

LAWYERS' DUTIES TO PROSPECTIVE CLIENTS

A CLEARER DEFINITION OF A "PROSPECTIVE CLIENT" IS NEEDED UNDER THE LEGAL PROFESSION ACT, GIVEN ITS PRACTICAL RAMIFICATIONS FOR LAWYERS

Introduction

Lawyers owe ethical duties to prospective clients, such as the duty of confidentiality and the duty to avoid conflicts of interests,¹ though not necessarily to the same extent as their duties to ordinary clients. The narrower scope of lawyers' ethical duties to prospective clients has been justified on the basis that "[a] lawyer's consultations 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".²

In addition, ethical issues involving prospective clients can arise in the context of anti-money laundering obligations³ or providing informal advice to friends. Apart from ethical duties, lawyers may also owe tortious duties to prospective clients in certain circumstances, for example, to inform the prospective client "in a timely manner whether or not instructions are being accepted".⁴

In Singapore, a prospective client is commonly defined as a person who "is about to retain or employ"

a solicitor or a law practice, based on the definition of a "client" in section 2(1) of the Legal Profession Act (LPA).⁵ In a 2018 Singapore High Court decision concerning an injunction application by a former prospective client to disqualify her former solicitors, the parties accepted that a former prospective client fell within the definition of "client" in section 2(1) of the LPA.⁶

However, when viewed through the prism of the American ethical regime, the LPA's definition of a prospective client does not address issues such as:

- Is a "consultation" between the prospective client and the lawyer required?
- Are the lawyer's views relevant?
- What is the purpose of the prospective client's consultation?
- Should bad faith by the prospective client be a factor?

This article examines whether a clearer definition of a "prospective client" is needed under the LPA, given its practical ramifications for lawyers.



1. Is a "Consultation between the Prospective Client and the Lawyer Required?"

The LPA's definition of a prospective client does not refer to any preliminary consultation between the prospective client and the lawyer. Instead, it fixes the point which a person becomes a prospective client at just before he or she engages the lawyer, which could occur during or after a preliminary consultation.

In contrast, Model Rule 1.18(a) of the ABA Model Rules defines a prospective client as "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter" [emphasis added].

One advantage of the LPA's definition is that it avoids arguments on the threshold issue of whether a "consultation" had occurred. This issue is not straightforward as seen from the commentary to Model Rule 1.18(a) of the ABA Model Rules, which observes that whether a consultation, which includes written, oral or electronic communications, has occurred depends on the facts.⁷ The commentary further explains that a consultation is likely to have occurred if:

- a lawyer "specifically requests or invites the submission of information about a potential representation";
- there are no clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations; and
- a person provides information in response.⁸

While questions over whether a "consultation" has occurred can render ethical issues more complex, a possible collateral effect of the LPA's definition is that lawyers may not be sensitised to the need to take precautions to ensure that a casual enquirer is not under the impression that he is or will become a prospective client.

2. Are the Lawyers' Views Relevant?

The reference to a prospective client in section 2(1) of the LPA appears to be entirely client-centric, namely, the client must be "about to retain or employ" the lawyer. The lawyer's views on whether he is "about to" accept the retainer or employment are seemingly irrelevant. This appears inconsistent with the general objective approach taken by the Singapore courts in determining whether a lawyer-client relationship arises. For example, in assessing whether an implied retainer arises in a particular case, the test adopted by the Singapore courts is whether "an objective consideration of all the circumstances", both from the client's and the solicitor's perspective, is such that "an intention to enter into such a contractual relationship ought fairly and properly to be imputed to all the parties".⁹

In a recent codification by the State Bar of California of an ethical rule on duties to prospective clients, the lawyer's perspective was taken into account. A comment to the new rule noted that a prospective client did not include a person who disclosed information to a lawyer after the lawyer had stated his or her unwillingness or inability to consult with that person.¹⁰ Moreover, a person who communicated information unilaterally to a lawyer by any means would not be a prospective client if there was no reasonable expectation that the lawyer was willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice.¹¹ The latter point is particularly significant in a publicity context where a prospective client "provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides information of general interest".¹²

3. What is the Purpose of the Prospective Client's Consultation?

The LPA's definition indicates that the purpose of the prospective client's consultation is to retain or employ the lawyer. However, the words "retain or employ" are admittedly vague. Many factors, which are not spelt out in the LPA, may evidence an imminent retention or employment of a solicitor. Four possible scenarios are outlined here: (i) signing a letter of engagement with the law practice; (ii) giving confidential information to the law practice; (iii) giving instructions to the law practice to take a step towards commencing legal proceedings; and (iv) obtaining legal advice from the law practice.

Scenario (i) raises an interesting point. Where an enquirer fails to respond to the lawyer's invitation to sign a letter of engagement, is there sufficient evidence that the enquirer would soon be retaining or employing the lawyer?¹³

Where the lawyer does not invite an enquirer to sign a letter of engagement, it is uncertain as to which of the other scenarios (ii), (iii) or (iv) can apply. In particular, although the California Rules of Professional Conduct provide for scenario (iv) as part of the definition of a prospective client,¹⁴ there is no consistent practice across the US states. In fact, as noted above, the ABA Model Rules only require "the possibility of forming a client-lawyer relationship" as a condition for defining a prospective client. Some may argue that this phrase is even less stringent than the LPA's definition.

4. Bad Faith by the Prospective Client

Prospective clients may consult lawyers for tactical reasons, so as to disqualify them from subsequently acting for an adverse party in the same matter.¹⁵ However, the LPA's definition does not take into account the motivations by a prospective client in consulting a lawyer.

In contrast, the ABA Model Rules observes that "a person who communicates with a lawyer for the purpose of disqualifying the lawyer" is not a prospective client.¹⁶ The California Rules of Professional Conduct go slightly further by noting that "a person who communicates information to a lawyer without a good faith intention to seek legal advice or representation" is not a prospective client.¹⁷

Conclusion

A clearer definition of a "prospective client" under the LPA will help to sieve out undesirable and unnecessary claims against lawyers at an early stage. While not all the missing pieces in the LPA's definition of a prospective client are critical (such as the "consultation" requirement), bad faith and the lawyer's perspective should not be disregarded in deciding whether an enquirer is a prospective client. The circumstances under which a prospective client is considered to be imminently retaining or employing the lawyer are necessarily fact-specific, but guiding principles by the courts in this area will be useful to reduce uncertainty for both lawyers and enquirers.

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Endnotes

1. See e.g. Ethics in Practice column, “Duties to Prospective Clients: Ethical Considerations” (Singapore Law Gazette, October 2009) <<http://v1.lawgazette.com.sg/2009-9/ethics.htm>> (accessed 10 April 2019).
2. See Comment 1 to Model Rule 1.18 of the American Bar Association Model Rules of Professional Conduct (“ABA Model Rules”).
3. Rule 15(1) of the Legal Profession (Prevention of Money Laundering and Financing of Terrorism) Rules 2015 (“Rules”) provides that where a legal practitioner or law practice is unable to complete prescribed customer due diligence measures, one requirement is that the legal practitioner or law practice “must not commence any new business relationship” with the prospective client. The specific definition of a “client” in Rule 2 of the Rules mirrors the definition of a “client” in section 2(1) of the LPA, namely, it includes a person who “is about to retain or employ” a legal practitioner or law practice.
4. Mark Davies, *Solicitors’ Negligence and Liability* (United States: Oxford University Press, 2008), at (2.64).
5. This applies to both contentious and non-contentious business.
6. *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* (2018) 5 SLR 894 at (10).
7. See Comment 2 to Model Rule 1.18 of the ABA Model Rules.
8. *Ibid.*
9. See e.g. *Anwar Patrick Adrian v Ng Chong & Hue LLC* (2014) 3 SLR 761 at (49).
10. See Comment 2 to Rule 1.18 of the California Rules of Professional Conduct.
11. *Ibid.*
12. See Comment 2 to Model Rule 1.18 of the ABA Model Rules. This part of the Comment was not reproduced in Comment 2 to Rule 1.18 of the California Rules of Professional Conduct.
13. Based on the facts of *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* (2018) 5 SLR 894 at (6).
14. See Rule 1.18(a) of the California Rules of Professional Conduct: “A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer **or securing legal service or advice from the lawyer in the lawyer’s professional capacity**, is a prospective client.” (emphasis added).
15. See e.g. G E Dal Pont, *Lawyers’ Professional Responsibility* (6th edition, Sydney: Thomson Reuters (Professional) Australia Limited, 2017), at (8.190).
16. See Comment 2 to Model Rule 1.18 of the ABA Model Rules.
17. See Comment 2 to Rule 1.18 of the California Rules of Professional Conduct.
