004)

### **FACTS**

A family law attorney advises a divorce client to meet with other attorneys in the community for the sole purpose of creating a conflict of interest so that the client's spouse could not retain the other attorneys in the divorce matter. The client then proceeds to meet with the other attorneys with no intent of retaining their services.

### **QUESTION**

1. May an attorney advise a client to meet with other attorneys in the community solely for the purpose of disqualifying the other attorneys from future representation of an opponent?
2. If an attorney meets with a prospective client, may the attorney later represent a client with materially adverse interests in the same or in a substantially related matter?

### **OPINION**

- A. An attorney may not advise or direct a client to meet with other attorneys in the community solely for the purpose of disqualifying the other attorneys from future representation of an opponent.

Taint shopping refers to the actions of someone engaging in the strategic elimination of potential attorneys for an opposing party by consulting with those attorneys for the sole purpose of disqualifying them from future adverse representation.

Rule 8.4(c) of the Illinois Rules of Professional Conduct provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(d) prohibits an attorney from engaging in conduct prejudicial to the administration of justice. Rule 8.4(a) provides that it is improper for an attorney to violate the rules through the actions of another. Rule 1.2(d) prohibits an attorney from counseling a client to engage in conduct that the lawyer knows is fraudulent. Taint shopping requires the use of deceit in order to be effective and accordingly, an attorney may not advise a client to engage in such conduct.

Directing a client to engage in taint shopping also violates Rule 4.4(a) which provides, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person." As set forth in Comment [1] to Rule 4.4, "Responsibility to a client requires a lawyer to subordinate the

interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.” Taint shopping interferes with the ability of another to retain the counsel of his or her choice and is thus just such an unwarranted intrusion into a prospective attorney-client relationship. Taint shopping burdens the unsuspecting lawyer to unnecessarily prepare for the initial consultation and participate in the meeting and assists in defeating the legal rights of other individuals to hire the counsel of their choice. *See, e.g.,* Virginia Ethics Opinion 1794 (2004).

- B. An attorney who participates in an initial consultation with a prospective client, but who is not retained by the prospective client, is not prohibited from later representing a client with materially adverse interests in the same or in a substantially related matter if (a) the attorney obtained informed consent from the prospective client including consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter; (b) even in the absence of informed consent, the attorney received no information that could be significantly harmful if used in the matter, or (c) the attorney can establish that the prospective client revealed information to the attorney with no intention of retaining the attorney.

Generally, lawyers have a duty, in their representation of clients, to maintain the confidentiality of information relating to the representation pursuant to Rule 1.6 of the Illinois Rules of Professional Responsibility and to avoid impermissible conflicts of interest pursuant to Rules 1.7 through 1.9 of the Rules. However, lawyers’ duties to prospective clients are not as extensive as the duties to clients. As the Restatement Third of the Law Governing Lawyers, sec. 15 cmt. B notes, in explaining why the prospective client should not receive 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.”

Rule 1.18 addresses a lawyer’s obligations to prospective clients. The Rule provides as follows:

- (a) A person who discusses 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 has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (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). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, or

(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 that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Pursuant to the Rule, information given to a lawyer by a prospective client seeking legal representation is protected. Moreover, if the initial consultation with the lawyer is bona fide and the lawyer receives information from the potential client that could be significantly harmful, then the prohibitions against conflicts of interest could potentially preclude future representation of an adverse party. *See also* ISBA Op. 12-05 (2012) and 95-04 (1995).

If, on the other hand, the person consulting with the lawyer was not genuinely seeking legal representation, then the Rule would not apply. Under the Rule, a prospective client is defined as “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship.” As noted in Comment [2], “Not all persons who communicate information to a lawyer are entitled to protection under this Rule.” If the individual has no real expectation of retaining the attorney, then the individual would not qualify as a true prospective client and the reasonable expectation of confidentiality would be absent. *See, e.g.*, Montana Bar Ethics Op. 010830 (2000). Thus, if the lawyer can establish that the prospective client revealed information to him or her with the sole intention of disqualifying the lawyer from future representation, then the prohibitions of Rule 1.18 would not apply. Unfortunately, proving such circumstances may be difficult.

Given the problems of proving the prospective client’s deceit, an attorney should consider limiting initial interviews with prospective clients so as to only obtain the information necessary to determine whether or not to undertake the new matter. *See*, Rule 1.18, Comment [4]. If the lawyer obtains no information in the initial consultation that could be significantly harmful if used in the subsequent matter, then the lawyer would not be precluded from future adverse representation. Rule 1.18, Comment [6]. Limiting information received at an initial consultation also has the added benefit of

minimizing the imputation of any conflict to other members of the disqualified lawyers firm.

The lawyer may also wish to consider obtaining the informed consent of the prospective client. As set forth in Comment [5] to Rule 1.18:

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.

Rule 1.0(e) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." To be effective, the informed consent should identify the risks of disclosure of information to the lawyer in the initial consultation. *See, e.g.*, ABA Formal Op. 90-358 for more information regarding advance waivers of conflicts of interest.

### **CONCLUSION**

A lawyer may not advise or direct a client to engage in the practice commonly known as taint shopping whereby a client consults with other lawyers in the community for the sole purpose of disqualifying the other lawyers from future representation of an opponent. A lawyer who meets with the prospective client is not prohibited from future adverse representation if the lawyer can prove that the prospective client had no intention of actually hiring the lawyer, if the lawyer received no information that could be significantly harmful to the prospective client pursuant to Rule 1.18, or if the lawyer can demonstrate that the lawyer first obtained the informed consent of the prospective client pursuant to Rule 1.18 of the Illinois Rules of Professional Conduct.

---

**Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.**

© Copyright 2012 Illinois State Bar Association