ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I arrived at my office early one morning last week and found an unsolicited email on my server from Dr. Adam Zappel. In the email, Dr. Zappel wrote that a friend gave him my email address, and that he needs my help. Dr. Zappel had sought my representation in a prospective medical malpractice case, and included information inculpating himself in the misdiagnosis of a 14-year-old, Tim Trouble, who as it turned out had been regularly indulging in his parents' liquor cabinet. What he thought was a simple case of alcohol poisoning, turned out to be an untreated burst appendix, which if not removed, could have resulted in Tim's death. Dr. Zappel wrote in his email to me that he had a drug problem at the time and had been regularly taking painkillers when he made the error. Worse, Nurse Hailey Honest witnessed the event and has said she will testify against him if the suit arises. This occurred where Zappel is in current residence, St. James Infirmary.

Currently, I represent Our Savior Hospital, where Dr. Zappel previously worked. Our Savior's administrator suspects Dr. Zappel may be planning a qui tam case alleging that Our Savior is engaged in up-coding cases of the common swine-flu to a more deadly flesh-eating disease.

I believe that it would be in Our Savior's interest to know that Dr. Zappel may be embroiled in litigation and had a substance abuse problem. I am also worried that the unsolicited information in the email may conflict me out of defending the qui tam case.

I checked the Rules of Professional Conduct under Rule 1.18 which states that I cannot represent a client with interests materially adverse to those of a prospective client in a substantially related matter if I received information from the prospective client that could be "significantly harmful" to the prospective client. But, I also read that a person who gives adverse information without "any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship . . . is not a prospective client."

I believe that the information I learned about Dr. Zappel could be harmful to him, and that the cases are substantially related since they both concern alleged misdiagnoses. My question to the Forum: Is Dr. Zappel a prospective client?

Sincerely,

Vera Decent

Dear Vera Decent:

The question whether a person is a "prospective client" is governed by Rule 1.18(e) of the Rules of Professional Conduct (RPC). Put in simple terms, not every person who contacts a lawyer regarding a potential engagement is a prospective client. The following persons are *not* prospective clients:

A person who:

> (1) 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; or
>
> (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of paragraph (a) [of Rule 1.18].

It seems pretty clear that unless you entered into an email exchange with Dr. Zappel, his email to you was an unsolicited unilateral communication. Nevertheless, Dr. Zappel could be deemed a prospective client if he had a reasonable expectation that you would discuss the possibility of being retained as his counsel in connection with the malpractice action. Whether he had a reasonable expectation could depend on a variety of factors. What is your area of practice? Have you ever represented a party in a medical malpractice action? Could Dr. Zappel have looked you up on the Internet to find out your area of practice? If you have not held yourself out as an attorney who handles medical malpractice litigation, then you have a pretty strong argument that Dr. Zappel had no reasonable expectation that you would be willing to discuss the possibility of forming a client-lawyer relationship to defend him if he were sued for medical malpractice. Although it would seem that under these circumstances Dr. Zappel would not be deemed a prospective client under Rule 1.18(e)(1), that is not necessarily the only line of inquiry.

If it can be established that Dr. Zappel intended to provide you with confidential information so that he could potentially disqualify you from representing Our Savior if in the event he brought a qui tam action against the hospital, then he would not be entitled to the protection given to prospective clients. As a former employee of Our Savior, Dr. Zappel may have known that you have been the hospital's legal counsel in certain matters. In our view the language of his email creates a

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suspicion that disqualification in the planned litigation may have been the real motive here. He claims that a "friend" gave him your email address. Who is this "friend"? Why is he soliciting your services by email? Couldn't he have just picked up the phone and called you? Why did he send you such a detailed initial communication outlining his potential legal problems?

Law firms should have established, internal procedures that deal with unsolicited email from persons allegedly seeking legal counsel. Although Comment [4] to Rule 1.18 outlines some suggestions for implementing procedures necessary to protect an attorney from receiving disqualifying information (i.e., "limit[ting] the initial interview to only such information as reasonably appears necessary for that purpose"), it would be best if your firm establishes clear procedures in the event anyone in your office receives unsolicited inquiries for legal counsel. For example, when unsolicited communications such as Dr. Zappel's email are received, it might be advisable for the firm to promptly issue a response declining the representation. In addition, if Dr. Zappel were considered a prospective client and you became conflicted because of your receipt of his email, then your firm could still represent the hospital if the appropriate screening mechanisms as prescribed in Rule 1.18(d)(2) are followed.

You have also asked whether the information contained in Dr. Zappel's email can be passed on to Our Savior, your existing client. As stated above, we believe that Dr. Zappel may have been trying to create a basis for your disqualification when he contacted you and does not enjoy the protection of a prospective client. But having said that, how do you, as a responsible lawyer, handle the confidential information that now, regrettably, is in your possession?

Comment [2] to Rule 1.18 states:

> Not all persons who communicate information to a lawyer are entitled to protection under [Rule 1.18]. As provided in paragraph (e) [of Rule 1.18], 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) [of Rule 1.18]. Similarly, a person who communicates with a lawyer for the purpose of disqualifying 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. . . .

There is some authority which suggests that no privilege attaches to information contained in unsolicited communications sent to an attorney from a person who is *not* deemed a "prospective client." *See* N.Y City Bar Ass'n Formal Op. 2001-1. Having said that, it is safe to say that if one wanted to minimize the risk of disqualification, it may be best if the information Dr. Zappel disclosed to you is not communicated to Our Savior. As Rule 1.2(e) states, "[a] lawyer may exercise professional judgment to waive or fail to assert a right or position of the client . . . when doing so does not prejudice the rights of the client." In addition, Comment [7] to Rule 1.4 suggests that information may be withheld from a client under certain circumstances, specifically "when the client would be likely to react imprudently to an immediate communication." This Comment further states that withholding certain information is permitted as long as its purpose is not "to serve the lawyer's own interest or convenience or the interests or convenience of another person." *Id.*

In deciding whether to disclose, one must also consider Rule 1.1(c), which says:

> A lawyer shall not intentionally:
> (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
> (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

According to Professor Roy Simon, Rule 1.1(c)(1) "essentially obligates a lawyer to use all legal and ethical means reasonably available to seek the client's objectives." *See* Simon's New York Rules of Professional Conduct Annotated 67 (2012). Based upon this provision of the RPC, there could be an argument that you may be required to advise Our Savior as to the information contained in Dr. Zappel's email because information concerning the doctor's professional conduct may be relevant to the hospital as part of its defense against the qui tam action. Although the answer is not necessarily clear, you would not have to disclose the information communicated to you by Dr. Zappel if you conclude that Our Savior would not be prejudiced. As will be discussed further below, you can probably learn more about Dr. Zappel's prior conduct through your own independent investigation as counsel to Our Savior.

The reason for the overabundance of caution with regard to what Dr. Zappel told you is mostly because the contents of his email contain admissions – particularly the fact that he was under the influence of drugs while engaged in professional activities. This information most likely would not be generally known. Although normally we would look at such information under the provisions of Rule 1.6, which defines what constitutes "confidential information," in this case you may have a duty to protect the confidentiality of a potentially opposing party, namely Dr. Zappel. *See generally* James M. Altman, *Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism*, N.Y. St. B.J. (Nov./Dec. 2010), p. 24 (internal citations omitted). Dr. Zappel could be considered a potential opposing party if you knew that he was considering commencing a qui tam case against your client. There also may be an argument that you owe Dr. Zappel (as a potentially opposing party not represented by counsel) a heightened obligation not to disclose the information

he communicated to you. Therefore, your conduct in dealing with him as an unrepresented party also may trigger obligations under Rule 3.4(a)(6) to conduct yourself in a manner that is not contrary to the RPC, which would include not disclosing the information that Dr. Zappel communicated to you.

Given the circumstances you have described, if the qui tam case against Our Savior does go forward, you can do your own independent investigation of Dr. Zappel (and any other doctors currently or formerly employed by Our Savior for that matter) to determine if in fact the hospital was encouraging its staff to "up-code" cases as well as any other relevant conduct that could expose the hospital to liability, including potential acts of malpractice as a result of misdiagnoses of patients. This leads to a potentially more difficult question: Are the malpractice and qui tam cases substantially related? If it can be established that there is a connection between Dr. Zappel's own professional conduct at his current employer, St. James Infirmary, as well as in his prior employment at Our Savior, then his conduct may be relevant to the qui tam action and the matters become substantially related. In all likelihood, Dr. Zappel would be deposed if he commenced the qui tam case against the hospital and would almost certainly be subject to lines of questioning concerning his own professional conduct, including anything that could affect his conduct as a physician (such as an addiction to drugs).

It is also important to address here your obligations as counsel to Our Savior. Rule 1.13 of the RPC governs a lawyer's obligations when representing an organization as a client. Specifically, Rule 1.13(b) states:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

Could Dr. Zappel qualify as a "person associated with the organization," and would you be required to inform Our Savior of the information contained in his email? Under this premise, since he is a former employee of Our Savior, the answer would most likely be no. That being said, you still possess knowledge concerning Dr. Zappel that would be of significant interest to Our Savior (i.e. his prior professional conduct while under the influence of drugs). Such conduct would almost certainly go to issues concerning the doctor's credibility in the context of the qui tam action. Although none of the information communicated to you by Dr. Zappel would be entitled to the protections given for confidential information as defined under Rule 1.6, the information should still not be disseminated to your client. As noted above, we would suggest that in the course of preparing to defend a potential qui tam action, you conduct your own independent investigation of former and current doctors and staff of the hospital. We believe that such an investigation would likely reveal if, in fact, certain employees had issues which would put their credibility into question – like Dr. Zappel.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I serve as outside counsel to a large multinational company. Jacob Sladder, the company's in-house counsel, has asked me to become involved in a matter involving a disgruntled former employee who claims that she was fired from the company after reporting that she was harassed by a number of her supervisors based upon her religious beliefs.

Sladder advised me that the company had received a claim letter from an attorney for the former employee, asserting that the company has a culture that promotes religious discrimination, demanding a fat settlement, and threatening suit if the matter is not resolved promptly. He explains, obviously within the boundaries of the attorney-client privilege, that he is concerned that the former employee's discrimination claims may have merit, both with respect to the individual complaining ex-employee and other potentially aggrieved employees. In particular, Sladder worries that company emails, both recent and extending back as far as five years, may include inculpating material. He explains that although he has not examined the emails and does not know whether they contain any smoking guns, statements to him from corporate employees lead him to believe that the contents of some messages may be problematic.

From my work with the company over the years, I am aware that under its records retention protocol, each month the company's management information system (MIS) personnel remove from the company's active system emails sent during the same month a year earlier, and that emails for each such purged month are retained on backup tapes, with a separate tape for each month. Because of the company's large-scale, worldwide operations, each month the company thus removes thousands of email mes-

sages. Inside counsel has asked me whether, on the basis of the letter from the lawyer for the former employee threatening litigation, the company has any obligation to alter its purge-and-retention procedure. What should I tell him?

The company's MIS personnel further informed me that as long as emails remain on the company's active system (that is, are less than a year old), they may be located and searched by author, recipient, or any words or combination of words that appear in the text. Once, however, they have been purged from the system and stored on tape, they are in effect "read only" and may not be searched by any of the means available for current emails.

The net result is that if litigation begins and the company is called upon to disgorge its relevant emails, the cost to search currently-maintained messages will be far less than the burden of searching the historical messages stored on the monthly tapes. I know that the company's emails include many items subject to the attorney-client privilege, and others that, although non-privileged, nonetheless contain sensitive business information that is unrelated to the claims asserted by the former employee and that the company does not want outsiders to see.

Accordingly, Sladder suggests that perhaps it is time to alter the company's records retention policy to provide for purging of emails, and storage on backup tapes, after six months or three months, not one year. If nothing else, he said, changing the policy would make it more difficult for this ex-employee, and other potential underfunded claimants, to get access to company emails. What advice do I give him?

Sincerely,
Noah Zark