



35 Subsequently, Competitor seeks to retain Attorney and Attorney’s law firm adverse to PC. The  
36 law firm is prepared to y set up an effective ethical screen isolating Attorney who met with PC<sup>1</sup>.

### 37 **Scenario 2a**

38 At the outset of the interview, Attorney advises PC that the interview is preliminary in  
39 nature and is designed to see if Attorney’s law firm would have a conflict of interest in  
40 representing PC and that PC should limit the disclosure of basic facts to the information that the  
41 attorney needs to determine whether the Attorney or his law firm have a conflict of interest that  
42 would prevent representation, such as the identity of the parties and the nature of the claim. PC  
43 provides the name of the defendant and the subject matter of the suit, but nothing more. The  
44 conflict search reveals the prospective defendant Competitor is an existing client of the firm.  
45 Attorney declines PC’s representation because of the conflict of interest. Attorney believes that  
46 the use or disclosure of the fact that PC may bring suit against Competitor would materially harm  
47 PC by causing Competitor to immediately secure counsel and potentially compromise the  
48 investigation of the case by restricting the ability to interview key witnesses who are employees  
49 of Competitor. On the other hand Attorney understands that the prospective suit is material to  
50 Competitor, since it would disrupt Competitor’s current plans for a public offering.

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<sup>1</sup> Rule 1.01(k) indicates that “‘screened’ means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under the rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.” Additionally, Rule 1.18(d)(2) requires that the prohibited lawyer be “apportioned no part of the fee therefrom” and “written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions.”

The elements of an effective ethical screen will vary from case to case, but the two most critical elements are: (1) the screen must be timely in place and (2) imposition of actual preventive measures to guarantee that the information will not be conveyed. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4<sup>th</sup> 776, 810, citing *Speedee Oil, supra*, 20 Cal. 4<sup>th</sup> at pp. 1142,1151-1152 & fn. 5) Some of the recognized elements of an effective ethical screen include:

1. Physical, geographic, and departmental separation of attorneys;
2. Prohibitions against and sanctions for discussing confidential matters;
3. Established rules and procedures preventing access to confidential information and files;
4. Procedures preventing a disqualified attorney from sharing in the profits from the representation<sup>1</sup>; and
5. Continuing education in professional responsibility.

(*Kirk v. First American Title Ins. Co., supra*, 183 Cal. App. 4<sup>th</sup> at P. 810-811)

51 **Scenario 2b**

52 Same facts as Scenario No. 2a, except that during the preliminary discussion to determine  
53 whether there would be a conflict of interest in Attorney's law firm representing PC, PC  
54 volunteers confidential material information relating to the claim which if disclosed to or used  
55 for the benefit of Competitor would be damaging to PC's case against Competitor . None of  
56 Attorney's questions would naturally have elicited such information.

57 **Scenario 3**

58 PC clears Attorneys conflict inquiry. Attorney and PC further their discussions. PC  
59 would like Attorney to proceed on an hourly fee basis. The Attorney therefore asked for financial  
60 information demonstrating PC's ability to pay hourly fees for the type of matter involved. PC  
61 provides financial information to Attorney which suggests PC's inability to finance the litigation  
62 on an hourly basis. PC then asked Attorney if he and his law firm would handle the case on a  
63 contingency basis. In response, Attorney asks for more information concerning the facts and  
64 merits of the case and the likely damage award, indicating that it was necessary to assess the  
65 potential value of the claim, the extent of work involved and any resulting fee. After receiving  
66 and reviewing such information, Attorney and his law firm declined to take the case. After PC  
67 sues, Attorney is approached to represent Competitor adverse to PC. Attorney believes that the  
68 information received about PC's financial situation and the merits of the case are materially  
69 adverse to the interests of PC.

70 **Scenario 4**

71 PC has cleared conflicts. The Attorney's law firm is prepared to take the case on an  
72 hourly basis. However, PC is interviewing several law firms and wants to evaluate Attorney's  
73 law firm by giving the law firm material, confidential information about the case and requests  
74 that the law firm prepare a memorandum analyzing the case, including its strengths and  
75 weaknesses, and setting forth a proposed strategy and budget. Attorney and the law firm agrees  
76 to accept the information and to perform the evaluation, at no charge, if PC will agree that, if the  
77 law firm is not retained, the law firm will be free to act adversely to PC in the same or a  
78 substantially related matter, including representing the prospective defendant, Competitor; in  
79 PC's case under the following conditions: (1) the Attorney who conducted the interview and any  
80 other lawyers or support personnel within Attorney's law firm who receive confidential  
81 information would be screened from the case and (2) PC agrees that the law firm's client in any  
82 subsequent litigation relating to the subject matter of the prospective engagement, including  
83 Competitor, can be informed of, and will be required to consent to, the screening arrangement  
84 and the reasons for it. PC, acting through its assistant general counsel, gives written consent to  
85 the arrangement. Attorney and his firm submit a presentation to PC, but PC does not hire  
86 Attorney or his law firm. After PC brings suit, the defendant , Competitor, seeks to hire the law  
87 firm to represent it against PC. Competitor has consented to the representation after being  
88 informed of the consultation and the screening arrangements.

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**Discussion**

Under these scenarios can Attorney or his law firm represent Competitor against PC and, if so, under what circumstances? The analysis of these four scenarios is largely governed by Rule 1.18 of the Rules of Professional Conduct, which provides in full as follows:

**Rule 1.18 Duties to Prospective Client**

(a) 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.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a result of 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 from the prospective client information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited 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 information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:

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

(2) the lawyer who received the information took reasonable\* measures to avoid exposure to more information than was reasonably\* necessary to determine whether to represent the prospective client; and

(i) the prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written\* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

Comment

Under the express language of Rule 1.18, a duty of confidentiality arises even when no lawyer client relationship develops when (1) a person consults a lawyer for the purpose of

132 retaining the lawyer or securing legal advice from the lawyer in the lawyer’s professional  
133 capacity, and (2) as a result of the consultation, the lawyer receives information that is protected  
134 by B& P Code Section 6068 (e) and Rule 1.6—that is, information that is confidential. (Rule  
135 1.18 (b)). To qualify as a prospective client, the person consulting the lawyer must have (1) a  
136 good faith intention to seek legal advice or representation and (2) a reasonable expectation, based  
137 on the lawyer’s conduct, that the lawyer is willing to discuss the possibility of forming a lawyer  
138 client relationship or providing legal advice. (*Id.*, Comment [2]; Formal Opinion 2003-161 at p. 6  
139 . A client who communicates with the lawyer in order to ensure the lawyer’s subsequent  
140 disqualification is not a prospective client. If the client communicates information unilaterally,  
141 without any indication from the lawyer that the lawyer is willing to be consulted with a view to  
142 representation, or if the client communicates information after the lawyer has stated his or her  
143 unwillingness or inability to consult, then the lawyer’s conduct cannot be said to imply a  
144 willingness to be consulted, and no duty of confidentiality can be implied. (Rule 1.18, Comment  
145 [2]; *People v. Gionis* (1995) 9 Cal.4th 1196.)

146 The attorney’s duty to a prospective client forbids use or disclosure of the confidential  
147 information disclosed except as would be permitted under Rule 1.9 (relating to former clients),  
148 and, if the information is material to the matter, bars the lawyer from acting adversely to the  
149 person in the same or a substantially related matter. Rule 1.18 (c)-(d)<sup>2</sup>. However, while a lawyer  
150 who has received confidential information from a prospective client is disqualified if the  
151 confidential information is “material to the matter” (Rule 1.18(c)), both the individual and firm  
152 wide prohibitions on representation in Rule 1.18 (c) can be avoided if both the affected client and  
153 the prospective client have given their informed written consent to the representation (Rule 1.18  
154 (d) (1)). Alternatively, the firm wide prohibition can be avoided if the lawyer has taken  
155 reasonable\* measures to avoid exposure to more information than was reasonably\* necessary to  
156 determine whether to represent the prospective and establishes an effective ethical screen  
157 (1.18(d)(2)).

158 Rule 1.18(c) contemplates a bilateral informed consent from both the prospective client  
159 and the affected client. Rule 1.18(c) does not address whether such consent can be given by the  
160 prospective client alone in advance of the conflict having arisen. On the other hand, other  
161 provisions of the Rules indicate that in appropriate circumstances such consents may be  
162 enforceable. Comment [9] to Rule 1.7 expressly states that Rule 1.7 “does not preclude an  
163 informed written consent to a future conflict in compliance with applicable case law.” ( Formal  
164 Opinion 1989-115 is to the same effect, stating that “an advance waiver of both conflict of  
165 interest and confidentiality protections is not, *per se*, invalid. *Id.* at 3).

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<sup>2</sup> Confidentiality applies not only to attorney-client privileged communications but also to all other “information gained in the professional relationship that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client.” *See, e.g.*, Formal Opinion 2003-161 at 9. If the lawyer did not get information that is confidential, for example, because the information was already publicly known at the time it was communicated, then the lawyer is not disqualified from acting adversely to the prospective client in the same or substantially related matters. *Id.* at 8; *In re Marriage of Zimmerman* (1993) 16 Cal. App. 4<sup>th</sup> 556, 565.

166 The validity of an advance consent will turn on “the extent to which the client reasonably  
167 understands the material risks that the consent entails. The more comprehensive the explanation  
168 of the types of future representations that might arise and the actual and reasonably foreseeable  
169 adverse consequences to the client of those representations, the greater the likelihood that the  
170 client will have the requisite understanding.” (Rule 1.7 Comment [9]). The experience and  
171 sophistication of the client, and whether the client is independently represented, are also relevant  
172 in determining whether the client reasonably understands the risks involved. (*Id.* See also *Visa*  
173 *U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003); *Simpson Strong-*  
174 *Tie Company, Inc. v. Ox-Post International, LLC*, 2018 WL 3956430, \*13 (N. D. Cal. 2018)).

175 To date, the cases where an advanced written consent have been upheld under California  
176 law tend to fall into two categories. First, such consents have been upheld when a joint client  
177 agrees that if the joint relationship ends it will not seek to prevent counsel from proceeding  
178 adversely to it on behalf of the other joint client or clients. *Zador Corp. v. Kwan*, (1995) 31 Cal.  
179 App. 4<sup>th</sup> 1285; *Elliott v. McFarland Unified School Dist.* (1985) 165 Cal. App. 3d 562. A second  
180 class of cases involve advance consents to concurrent adverse representation of an identified  
181 client in specified but unrelated matters. *Visa U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d  
182 1100 (N.D. Cal. 2003). Conversely, federal courts applying California law have declined to  
183 enforce general more open ended advance waivers of the right to disqualify a law firm from  
184 acting adversely to the consenting client in unrelated matters.<sup>3</sup> There is authority from other  
185 jurisdictions enforcing such a general consent against a sophisticated client represented by  
186 counsel.<sup>4</sup>

187 The California Supreme Court has expressly declined to express a view on the validity of  
188 more broadly framed advance consents. *Sheppard, Mullin, Richter & Hampton, LLP v. J-M*  
189 *Manufacturing Company, Inc.*, 6 Cal. 5<sup>th</sup> 59, 86 (2018). Instead, the Supreme Court rested its  
190 decision invalidating the consent upon the fact that the law firm had failed to disclose a known  
191 existing concurrent loyalty conflict with an existing client. *Id.*

192 As an alternative to an informed consent, Rule 1.18 (d) (2) also permits the firm wide  
193 disqualification in Rule 1.18 (c) to be avoided if three conditions are met. First, the attorney who  
194 received the material confidential information must have taken “reasonable measures to avoid  
195 exposure to more information than was reasonably necessary to determine whether to represent  
196 the prospective client” Second, the prohibited attorney must be timely screened from

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<sup>3</sup> *United States ex rel. Bergelectric Corp. v. Sauer, Inc.*, 2018 WL 6619981 (N.D. Cal. 2018) (“any and all conflicts of interest which presently exist, or may hereafter exist”), *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100 (E.D. Cal. 2015) (waiver with respect to “any other client either generally or in in any matter in which [the consenting client] may have an interest” is “broad, general and indefinite”); *Western Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074 (C.D. Cal. 2015 (any existing or future client in any matter not substantially related; open-ended as to time); *Concat LP v. Unilever, PLC*, 350 F. Supp. 796 (N.D. Cal. 2004) (consent to present and future representation of any existing or new clients adverse to consenting client is unenforceable “boilerplate”).

<sup>4</sup> See, e.g., *Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013).

197 participation in the matter and any portion of the fee. Third, the prospective client is given  
198 written notice.

199 With respect to the first requirement, the lawyer who received the information has the  
200 burden of showing that the lawyer took reasonable measures to avoid exposure to more  
201 information than was reasonably necessary to determine whether to represent the prospective  
202 client. (Commission response to written dissent of Robert Kerr, p.4.) If the lawyer cannot  
203 demonstrate that the lawyer took such measures, then screening is not available. See: *SkyBell*  
204 *Technologies Inc. v. Ring*, 2018 WL 601-6156.

205 Neither the Rule nor the Comments thereto define what constitutes information  
206 “reasonably necessary to determine whether to represent the prospective client. The only  
207 reported decision construing Rule 1.18 also declined to take a position on that issue. *Skybell*  
208 *Technologies*, supra.<sup>5</sup> It has been argued that such information is limited solely to the  
209 information necessary to determine whether the lawyer is ethically permitted to undertake the  
210 case, such as information necessary to check conflicts and perhaps, in a litigation context,  
211 sufficient information about the merits to permit a preliminary judgment that the prospective  
212 client’s position is not frivolous. We do not think that the language can be read so narrowly.

213 The Rule does not expressly limit the information a reasonable lawyer would require to  
214 determine whether representation should occur to a conflict inquiry. Instead, it addresses  
215 information reasonably necessary for the lawyer to decide whether the lawyer is willing to  
216 represent the client. Information reasonably necessary reflects an objective standard and will  
217 depend on the nature of the case and the representation. Such information could include  
218 information about the prospective client and its business or the merits of the case that is far more  
219 extensive than needed to determine whether representation is ethically permissible. In addition,  
220 a contrary reading of the rule which would permit screening only in cases involving information  
221 necessary for ethical compliance would reduce the class of cases in which screening made a  
222 difference to an inconsequential number, since most conflict inquiries will not result in the  
223 communication of material confidential information. This conclusion is supported by the  
224 Restatement (3rd) of the Law Governing Lawyers, §15. . There, the reporters comment (c), §15,  
225 provides in pertinent part:

226 It is often necessary for a prospective client to reveal and for the  
227 lawyer to learn confidential information (see §59) during an initial  
228 consultation prior to their decision about formation of a client-  
229 lawyer relationship. For that reason, the attorney-client privilege is  
230 attaches to communications of a prospective client (see §70,  
231 Comment *e*). The lawyer must often learn such information to  
232 determine whether a conflict of interest exists with an existing

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<sup>5</sup> In *dicta*, however, the Court in *Skybell* suggests that the information reasonably necessary for a firm to determine whether to represent a client may go beyond the information necessary to clear conflicts. *SkyBell*, Id. at 9 [“it is a close question whether the information...received was reasonably necessary ... to determine whether to represent Skybell. Nonetheless, the Court need not decide this issue because it has already determined... any reasonable measures to avoid exposure to such information were not taken.”]

233 client of the lawyer *or the lawyer's firm and whether the matter is*  
234 *one that the lawyer is willing to undertake.*

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236 In order to avoid acquiring disqualifying information, a lawyer  
237 considering whether or not to undertake a new matter may limit the  
238 initial interview to such confidential information as reasonably  
239 appears necessary for that purpose. Where that information  
240 indicates that a conflict of interest or *other reasons for*  
241 *nonrepresentation* exists, the lawyer should so inform the  
242 prospective client or simply decline the representation... The  
243 lawyer may also condition conversations with the prospective  
244 client on the person's consent to the lawyer's representation of  
245 other clients (see §122, Comment *d*) the prospective client's  
246 informed consent to such an agreement frees the lawyer to  
247 represent a client in a matter and to use in that matter, but only if  
248 the agreement so provides, confidential information received from  
249 the prospective client...." [Should this go in the discussion of  
250 conflict of advance waivers?]

251 Apart from the *dicta* in *Skybell* suggesting that the information necessary for a firm to  
252 determine whether to represent a client may go beyond the information necessary to clear  
253 conflicts. (*SkyBell*, *Id.* at 9), The New Jersey Supreme Court in *O. Builders & Associates, Inc. v.*  
254 *Yuna Corp. of NJ* (2011) 206 N. J. 109, 125 came to the same conclusion. Quoting liberally  
255 from the Restatement (3<sup>rd</sup>) of the Law Governing Lawyers §15(2) the court observed:

256 [a] prospective client's assurance of confidentiality ... must yield  
257 to a reasonable degree to the need of the legal system and to the  
258 interests of the lawyer and of other clients," and that they "include  
259 the need of a lawyer to obtain information needed to determine  
260 whether the lawyer may properly accept representation without  
261 undue risk of prohibitions if no representation ensues.

262 *O' Builders, Id.* at 125

263 To summarize, in order to satisfy the requirements of Rule 1.18(d)(2) an interviewing  
264 firm must undertake affirmative actions to avoid exposure to more information than was  
265 reasonably necessary to determine whether to represent the prospective client. The Committee  
266 concludes that such information may, under the circumstances, exceed the information required  
267 to do a conflicts inquiry.

## 268 **Discussion of Scenarios**

269 In each of the four scenarios, Attorney is personally disqualified from acting adversely to  
270 PC in the same or a substantially related matter without informed written consent from PC and  
271 the affected client, Competitor, or an effective advanced consent, because during the interview  
272 Attorney received information that is protected by the obligation of confidentiality that is

273 material to the resolution of the case. Rule 1.18 (c) and (d). None of the scenarios involve such  
274 informed consent. Accordingly, Attorney owes a duty to PC not to use or disclose information  
275 received as result of the consultation. Rule 1.18 (b). Further, to avoid disqualification in the  
276 absence of an effective informed consent, Attorney and his law firm need to satisfy the  
277 conditions necessary for an effective ethical screen set out in Rule 1.18(c) and (d) (2).

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279 **Scenario 1**

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281 Here the Prospective client has not provided informed consent for Attorney to represent  
282 Competitor nor has he taken any measures—let alone reasonable measures—to ensure that the he  
283 received no more information than was reasonably necessary to determine whether or not to  
284 represent the prospective client. Rule 1.18 (c)-(d); *accord, SkyBell Technologies Inc. v. Ring*,  
285 2018 WL 601-6156 [there must be some type of preceding or concurrent affirmative act that is  
286 carried out by the attorney to limit the disclosure and the attorney should advise prospective  
287 client to withhold any information deemed “confidential”].) Accordingly, neither Attorney nor  
288 his law firm may represent Competitor.

289 **Scenario 2a**

290 Consistent with the analysis under Scenario 1, Attorney owes a duty to PC not to use or  
291 disclose information received as result of the consultation. On the other hand, Attorney has a  
292 duty to inform his current client of significant and/or material developments. While there is no  
293 reported California case, the weight of ethics opinions is that Attorney may not use or disclose  
294 the information acquired from PC to his law firm’s existing client, Competitor notwithstanding  
295 Attorney’s duty to communicate (Rule 1.4)<sup>6</sup> and the inherent duty of loyalty to Competitor.<sup>7</sup>

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<sup>6</sup> 1.4 [Communication with Client]

(a)(3) An attorney shall “Keep the client reasonably informed about significant developments relating to the representation including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.”

Comment [1]: “ an attorney will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Business & Professions Code Section 6068 (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances

<sup>7</sup> The duty of loyalty implicates the biblical injunction against “serving two masters (Matthew 6:24).” (*Flatt v. Superior Court, supra*, 9 Cal 4<sup>th</sup> at 286.) The duty of loyalty has been found to be sufficiently important that a mandatory rule of disqualification in cases of dual representation involving unrelated matters is firmly entrenched in California law. *Flatt v.*

296 In *Flatt v. Superior Court* (1994) 9 Cal 4<sup>th</sup> 275, the California Supreme Court held that an  
297 attorney's duty of loyalty to any existing client not only precluded the attorney from representing  
298 a prospective client against the existing client but also insulated the attorney from liability in  
299 failing to advise the prospective client of the potential statute of limitations of any claim the  
300 prospective client may have against the attorneys existing client. The court in *Flatt*, however, did  
301 not address the obligation, if any, of the attorney to disclose to the existing client the information  
302 the prospective client provided to the attorney. However, Rule 1.6 and Business and Professions  
303 Code section 6068(e)(1) contain no exception that would authorize such disclosure. Further, case  
304 law and prior opinions from this Committee and local bar committees demonstrate that in such a  
305 context the duty of confidentiality remains paramount so that disclosure to Competitor is not  
306 permitted.

307 In Opinion No. 2003-163, this Committee opined that when an outside attorney  
308 represents a corporation and also simultaneously represents a corporate constituent (the Chief  
309 Financial Officer) in an unrelated matter, the duty of confidentiality precluded the attorney from  
310 disclosing the confidences of the CFO to the corporation without the CFO's consent despite the  
311 duty to communicate and the duty of loyalty owed to the corporation.

312 In LA County 528 (2017), LA County 528, the opinion concluded that an attorney  
313 engaged by an insurance carrier to defend the interests of an insured is prohibited from  
314 disclosing to the insurance carrier information obtained from the insured that could provide a  
315 basis for the insurance carrier to deny coverage.

316 In *A v. B*, 158 A. J. 51(1999) a law firm represented a husband and wife jointly in  
317 planning their estates. Through an error in the firm's conflict system, the firm started to represent  
318 a woman in a paternity action against the husband. When the firm realized the error, it withdrew  
319 from the representation against the husband and asked the husband for consent to disclose the  
320 existence of the illegitimate child to the wife, but the husband refused. The New Jersey Supreme  
321 Court held that the information was confidential, but the broad New Jersey exception for fraud  
322 prevention permitted the firm to disclose to the wife. California has not recognized such a broad  
323 fraud exception to the duty of confidentiality.

324 Inherent in the logic of these decisions and comments to Rule 1.6 is the implicit  
325 recognition that the duty of confidentiality is paramount to the attorney's subsequent duty of  
326 loyalty to communicate to his or her other client information that may be material to the client's  
327 representation. (Comment 1, Rule 1.6, citing *In Re Jordan* (1974) 12 Cal 3<sup>rd</sup> 575, 580) The  
328 Committee has found no authority that would suggest the rule should be otherwise with respect  
329 to disclosures made by either a prospective client or a previous client. Accordingly, in each  
330 scenario the Attorney has a duty to retain in confidence the information imparted by PC absent  
331 application of Rule 1.6 (b) or PC's consent. (Rule 1.18(b), referring to Rule 1.9.)<sup>8</sup> Moreover, the

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*Superior Court, supra*, 9 Cal 4<sup>th</sup> 286. Moreover the duty of loyalty may arise without potential breaches of confidentiality. (*Id.*)

<sup>8</sup> Rule 1.9(b) provides in pertinent part: "a lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formally was associated had previously represented a client (1) whose interests are materially adverse to that person, and (2) about whom the lawyer had acquired information protected by Business and

332 confidential information provided to Attorney is imputed to the members of his firm (Rule  
333 1.8.11)<sup>9</sup> unless the law firm is able to avoid disqualification by implementing a timely and  
334 effective ethical screen pursuant to Rule 1.18(d).

335 Should PC later sue Competitor, Attorney will be free to act adversely to PC on behalf of  
336 Competitor, because the confidential information that Attorney received from PC concerning its  
337 s intention to sue Competitor is rendered moot and immaterial by the fact that PC has now sued,  
338 a fact now known by Competitor, and the lawyer received no other information that would be  
339 material to the resolution of the case. Rule 1.18 (c).<sup>10</sup> As a result, even if Attorney is  
340 disqualified, unlike in Scenario 1, a timely and otherwise adequate screen would prevent  
341 disqualification, because the lawyer took reasonable steps to obtain no more information than  
342 was necessary. Rule 1.18 (d) (2)

### 343 **Scenario 2b**

344 Unlike scenario 2a, PC volunteers confidential, material information to Attorney, whose  
345 questions did not elicit such information. A person who unilaterally communicates information  
346 without a reasonable expectation that the attorney is willing to discuss the possibility of forming  
347 a lawyer-client relationship or to provide legal advice is not a "prospective client" within the  
348 meaning of Rule 1.18(a). (Comment 2 to Rule 1.18.) Nor is a person who communicates  
349 information to a lawyer without a good faith intention to seek legal advice or representation. (Id.,  
350 citing *People v. Gionis* (1995) 9 Cal 4th 1196 [40 Cal Rptr. 2<sup>nd</sup> 456].)<sup>11</sup>

351 Here, PC was engaged in a good faith effort to obtain legal representation, and the  
352 Lawyer indicated a willingness to discuss that possibility. Therefore, consistent with the analysis  
353 under scenario 2a, Attorney may not use or disclose the confidential information. As a result,  
354 Attorney is personally disqualified from acting adversely to PC, because the Attorney has  
355 acquired material confidential information. On the other hand, the Attorney's law firm would not  
356 be disqualified if it timely establishes an effective ethical screen pursuant to the requirements of  
357 rule 1.18 (d) (2), because the lawyer clearly took reasonable measures to avoid the disclosure of  
358 any more information than was reasonably necessary to determine whether to accept the  
359 representation.

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Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent.

<sup>9</sup> Likewise, neither the Attorney nor his law firm may use the confidential information provided to Attorney under the circumstances presented.(Rule 1.8.2)

<sup>10</sup> There may be circumstances where, for some reason, the Attorney's duty not to use or disclose the fact, timing or content of the initial consultation could create a potential conflict under Rule 1.7 (b) to the extent that the lawyer's compliance with the duty not to use or disclose that information creates a significant risk of a material impairment of the representation.

<sup>11</sup> This paragraph departs from the ABA Model Rule 1.18 by clearly articulating the scope of qualifying consultations so that a prospective client may not simply disclose information in an attempt to disqualify the consulting lawyer from representing an opponent. (Commission for the Revision of the Rules of Professional Conduct ("Commission") Executive Summary, p 2.)

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**Scenario 3**

361 As with Scenario 2a, Attorney is personally disqualified and may not use or disclose the  
362 confidential information received from the prospective client. On the other hand, Attorney’s law  
363 firm should be able to avoid disqualification with a timely and otherwise adequate screen  
364 because at all times the lawyer limited disclosure to information reasonably necessary to  
365 determine whether to undertake the representation. Information necessary to determine whether  
366 to undertake the representation is context dependent and may include information relating to the  
367 client’s reputation, ability to pay its bills, or, in contingent fee or fee award cases, the merits of  
368 the case and recoverable damages. In this case, Attorney initially advised PC to disclose only the  
369 information necessary to determine whether a conflict existed. Then, when PC requested  
370 representation on an hourly basis, the law firm advised the client to disclose only the information  
371 that was necessary to determine whether the client would be able to pay anticipated fees on an  
372 hourly basis. Finally, when the client requested instead that the firm undertake the cases on a  
373 contingent basis, the law firm advised the client that it should provide no more information than  
374 needed to permit the law firm to assess the likelihood and amount of a recovery from which fees  
375 would be paid. Under the circumstances, each of these classes of information were reasonably  
376 necessary for the law firm to decide whether it was willing to accept the case. The availability of  
377 screening independent of informed consent under these facts may be subject to greater  
378 uncertainty since it is a question that has yet to be settled. *Skybell*. It is, however, the  
379 Committee’s opinion that Attorney’s affirmative efforts to secure no more information than  
380 necessary to determine whether undertake PC’s representation should entitle PC’s law firm to set  
381 up an effective ethical .<sup>12</sup>

382

**Scenario 4:**

383 Consistent with the discussion under Scenario 2a and 3, Attorney and the team who  
384 received PC’s material confidential information are personally disqualified from representing the  
385 defendant Competitor adverse to PC, because they actually received information material to the  
386 matter. Again Attorney and the interviewing team may not use or disclose such confidential  
387 information.

388 The availability of screening for the law firm independent of informed consent under  
389 these facts is more problematic since not only has Attorney obtained information that was  
390 necessary for his decision to represent PC, but, at PC’s request, Attorney has obtained  
391 information and provided analysis and work product to PC in order to persuade PC to retain  
392 Attorney and his firm, information that the firm itself did not require to decide that it was both  
393 willing and able to take the case. It is doubtful that information received by a law firm that the  
394 prospective client insists on providing in order to evaluate the law firm’s qualifications is  
395 “reasonably necessary [for the lawyer] to determine whether to represent the prospective  
396 client...” and accordingly, it is doubtful that ethical screening would be available and sufficient  
397 to permit the law firm to represent Competitor.

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<sup>12</sup> The determination of whether reasonable measures were taken to limit information acquired and to limit that information to information reasonably necessary to determine whether an attorney can or should represent a prospective client is plainly an objective, fact dependent inquiry which will be resolved on a case by case basis.

398 Here, however, PC is prepared to give informed written consent to any conflict created  
399 by Attorney's receipt of confidential information and the resulting screening arrangement so that  
400 Attorney's firm could represent Competitor. Moreover, PC gave advanced written consent to the  
401 firm's representation of Competitor, provided that the lawyers who received its confidential  
402 information in the course of the beauty contest were screened from the matter.

403 This advanced consent should clearly be enforceable. It is specific, limited to a single  
404 identified client and a single matter. Such specificity provides sufficient disclosure under the  
405 reasoning of *Zador Corp. v. Kwan, surpa.* 31 Cal. App. 4<sup>th</sup> 1285 and *Elliott v. McFarland*  
406 *Unified School Dist. ,surpra,* 165 Cal. App. 3d 562.<sup>13</sup> Further, with this advanced consent PC is  
407 waiving only the right to insist on imputed disqualification despite an effective ethical screen, a  
408 more modest forfeiture than in *Zador* or *McFarland* which upheld consents resulting in the full  
409 waiver of the protections afforded a present or former client. Additionally, here PC is  
410 sophisticated and represented by its own in house counsel and specifically invited the disclosure  
411 in order to meet its own objectives.

#### 412 **Best Practices To Avoid Disqualification**

413 Certain prophylactic steps should be implemented to address possible ethical issues  
414 arising from the new client intake process. The steps include, but are certainly not limited to,:

- 415 1. During the initial client intake, advising the prospective client of the following:
  - 416 a. That until a conflicts check is completed, there is no assurance of an  
417 attorney client relationship; and
  - 418 b. During the period where conflicts are being reviewed, no information  
419 should be exchanged other than that which relates solely to the Attorney's  
420 conflict of interest inquiry.
- 421 2. After the conflicts of interest is cleared, the Attorney should:
  - 422 a. only secure such information that avoids any conflict of interest concerns  
423 and addresses the 2 critical case intake factors:
    - 424 i. whether the clients legal position appears legally and factually  
425 tenable; and
    - 426 ii. whether the client and attorney can work out reasonable financial  
427 accommodations to undertake the representation.
  - 428 b. put in writing the admonitions provided to the prospective client and the  
429 client should sign an acknowledgment that it has been instructed not to

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<sup>13</sup> Accordingly, it is not necessary to this opinion to address the question of the enforceability of more generally framed advance waivers to conflicts involving unspecified matters or unspecified adverse clients, and we express no view on that issue.

430 disclose any confidential information that the client does not want shared  
431 with other parties.

432 3. That to the extent the Attorney and Client must engage in a more detailed  
433 substantive discussion of the prospective client's case in order to determine  
434 whether the attorney should take the case, The attorney should have the Client  
435 execute an advance consent and waiver that is explains in detail the specific  
436 material risks that the consent entails. (Comment 9, Rule 1.7) The explanation  
437 should provide a comprehensive explanation of the types of future  
438 representations that might arise and the actual and reasonably foreseeable adverse  
439 consequences to the client of those representations.

440 4. Consider having a non-attorney conduct the interview since Rule 1.18 refers only  
441 to attorneys and the representation rule of Rule 1.10 specifically only applies to  
442 attorneys. (See Comment (2).)

443

444 **CONCLUSION**

445 [INSERT]