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**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
DRAFT FORMAL OPINION INTERIM NO. 17-0003  
DUTIES TO PROSPECTIVE CLIENTS AND ETHICAL SCREENING**

**ISSUES:**

- 1. When a prospective client has provided material confidential information to an interviewing lawyer, may the interviewing lawyer disclose or use that information?
- 2. When the interviewing lawyer has received material confidential information from a prospective client, under what conditions is ethical screening available so that other lawyers in the lawyer’s law firm may represent other clients who are adverse to the prospective client in the same or substantially related matters?
- 3. To what extent can a prospective client give advanced informed written consent to permit an interviewing lawyer’s law firm to be adverse to a former prospective client in the same or substantially related matter in circumstances where the interviewing lawyer would be prohibited from representing the client and screening would otherwise be insufficient to ensure that law firm’s right to do so.

**DIGEST:**

When a person is a prospective client within the meaning of rule 1.18 (a), the interviewing lawyer owes the prospective client the same duty of confidentiality owed an existing or former client pursuant to rules 1.6 and 1.9 even though no lawyer-client relationship thereafter ensues. (Rule 1.18(a)) The lawyer may not use or disclose such information without the prospective client’s informed written consent. (Rule 1.18(b), Rule 1.9(a)) This is so even if the information would be material to the representation of an existing client of the lawyer or the lawyer’s law firm. The duty of confidentiality to the prospective client outweighs the duty to inform the current client.

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40 An interviewing lawyer who receives material confidential information from a  
41 prospective client is prohibited from accepting representation materially  
42 adverse to the prospective client in the same or a substantially related matter  
43 absent informed written consent. That prohibition is imputed to other  
44 members of the law firm unless the interviewing lawyer took reasonable  
45 measures to obtain only that information reasonably necessary to determine  
46 whether to represent the existing client and the law firm promptly undertook  
47 the screening measures specified in rule 1.18 (d) (2). Reasonable measures  
48 include advising the client to provide only identified information that the  
49 lawyer reasonable needs to decide whether to undertake the representation  
50 and limiting questioning of the client so as to elicit only such information. The  
51 information reasonably necessary to determine whether to represent the  
52 prospective client is that which a reasonable lawyer in the situation of the  
53 interviewing attorney would require to determine whether the proposed  
54 representation was both ethically proper and economically acceptable. It  
55 includes information beyond what is required to determine whether the  
56 representation is ethically permissible to determine a conflict of interest, and  
57 may include information as to whether the client’s position is tenable, and, in  
58 appropriate circumstances, may include information relating to the client’s  
59 reputation or financial condition, the merits of the claim, and the likely range  
60 of recoveries.

61 The prohibition against accepting a representation that is materially adverse to  
62 a prospective client resulting from the receipt of that prospective client’s  
63 material confidential information can be waived with the informed written  
64 consent of both the prospective client and any affected client of the law firm.  
65 (Rule 1.18 (d) (1). A prospective client may give advance informed written  
66 consent to the law firm acting adversely to the prospective client in the same  
67 matter or substantially related matters. (Rule 1.9(a), Rule 1.18(b))

68 **AUTHORITIES**

69 **INTERPRETED:** Rules 1.01(e), 1.4, 1.6, 1.7, 1.8.2, 1.9, 1.10, 1.16 and 1.18 of the Rules of  
70 Professional Conduct of the State Bar of California.<sup>1</sup>

71 Business and Professions Code section 6068(e)(1).

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<sup>1</sup> Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

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**STATEMENT OF FACTS**

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**Facts Common to Each Scenario:**

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A person or entity (“PC”) consults with a lawyer (“Lawyer”) about retaining Lawyer and Lawyer’s firm (“Law Firm”) to prosecute a misappropriation of trade secret claim against its Competitor (“Competitor”). The Lawyer conducts the interview to determine whether Lawyer can and should represent PC. Law Firm does not take PC’s case.

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**Scenario 1**

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At the outset of the interview, Lawyer advises PC that Lawyer has not agreed to represent PC and that the decision will be made after the interview and subject to Law Firm’s approval. Lawyer does not provide PC with any guidance about what PC should disclose to Lawyer or caution PC against the disclosure any material confidential information. Instead, Lawyer begins asking PC open ended questions about PC’s business and PC’s potential claims against Competitor. During the interview, PC provides confidential information about the merits of the case and about PC’s ability to finance the case. The disclosure of such information or use of it for the benefit of an opponent, including Competitor, would materially damage PC’s case. Shortly after the interview, Lawyer advises PC that Law Firm will not take PC’s case. Subsequently, Competitor seeks to retain Law Firm to defend Competitor in the matter brought by PC. Law Firm is prepared to set up an effective ethical screen isolating Lawyer who met with PC<sup>2</sup>.

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<sup>2</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 non-lawyer 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;

92 **Scenario 2a**

93 At the outset of the interview, Lawyer advises PC that Lawyer has not agreed to represent PC  
94 and that the interview is designed to see only if Law Firm would have a conflict of interest in  
95 representing PC. Lawyer advises PC that PC should limit the disclosure of basic facts to the  
96 information that Lawyer needs to determine whether the Lawyer or Law Firm have a conflict of  
97 interest that would prevent representation, such as the identity of the parties and the nature of  
98 the claim. Lawyer also cautions PC not to disclose to Lawyer any other confidential information  
99 or any information that is not reasonably necessary to assist Lawyer in determining if there is a  
100 conflict of interest because PC and Lawyer have not yet formed an attorney-client relationship.  
101 PC provides the name of the defendant and the subject matter of the suit, but nothing more.  
102 The conflict search reveals the prospective defendant Competitor is an existing client of Law  
103 Firm. Law Firm declines PC's representation because of the conflict of interest. Lawyer believes  
104 that the use or disclosure of the fact that PC may bring suit against Competitor could materially  
105 harm PC by alerting Competitor to the threatened litigation. On the other hand Lawyer  
106 understands that the prospective suit is material to Competitor, since it would disrupt  
107 Competitor's current plans for a public offering.

108 **Scenario 2b**

109 Same facts as Scenario 2a, except that during the preliminary discussion to determine whether  
110 there would be a conflict of interest in Law Firm's representation of PC, and despite Lawyer's  
111 admonitions, PC volunteers confidential material information relating to PC's claim which if  
112 disclosed to or used for the benefit of Competitor would be damaging to PC's case against  
113 Competitor. None of Lawyer's questions would naturally have elicited such information.

114 **Scenario 3**

115 PC clears Law Firm's conflict inquiry. Lawyer and PC would like to continue discussions about  
116 whether Law Firm can and should take on PC's case. PC would like Lawyer to proceed on an  
117 hourly fee basis. The Lawyer therefore asks for financial information demonstrating PC's ability  
118 to pay hourly fees for the type of matter involved. Lawyer cautions PC not to disclose to Lawyer  
119 any other confidential information or any information that is not reasonably necessary to assist  
120 Lawyer in determining if PC is able to pay Law Firm's hourly fees because PC and Lawyer have  
121 not yet formed an attorney-client relationship. PC provides financial information to Lawyer  
122 which shows PC's inability to finance the litigation on an hourly basis. PC then asks Lawyer if  
123 Law Firm would handle the case on a contingency basis. In response, Lawyer asks for more  
124 information concerning the facts and merits of the case and the likely damage award, indicating

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4. Procedures preventing a disqualified attorney from sharing in the profits from the representation<sup>2</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)

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125 that it was necessary to assess the potential value of the claim, the extent of work involved and  
126 any resulting fee. Lawyer again cautions PC to limit PC’s disclosure of information to Lawyer to  
127 only the information being requested. After receiving and reviewing PC’s information, Lawyer  
128 decides against recommending that Law Firm take the case, but Lawyer does not share any of  
129 PC’s information, the related analysis that Lawyer conducted or any conclusions that Lawyer  
130 reached with any other member of Law Firm. Lawyer informs PC that Law Firm will not take the  
131 case, explaining Lawyer’s reasons and that Lawyer did not share of PC’s information with any  
132 other member of Law Firm. After PC sues, Lawyer is approached to represent Competitor  
133 adverse to PC. Lawyer believes that the information received about PC’s financial situation and  
134 the merits of the case are materially adverse to the interests of PC. Law Firm is prepared to  
135 initiate a timely and effective screen of Lawyer and to comply with the requirements of rule  
136 1.18(d)(2).

137 **Scenario 4**

138 PC has cleared conflicts. Law Firm is prepared to take the case on an hourly basis. However, PC  
139 is interviewing several law firms and wants to evaluate Lawyer and Law Firm by giving Lawyer  
140 material, confidential information about the case, so that Lawyer can prepare a memorandum  
141 analyzing the case, including its strengths and weaknesses, and setting forth a proposed  
142 strategy and budget. Lawyer and Law Firm agree to accept the information and to perform the  
143 evaluation, at no charge, if PC will agree that, if Law Firm is not retained, Law Firm will be free  
144 to act adversely to PC in the same or a substantially related matter, including representing the  
145 prospective defendant, Competitor; in PC’s case, under the following conditions: (1) Lawyer  
146 who conducted the interview and any other lawyers or support personnel within Law Firm who  
147 receive confidential information would be screened from the case and (2) PC agrees that Law  
148 Firm’s client in any subsequent litigation relating to the subject matter of the prospective  
149 engagement, including Competitor, can be informed of, and will be required to consent to, the  
150 screening arrangement and the reasons for it. PC, acting through its assistant general counsel,  
151 gives written consent to the arrangement. Lawyer submits a presentation to PC, but PC does  
152 not hire Law Firm. After PC brings suit, the defendant, Competitor, seeks to hire Law Firm to  
153 represent it against PC. Competitor has consented to the representation after being informed  
154 of the consultation and the screening arrangements.

155 **DISCUSSION**

156 The analysis of these four scenarios is governed primarily by rule 1.18 of the California Rules of  
157 Professional Conduct, which provides in full as follows:

158 Rule 1.18 Duties to Prospective Client

159 (a) A person\* who, directly or through an authorized representative, consults a lawyer  
160 for the purpose of retaining the lawyer or securing legal service or advice from the  
161 lawyer in the lawyer’s professional capacity, is a prospective client.  
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163 (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated  
164 with a prospective client shall not use or reveal information protected by Business and  
165 Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a  
166 result of the consultation, except as rule 1.9 would permit with respect to information  
167 of a former client.

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169 (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially  
170 adverse to those of a prospective client in the same or a substantially related matter if  
171 the lawyer received from the prospective client information protected by Business and  
172 Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the  
173 matter, except as provided in paragraph (d). If a lawyer is prohibited from  
174 representation under this paragraph, no lawyer in a firm\* with which that lawyer is  
175 associated may knowingly\* undertake or continue representation in such a matter,  
176 except as provided in paragraph (d).

177  
178 (d) When the lawyer has received information that prohibits representation as provided  
179 in paragraph (c), representation of the affected client is permissible if:

180  
181 (1) both the affected client and the prospective client have given informed  
182 written consent,\* or

183  
184 (2) the lawyer who received the information took reasonable\* measures to avoid  
185 exposure to more information than was reasonably\* necessary to determine  
186 whether to represent the prospective client; and

187  
188 (i) the prohibited lawyer is timely screened\* from any participation in the  
189 matter and is apportioned no part of the fee therefrom; and

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

194  
195 Under the express language of rule 1.18, a duty of confidentiality arises even when no lawyer  
196 client relationship ensues when (1) a person consults a lawyer for the purpose of retaining the  
197 lawyer or securing legal advice from the lawyer in the lawyer's professional capacity, and (2) as  
198 a result of the consultation, the lawyer receives information that is protected by B& P Code  
199 Section 6068 (e) and rule 1.6—that is, information that is confidential. (Rule 1.18 (b)). To  
200 qualify as a prospective client, the person consulting the lawyer must have (1) a good faith  
201 intention to seek legal advice or representation and (2) a reasonable expectation, based on the  
202 lawyer's conduct, that the lawyer is willing to discuss the possibility of forming a lawyer client

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203 relationship or providing legal advice. (*Id.*, Comment [2]; Formal Opinion 2003-161 at p. 6)<sup>3</sup>.  
204 (Rule 1.18, Comment [2]<sup>4</sup>; .)

205 The lawyer’s duty to a prospective client forbids use or disclosure of the confidential  
206 information disclosed except as would be permitted under rule 1.9 (relating to former clients),  
207 and, if the information is material to the matter, bars the lawyer from acting adversely to the  
208 person in the same or a substantially related matter as well as the lawyer’s law firm (Rule  
209 1.18(c)) except as may be permitted under rule 1.18 (d). Rule 1.18 (c)-(d)<sup>5</sup>. However, both the  
210 individual and firm wide prohibitions on representation in Rule 1.18 (c) will not apply if both the  
211 affected client and the prospective client have given their informed written consent to the  
212 representation (Rule 1.18 (d) (1)). Alternatively, if the lawyer has taken reasonable measures to  
213 avoid exposure to more information than was reasonably necessary to determine whether to  
214 represent the prospective client and establishes an effective ethical screen of the interviewing  
215 lawyer (1.18(d)(2)), the firm wide prohibition of Rule 1.18(c) will not be triggered.

216 Rule 1.18(d)(1) contemplates a bilateral informed consent from both the prospective client and  
217 the affected client. Rule 1.18(d) does not address whether such consent can be given by the  
218 prospective client alone in advance of the conflict having arisen. On the other hand, other  
219 provisions of the rules indicate that in appropriate circumstances such consents may be  
220 enforceable. Comment [9] to rule 1.7 expressly states that rule 1.7 “does not preclude an  
221 informed written consent to a future conflict in compliance with applicable case law.” ( Formal  
222 Opinion 1989-115 is to the same effect, stating that “an advance waiver of both conflict of  
223 interest and confidentiality protections is not, *per se*, invalid. *Id.* at 3). The Restatement of the

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<sup>3</sup> Rule 1.18, Comment 2 provides: “ A person who by any means communicates information unilaterally to a lawyer, without a reasonable expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice is not a “prospective client” within the meaning of paragraph (a). In addition a person who discloses information to a lawyer after th lawyer has stated his or her unwillingness or inability to consult with the person (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr. 2d 456], or who communicates information to a lawyer without a good faith intention to seek legal advice or representation is not a prospective client within the meaning of paragraph (a) “

<sup>4</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.)

<sup>5</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.

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224 Law Governing Lawyers at comment c to Section 15 [A Lawyer’s Duties to a Prospective Client]  
225 also recognizes advance consents in the context of an interview with a prospective client:

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227           The lawyer may also condition conversations with the prospective  
228 client on the person’s consent to the lawyer’s representation of  
229 other clients (see § 122, Comment *d*) or on the prospective  
230 client’s agreement that any information disclosed during the  
231 consultation is not to be treated as confidential (see § 62). The  
232 prospective client’s informed consent to such an agreement frees  
233 the lawyer to represent a client in a matter and to use in that  
234 matter, but only if the agreement so provides, confidential  
235 information received from the prospective client. A prospective  
236 client may also consent to a representation in other ways  
237 applicable to a client under § 122.

238 The validity of an advance consent will turn on “the extent to which the client reasonably  
239 understands the material risks that the consent entails. The more comprehensive the  
240 explanation of the types of future representations that might arise and the actual and  
241 reasonably foreseeable adverse consequences to the client of those representations, the  
242 greater the likelihood that the client will have the requisite understanding.” (Rule 1.7 Comment  
243 [9]). The experience and sophistication of the client, and whether the client is independently  
244 represented, are also relevant in determining whether the client reasonably understands the  
245 risks involved. (*Id.* See also *Visa U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1106 (N.D.  
246 Cal. 2003); *Simpson Strong-Tie Company, Inc. v. Ox-Post International, LLC*, 2018 WL 3956430,  
247 \*13 (N. D. Cal. 2018)).

248 To date, the cases where an advanced written consent have been upheld under California law  
249 tend to fall into two categories. First, such consents have been upheld when a joint client  
250 agrees that if the joint relationship ends it will not seek to prevent counsel from proceeding  
251 adversely to it on behalf of the other joint client or clients. *Zador Corp. v. Kwan*, (1995) 31 Cal.  
252 App. 4<sup>th</sup> 1285; *Elliott v. McFarland Unified School Dist.* (1985) 165 Cal. App. 3d 562. A second  
253 class of cases involve advance consents to concurrent adverse representation of an identified  
254 client in unrelated matters. *Visa U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal.  
255 2003).<sup>6</sup>

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<sup>6</sup> Conversely, federal courts applying California law have declined to enforce general more open ended advance waivers of the right to disqualify a law firm from acting adversely to the consenting client in unrelated matters. *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

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256 As an alternative to an informed consent, rule 1.18 (d) (2) also permits firm wide representation  
257 if three conditions are met. First, the lawyer who received the material confidential  
258 information must have taken “reasonable measures to avoid exposure to more information  
259 than was reasonably necessary to determine whether to represent the prospective client”  
260 Second, the prohibited lawyer must be timely screened from participation in the matter and  
261 any portion of the fee. Third, the prospective client is given written notice.

262 With respect to the first requirement, the lawyer who received the information has the burden  
263 of showing that the lawyer took reasonable measures to avoid exposure to more information  
264 than was reasonably necessary to determine whether to represent the prospective client.  
265 (Commission response to written dissent of Robert Kerr, p.4.) If the lawyer cannot demonstrate  
266 that the lawyer took such measures, then screening is not available. (See Judge James Selna’s  
267 Order on Motion to Disqualify in *SkyBell Technologies Inc. v. Ring*, No. 18-cv-0014 (C.D. Cal.  
268 Sept. 18, 2018), interpreting rule 1.18 and duties to prospective clients.) There, the District  
269 Judge disqualified a law firm after a defense lawyer joined the firm midstream during a patent  
270 lawsuit for which the law firm had once made an unsuccessful marketing pitch to represent  
271 SkyBell in enforcing its patents against, among others, Ring, Inc. Although the firm  
272 implemented an ethical screen so the Ring defense lawyers would be insulated from the firm’s  
273 earlier pitch to SkyBell, the law firm was disqualified because the court concluded the firm had  
274 not taken reasonable steps “at each stage of the discussion with SkyBell” to avoid exposure to  
275 more information than was reasonably necessary to determine whether to represent SkyBell.  
276

277 Initially, the firm told SkyBell’s outside patent counsel to provide only so much information as  
278 necessary to conduct a conflict search. The court found the firm had taken reasonable steps at  
279 this stage of the discussions. (*Id.*, 7.) However, after the conflict search revealed no conflict,  
280 attorneys at the disqualified firm participated in several calls and meetings, learned SkyBell’s  
281 business objectives and goals for its patent litigation and presented a 40-page proposal  
282 containing the firm’s strategic analysis. There was no similar admonition to SkyBell to restrict  
283 the information required of the firm to undertake SkyBell’s representation once conflicts had  
284 cleared. The court faulted the lawyers for not affirmatively warning SkyBell to limit its  
285 disclosure of information after conflicts had cleared (*Id.* at 7-9.) , stating “there must be some  
286 type of preceding or concurrent affirmative act that is carried out by the attorney to limit the

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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”). However, there is authority from other jurisdictions enforcing such a general consent against a sophisticated client represented by counsel. *Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013). The California Supreme Court has expressly declined to express a view on the validity of more broadly framed advance consents. *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, 6 Cal. 5<sup>th</sup> 59, 86 (2018). Instead, the Supreme Court rested its decision invalidating the consent in that case upon the fact that the law firm had failed to disclose a known existing concurrent loyalty conflict with an existing client. *Id.*

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287 disclosure.... Skybell’s representatives were never informed ... that they should withhold any  
288 information and were actually encouraged to provide all the information they could.”(Id.)

289  
290 Neither the Rule nor the Comments thereto define what constitutes information “reasonably  
291 necessary to determine whether to represent the prospective client. The only reported  
292 decision construing rule 1.18 also declined to take a position on that issue. (*Skybell*  
293 *Technologies*, supra, *Id.* at 9 [“it is a close question whether the information...received was  
294 reasonably necessary ... to determine whether to represent Skybell. Nonetheless, the Court  
295 need not decide this issue because it has already determined... any reasonable measures to  
296 avoid exposure to such information were not taken.”]) It has been argued that such  
297 information is limited solely to the information necessary to determine whether the lawyer is  
298 ethically permitted to undertake the case, such as information necessary to check conflicts and  
299 perhaps, in a litigation context, sufficient information about the merits to permit a preliminary  
300 judgment that the prospective client’s position is not frivolous. We do not think that the  
301 language can be read so narrowly.

302 The Rule does not expressly limit the information a reasonable lawyer would require to  
303 determine whether representation should occur to a conflict inquiry. Instead, it addresses  
304 information reasonably necessary for the lawyer to decide whether the lawyer is willing to  
305 represent the client. Information reasonably necessary reflects an objective standard and will  
306 depend on the nature of the case and the representation. Such information could include  
307 information about the prospective client and its business or the merits of the case that is far  
308 more extensive than needed to determine whether representation is ethically permissible. A  
309 contrary reading of the rule which would permit screening only in cases involving information  
310 necessary for ethical compliance would reduce the class of cases in which screening made a  
311 difference to an inconsequential number, since most conflict inquiries will not result in the  
312 communication of material confidential information. This conclusion is supported by the  
313 Restatement (3rd) of the Law Governing Lawyers, §15. There, the reporters comment (c), §15,  
314 provides in pertinent part:

315  
316 It is often necessary for a prospective client to reveal and for the  
317 lawyer to learn confidential information (see §59) during an initial  
318 consultation prior to their decision about formation of a client-  
319 lawyer relationship. For that reason, the attorney-client privilege  
320 is attaches to communications of a prospective client (see §70,  
321 Comment e). The lawyer must often learn such information to  
322 determine whether a conflict of interest exists with an existing  
323 client of the lawyer *or the lawyer’s firm and whether the matter is*  
324 *one that the lawyer is willing to undertake.*

325 oOo

326 In order to avoid acquiring disqualifying information, a lawyer  
327 considering whether or not to undertake a new matter may limit

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328 the initial interview to such confidential information as reasonably  
329 appears necessary for that purpose. Where that information  
330 indicates that a conflict of interest or *other reasons for*  
331 *nonrepresentation* exists, the lawyer should so inform the  
332 prospective client or simply decline the representation....

333 To summarize, in order to satisfy the requirements of Rule 1.18(d)(2) an interviewing law firm  
334 must undertake affirmative actions to avoid exposure to more information than is reasonably  
335 necessary to determine whether to represent the prospective client. The Committee concludes  
336 that such information may, in appropriate circumstances, exceed the information required to  
337 determine whether the representation is ethically proper.

### 338 **Discussion of Scenarios**

339 In all of the scenarios, Lawyer received information that is protected by the obligation of  
340 confidentiality and that is material. Rule 1.18 (b) and (c). Accordingly, Lawyer owes a duty to PC  
341 not to use or disclose information received as result of the consultation. Rule 1.18 (b). In  
342 addition, except in Scenario 2a, where the information received by the lawyer ceases to be  
343 material at the time that PC files a suit against Competitor, Lawyer is prohibited from acting  
344 adversely to PC in the same or a substantially related matter without informed written consent  
345 from PC and the affected client, Competitor, or an effective advanced consent. Further, in the  
346 absence of an effective informed consent, Lawyer and Law Firm need to satisfy the conditions  
347 necessary for an effective ethical screen set forth in rule 1.18(c) and (d) (2) in order for the Law  
348 Firm to be permitted to represent Competitor.

#### 349 **Scenario 1**

350  
351 Here, the Prospective client has not provided informed consent for Lawyer to represent  
352 Competitor nor has the Lawyer taken any measures—let alone reasonable measures—to  
353 ensure that the Lawyer would receive no more information than was reasonably necessary to  
354 determine whether or not to represent the prospective client. Rule 1.18 (c)-(d); *accord, SkyBell*  
355 *Technologies Inc. v. Ring*, 2018 WL 601-6156 [there must be some type of preceding or  
356 concurrent affirmative act that is carried out by the lawyer to limit the disclosure and the  
357 lawyer should advise prospective client to withhold any information deemed “confidential”].)  
358 Accordingly, neither Lawyer nor Law Firm may represent Competitor.

#### 359 **Scenario 2a**

360 In this scenario, Lawyer has learned that PC plans to sue a current client of Law Firm,  
361 Competitor. This information is material to both PC and to Competitor. Consistent with the  
362 analysis under Scenario 1, Lawyer owes a duty to PC not to use or disclose information  
363 received as result of the consultation. On the other hand, Lawyer has a duty to inform his  
364 current client of significant developments related to the representation. While there is no  
365 reported California case on point here, the weight of ethics opinions is that Lawyer may not use  
366 or disclose the information acquired from PC to Law Firm’s existing client, Competitor,

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367 notwithstanding Lawyer’s duty to communicate (Rule 1.4)<sup>7</sup> and the inherent duty of loyalty to  
368 Competitor.<sup>8</sup>

369 In *Flatt v. Superior Court* (1994) 9 Cal 4<sup>th</sup> 275, the California Supreme Court held that an  
370 lawyer’s duty of loyalty to an existing client not only precluded the lawyer from representing a  
371 prospective client against the existing client but also insulated the lawyer from liability in failing  
372 to advise the prospective client of the potential statute of limitations of any claim the  
373 prospective client may have against the lawyers existing client. The court in *Flatt*, however, did  
374 not address the obligation, if any, of the lawyer to disclose to the existing client the information  
375 the prospective client provided to the lawyer. However, rule 1.6 and Business and Professions  
376 Code section 6068(e)(1) contain no exception that would authorize such disclosure. Further,  
377 case law and prior opinions from this Committee and local bar committees demonstrate that in  
378 such a context the duty of confidentiality remains paramount so that disclosure to Competitor  
379 is not permitted.

380 In Cal. State Bar Formal Opn. No. 2003-163, this Committee opined that when an outside  
381 lawyer represents a corporation and also simultaneously represents a corporate constituent  
382 (the Chief Financial Officer) in an unrelated matter, the duty of confidentiality precluded the  
383 lawyer from disclosing the confidences of the CFO to the corporation without the CFO’s consent  
384 despite the duty to communicate and the duty of loyalty owed to the corporation.

385 In LA County 528 (2017), LA County 528, the opinion concluded that an lawyer engaged by an  
386 insurance carrier to defend the interests of an insured is prohibited from disclosing to the  
387 insurance carrier information obtained from the insured that could provide a basis for the  
388 insurance carrier to deny coverage.

389 In *A v. B*, 158 A. J. 51(1999) a law firm represented a husband and wife jointly in planning their  
390 estates. Through an error in the firm’s conflict system, the firm started to represent a woman in

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<sup>7</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>8</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. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> 286. Moreover the duty of loyalty may arise without potential breaches of confidentiality. (*Id.*)

391 a paternity action against the husband. When the firm realized the error, it withdrew from the  
392 representation against the husband and asked the husband for consent to disclose the  
393 existence of the illegitimate child to the wife, but the husband refused. The New Jersey  
394 Supreme Court held that the information was confidential, but the broad New Jersey exception  
395 for fraud prevention permitted the firm to disclose to the wife. California has not recognized  
396 any exception to the duty of confidentiality that would permit disclosure here.

397 Inherent in the logic of these decisions and comments to rule 1.6 is the implicit recognition that  
398 the duty of confidentiality overrides the lawyer's subsequent duties of loyalty and to  
399 communicate to his or her other client information that may be material to the client's  
400 representation. (Comment 1, Rule 1.6, citing *In Re Jordan* (1974) 12 Cal 3<sup>rd</sup> 575, 580) The  
401 Committee has found no authority that would suggest the rule should be otherwise with  
402 respect to disclosures made by either a prospective client or a previous client. Accordingly, in  
403 each scenario the Lawyer has a duty not to use or disclose the information imparted by PC  
404 absent application of rule 1.6 (b) or PC's informed consent. (Rule 1.18(b), referring to Rule 1.9.)<sup>9</sup>

405 Should PC later sue Competitor, however, Lawyer would likely be permitted to represent  
406 Competitor against PC, because the confidential information that Lawyer received from PC  
407 concerning its intention to sue Competitor is rendered moot and immaterial by the fact that PC  
408 has now sued, a fact now known by Competitor, and Lawyer received no other information that  
409 would be material to the resolution of the case. Rule 1.18 (c).<sup>10</sup> Further, even if Lawyer were  
410 prohibited from representing Competitor, a timely screen and compliance with rule 1.18(d)(2)  
411 should permit Law Firm to represent PC because, unlike in Scenario 1, Lawyer took reasonable  
412 steps to obtain no more information than was necessary to determine whether Lawyer or Law  
413 Firm had a conflict of interest.

414 **Scenario 2b**

415 Unlike scenario 2a, PC volunteers material confidential information to Lawyer during the  
416 interview even though the Lawyer had instructed the client not to provide such information and  
417 Lawyer's questions did not seek to elicit such information.

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<sup>9</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 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>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.

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418 As with the other scenarios, PC was engaged in a good faith effort to obtain legal  
419 representation, and the Lawyer indicated a willingness to discuss that possibility. Therefore,  
420 under rule 1.18(b) Lawyer may not use or disclose the confidential information. And, because  
421 Lawyer has acquired material confidential information from PC, even though Lawyer instructed  
422 Lawyer not to disclosure such information, Lawyer is prohibited from acting adversely to PC in  
423 the same or substantially related matter. (Rule 1.18(c)). However, because Lawyer took  
424 reasonable measures to avoid the disclosure of any more information than was reasonably  
425 necessary to determine whether to accept the representation, Law Firm would not be  
426 prohibited from representing Competitor if Law Firm timely establishes an effective ethical  
427 screen and complies with the requirements of rule 1.18 (d) (2).

### 428 **Scenario 3**

429 As with the other scenarios, Lawyer is prohibited from representing Competitor and may not  
430 use or disclose the confidential information received from PC. On the other hand, Law Firm  
431 should be able to represent Competitor with a timely and adequate screen and compliance  
432 with the rule 1.18(d)(2) because at all times the Lawyer made reasonable efforts to avoid  
433 disclosure to more information than was reasonably necessary to determine whether to  
434 undertake the representation. Information necessary to determine whether to undertake the  
435 representation is context dependent and may include information other than information to  
436 determine whether the engagement is ethically permissible. For example, it may be reasonable  
437 to request information from a perspective client relating to the client's reputation, ability to pay  
438 its bills, or, in contingent fee or fee award cases, the merits of the case and recoverable  
439 damages. In this case, Lawyer initially advised PC to disclose only the information necessary to  
440 determine whether a conflict existed. Then, when PC requested representation on an hourly  
441 basis, Lawyer advised PC to disclose only the information that was necessary to determine  
442 whether PC would be able to pay anticipated fees on an hourly basis. Finally, when PC  
443 requested instead that Law Firm undertake the cases on a contingent basis, Lawyer advised the  
444 client that it should provide no more information than needed to permit Lawyer to assess the  
445 likelihood of success and the amount of a recovery from which fees would be paid. In each  
446 instances, Lawyer cautions PC against disclosing more information that is reasonably necessary  
447 for Lawyer's inquiry. Under the circumstances, each of these classes of information was no  
448 broader than reasonably necessary for Lawyer to decide whether it would recommend to Law  
449 Firm to accept the case on the terms proposed by PC. In addition, after receiving and reviewing  
450 PC's information and deciding against recommending that Law Firm take the case, Lawyer does  
451 not share any of PC's information, the related analysis that Lawyer conducted or any  
452 conclusions that Lawyer reached with any other member of Law Firm.

453 Under these facts, it is the Committee's opinion that Lawyer's affirmative efforts to secure no  
454 more information than necessary to determine whether to undertake PC's representation

455 would permit Law Firm to represent Competitor if Law Firm timely set up an ethical screen and  
456 complied all the requirements of rule 1.18(d)(2).<sup>11</sup>

457 **Scenario 4:**

458 Consistent with the discussion under Scenario 2a and 3, Lawyer and the team who received  
459 PC's material confidential information are prohibited from representing Competitor against to  
460 PC, because they actually received confidential information material to the matter. Again,  
461 Lawyer and the interviewing team may not use or disclose such confidential information.

462 The availability of ethical screening for Law Firm, independent of informed consent under these  
463 facts, is more problematic since not only has Lawyer obtained information that was necessary  
464 for Law Firm's decision to represent PC, but, at PC's request, Lawyer has obtained information  
465 and provided analysis and work product to PC in order to persuade PC to retain Lawyer and  
466 Law Firm; information that Lawyer did not require to decide that Law Firm was both willing and  
467 able to take the case. It is doubtful that the scope of information received by Lawyer and the  
468 interviewing team that PC insists on providing in order to evaluate Law Firm's qualifications is  
469 "reasonably necessary [for the lawyer] to determine whether to represent the prospective  
470 client..." and accordingly, it is doubtful that ethical screening would be available and sufficient  
471 to permit the Law Firm to represent Competitor.

472 Here, however, PC is prepared to give informed written consent to any conflict created by  
473 Lawyer's receipt of any confidential information and the resulting screening arrangement so  
474 that Law Firm could represent Competitor. Moreover, PC gave advanced written consent to the  
475 firm's representation of Competitor, provided that any lawyers who received its confidential  
476 information in the course of the beauty contest were timely screened from the matter.

477 Assuming PC gave its informed written consent in compliance with applicable case law and as  
478 described in Comment [9] to rule 1.7, PC's advanced consent to both Law Firm's future  
479 representation of Competitor and the screening arrangement is ethically proper. It is limited to  
480 a single identified client and single matter, and provides sufficient disclosure under the  
481 reasoning of *Zador Corp. v. Kwan, supra*, 31 Cal. App. 4<sup>th</sup> 1285 and *Elliott v. McFarland Unified*  
482 *School Dist., supra*, 165 Cal. App. 3d 562.<sup>12</sup> In addition, with this advanced consent, PC is  
483 waiving only the right to insist on imputed disqualification despite an effective ethical screen, a  
484 more modest forfeiture than in *Zador* or *McFarland* which upheld consents resulting in the full  
485 waiver of the protections afforded a present or former client. Furthermore, here PC is

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<sup>11</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.

<sup>12</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.

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486 sophisticated and represented by its own in house counsel and specifically invited the  
487 disclosure in order to meet its own objectives.

488 **CONCLUSION**

489 An interviewing lawyer owes the prospective client the same duty of confidentiality owed an  
490 existing client pursuant to rule 1.6, even though no lawyer-client relationship thereafter ensues.  
491 (Rule 1.18(a)) The lawyer may not use or disclose such information without the prospective  
492 client’s informed consent. (Rule 1.18(b)) This is so even if the information would be material to,  
493 or a significant development in connection with, the representation of, an existing client of the  
494 lawyer or the lawyer’s law firm—the duty of confidentiality to the prospective client outweighs  
495 the duty to inform the current client.

496 An interviewing lawyer who receives material confidential information from a prospective client  
497 is prohibited from accepting representation adverse to the prospective client in the same or a  
498 substantially related matter. That prohibition is imputed to other members of the law firm  
499 unless the interviewing lawyer took reasonable measures to obtain only that information  
500 reasonably necessary to determine whether to represent the existing client and the law firm  
501 promptly undertook the screening measures specified in Rule 1.18 (d) (2). Reasonable  
502 measures include advising the prospective client to provide only identified information that the  
503 lawyer needs to decide whether to undertake the representation and limiting questioning of  
504 the client so as to elicit only such information. The information reasonably necessary to  
505 determine whether to represent the prospective client is that which a reasonable lawyer in the  
506 situation of the interviewing attorney would require to determine whether the proposed  
507 representation was both ethically proper and economically acceptable. Such information may  
508 include information relating to the client’s reputation or financial condition, the merits of the  
509 claim, and the likely range of recoveries.

510 The prohibition against accepting a representation that is materially adverse to a prospective  
511 client resulting from the receipt of that prospective client’s material confidential information  
512 can be waived with the informed written consent of both the prospective client and any  
513 affected client of the law firm. (Rule 1.18 (d) (1). Correspondingly, a prospective client may  
514 give advance consent to the law firm acting adversely to the prospective client in the same  
515 matter or substantially related matters. (Rule1.9(a) and Rule 1.18(b))

516 This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of  
517 the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of  
518 California, its Board of Trustees, any persons, or tribunals charged with regulatory  
519 responsibilities, or any licensee of the State Bar.