

## SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

# Communications With Prospective Clients Carry Disqualification Risks

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In almost every state, attorneys have ethical duties to prospective clients who consult with them about a potential case, even if no attorney-client relationship ever ensues.

New York Rule of Professional Conduct 1.18 forbids attorneys from “representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter,” but only if “the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.” See N.Y. R. Prof’l Conduct 1.18(c). As a result, attorneys need to exercise some degree of caution in initial client consultations, or face the risk of a disqualification motion if the attorney is engaged on behalf of another party in a related matter.

*Freedman v. Rakosi*, 2023 WL 3687783 (S.D.N.Y. May 27, 2023), is a case in point. There, Southern District Magistrate Judge Stewart D. Aaron



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recently disqualified the defendant’s counsel after deciding a novel issue under Rule 1.18: whether the duty to prospective clients applies where the prospective client never personally communicated with the attorney, but rather an intermediary acted on behalf of the prospective client to secure legal representation. Judge Aaron ultimately concluded that the plaintiffs qualified as prospective clients under the rule, even though their agent, an out-of-state attorney, was the one to contact and have the communication regarding potential representation. Moreover, because the attorney with whom the out-of-state attorney communicated was not walled off from the matter when the defendants later sought representation from his firm, the attorney’s entire firm was precluded from representing the defendants.

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## ‘Freedman v. Rakosi’

In their motion to disqualify, the plaintiffs, two of the partners in four real estate partnerships, sought to have the court disqualify Kevin Fritz and Mitchell Schuster, and their law firm, Meister Seelig & Fein PLLC, from representing defendant Michael Rakosi or any other defendant in the action. In the action, the plaintiffs bring claims against Rakosi and the partnerships’ manager for mismanagement of the partnerships.

Approximately two years before filing the action, in February 2021, the plaintiffs asked California attorney Hillel Abrams to assist them in finding

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counsel for purposes of assessing the viability of an action against Rakosi and potentially representing the plaintiffs in such an action. Abrams called Fritz and they discussed the potential representation. Abrams followed up with Fritz the following day by email, providing additional information and documents relevant to the plaintiffs’ potential claims. Shortly thereafter, however, the plaintiffs decided to retain other counsel.

In February 2023, shortly after the plaintiffs commenced the action against Rakosi and the partnerships’ manager, the plaintiffs learned that Meister Seelig would be representing Rakosi.

Accordingly, on Feb. 2, 2023, the plaintiffs’ counsel wrote a letter to Schuster requesting that he confirm that an ethical wall would be put in place to prevent Fritz from having any involvement in the matter, and inform plaintiffs counsel whether Fritz had had any involvement in the matter. The letter went unanswered.

After Schuster and Fritz entered appearances in the action, plaintiffs counsel wrote another letter to Schuster in which counsel asserted that because Meister Seelig chose to involve Fritz in the representation, the entire firm was conflicted and requested that Meister Seelig withdraw from the matter. Schuster also did not respond to this letter. The plaintiffs then filed their motion to disqualify pursuant to New York Rule of Professional Conduct 1.18.

### Relevant Legal Principles

In resolving the plaintiffs’ motion for disqualification, Judge Aaron first examined the principles governing disqualification. In deciding disqualification motions, Judge Aaron observed, district courts are required to take a “restrained approach that focuses primarily on preserving the integrity of the trial process.” That is because “disqualification motions often are made for tactical reasons, and thus, they are viewed with disfavor, and the party seeking disqualification must meet a heavy burden of proof in order to prevail.”

Judge Aaron recognized that “federal courts look to state disciplinary rules when considering motions for disqualification,” but that “such rules need not be rigidly applied” and “merely provide general guidance.” Judge Aaron then identified

the relevant disciplinary rule, Rule 1.18, which he explained “forbids an attorney from ‘represent[ing] a client with interests materially adverse to those of a prospective client,’ that is, ‘a person who consults with a lawyer about the possibility of forming a client-lawyer relationship,’ in the same or a substantially related matter, but only if ‘the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.’” (quoting N.Y. R. Prof’l Conduct 1.18(a), (c)) (alteration in original).

Judge Aaron observed that the “information” referenced in Rule 1.18 is “‘confidential information,’ as defined in Rule 1.6(a),” which generally includes

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sensitive or privileged information. *Id.* at \*5 (citing N.Y. R. Prof’l Conduct 1.6(a); *Mayers v. Stone Castle Partners*, 1 N.Y.S.3d 58 (1st Dep’t 2015)). Judge Aaron also noted that although the term “significantly harmful” is not defined in the rules, “it has been interpreted to include a party’s settlement strategy; its ‘bottom line’ in settlement; its ‘views and impressions of the litigation;’ and its ‘opinions and impression of even public documents and facts.” On the other hand, the term typically does not include “information that is public; information regarding the ‘history of the dispute;’ and information ‘likely to be revealed’ in discovery.”

After identifying the relevant legal principles, Judge Aaron addressed the three issues on which Plaintiffs’ disqualification motion turned: (whether the plaintiffs were “prospective clients” of Fritz within the meaning of Rule 1.18; whether the present case is “substantially related” to the matter about which Fritz was contacted by Plaintiffs’ representative; and whether the information Fritz obtained could be significantly harmful to the plaintiffs in the case.

### **Application of Legal Principles to ‘Freedman’**

First, Judge Aaron rejected Rakosi’s argument that the plaintiffs were not prospective clients of Fritz because the plaintiffs did not personally communicate with him and, instead, communicated with Fritz through another lawyer, Abrams. Judge Aaron explained that “courts have recognized, in analogous circumstances, the ability of a client (or prospective client) to have privileged communications with an attorney through an intermediary.” Accordingly, Judge Aaron found that Abrams contacting Fritz on behalf of the plaintiffs to explore the possibility of Fritz entering into an attorney-client relationship with the plaintiffs was sufficient to render the plaintiffs “prospective clients” of Fritz for purposes of Rule 1.18.

Second, Judge Aaron concluded that the matter about which Fritz was consulted in February 2021 was “quite clearly” “substantially related” to the present action. During the February 2021 call between Abrams and Fritz, Abrams described Rakosi as having allegedly breached the partnership agreements by revising the management

agreement without the requisite consent. Plaintiffs' instant complaint based its claim for rescission on the exact same alleged breach. As a result, Judge Aaron found the present action to be "substantially similar" to the matter Abrams and Fritz discussed two years prior.

Third, Judge Aaron concluded that the information Abrams provided to Fritz qualifies under Rule 1.18 both as confidential information and as information that could be significantly harmful to the plaintiffs in the current action. Judge Aaron found that the discussion between Abrams and Fritz included confidential information because Abrams provided his (and therefore, the plaintiffs') views and impressions of the parties' underlying dispute, and that such information could be significantly harmful to the plaintiffs if revealed to their adversary. Judge Aaron found that the information exchanged satisfied the Rule 1.18 standard regardless of whether Fritz no longer remembered the substance of the information (as he claimed).

Having concluded that the plaintiffs were former prospective clients of Fritz, and the information shared with him was confidential and could be significantly harmful to the plaintiffs' case, Judge Aaron found it necessary, in his discretion, to disqualify Fritz from representing Rakosi. Judge Aaron reasoned that former prospective clients are "entitled to freedom of apprehension and to certainty that [their] interests will not be prejudiced by the disclosure of confidential information."

Finally, Judge Aaron turned to the related question of whether Fritz's disqualification required that all Meister Seelig attorneys be disqualified. Judge Aaron observed that under Rule 1.18(c), once an attorney is disqualified, "no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter," with two exceptions. (quoting N.Y. R. Prof'l Conduct 1.18(c)). Judge Aaron considered whether Meister Seelig "notified, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer was prohibited from participating in the representation of the current client" and "implemented effective screening procedures." (quoting N.Y. R. Prof'l Conduct 1.18(d)(2)). Since Fritz actually participated in the representation of Rakosi, including by entering an appearance as counsel of record in the case, Judge Aaron concluded that all attorneys at Meister Seelig must be disqualified from the matter and granted the plaintiffs' motion in full.

## Conclusion

Judge Aaron's application of New York Rule of Professional Conduct 1.18 highlights the significant duties attorneys owe to former prospective clients. In speaking with prospective clients (or their counsel), an attorney should exercise caution before delving into confidential matters. To the extent the attorney's firm is later engaged by an adverse party to the prospective client, the attorney who previously spoke with the prospective client should be screened off as soon as possible.