

1 Draft prepared for the September 11, 2020 COPRAC Meeting

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10 THE STATE BAR OF CALIFORNIA
11 STANDING COMMITTEE ON
12 PROFESSIONAL RESPONSIBILITY AND CONDUCT
13 DRAFT FORMAL OPINION INTERIM NO. 17-0003
14 DUTIES TO PROSPECTIVE CLIENTS AND ETHICAL SCREENING
15

16
17 **ISSUES:**

18 1. When a prospective client has provided material confidential information
19 to an interviewing lawyer, may the interviewing lawyer disclose or use that
information?

20 2. When the interviewing lawyer has received material confidential
21 information from a prospective client, under what conditions is ethical
22 screening available so that other lawyers in the lawyer’s law firm may
23 represent other clients who are adverse to the prospective client in the same
24 or substantially related matters?

25 3. To what extent can a prospective client give advanced informed written
26 consent to permit an interviewing lawyer’s law firm to be adverse to a former
27 prospective client in the same or substantially related matter in circumstances
28 where the interviewing lawyer would be prohibited from representing the
29 client and screening would otherwise be insufficient to ensure that law firm’s
30 right to do so.

31 **DIGEST:**

32 When a person is a prospective client within the meaning of rule 1.18(a), the
33 interviewing lawyer owes the prospective client the same duty of
34 confidentiality owed an existing or former client pursuant to rules 1.6 and 1.9
35 even though no lawyer-client relationship thereafter ensues. (Rule 1.18(a)) The
36 lawyer may not use or disclose such information without the prospective
37 client’s informed written consent. (Rule 1.18(b), Rule 1.9(a)) This is so even if
38 the information would be material to the representation of an existing client of
39 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.¹

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

¹ 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

74 **Facts Common to Each Scenario:**

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

79 **Scenario 1**

80 At the outset of the interview, Lawyer advises PC that Lawyer has not agreed to
81 represent PC and that the decision will be made after the interview and subject to Law Firm’s
82 approval. Lawyer does not provide PC with any guidance about what PC should disclose to
83 Lawyer or caution PC against the disclosure any material confidential information. Instead,
84 Lawyer begins asking PC open ended questions about PC’s business and PC’s potential claims
85 against Competitor. During the interview, PC provides confidential information about the
86 merits of the case and about PC’s ability to finance the case. The disclosure of such information
87 or use of it for the benefit of an opponent, including Competitor, would materially damage PC’s
88 case. Shortly after the interview, Lawyer advises PC that Law Firm will not take PC’s case.
89 Subsequently, Competitor seeks to retain Law Firm to defend Competitor in the matter brought
90 by PC. Law Firm is prepared to set up an ethical screen isolating Lawyer who met with PC².

² 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. 4th 776, 810, citing *Speedee Oil, supra*, 20 Cal. 4th 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; and

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92 **Scenario 2a**

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

5. Continuing education in professional responsibility.

(*Kirk v. First American Title Ins. Co.*, *supra*, 183 Cal. App. 4th 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 any of PC's information with
132 any 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 PC's interests. Law Firm is prepared to initiate
135 a timely and effective screen of Lawyer and to comply with the requirements of rule 1.18(d)(2).

136 **Scenario 4**

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

154 **DISCUSSION**

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

157 Rule 1.18 Duties to Prospective Client

158 (a) A person* who, directly or through an authorized representative, consults a lawyer
159 for the purpose of retaining the lawyer or securing legal service or advice from the
160 lawyer in the lawyer's professional capacity, is a prospective client.

161
162 (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated
163 with a prospective client shall not use or reveal information protected by Business and

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164 Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a
165 result of the consultation, except as rule 1.9 would permit with respect to information
166 of a former client.

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

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

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

182
183 (2) the lawyer who received the information took reasonable* measures to avoid
184 exposure to more information than was reasonably* necessary to determine
185 whether to represent the prospective client; and

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

189
190 (ii) written* notice is promptly given to the prospective client to enable
191 the prospective client to ascertain compliance with the provisions of this
192 rule.

193
194 Under the express language of rule 1.18, a duty of confidentiality arises even when no
195 lawyer client relationship ensues when (1) a person consults a lawyer for the purpose of
196 retaining the lawyer or securing legal advice from the lawyer in the lawyer's professional
197 capacity, and (2) as a result of the consultation, the lawyer receives information that is
198 protected by Business and Professions Code Section 6068(e) and rule 1.6—that is, information
199 that is confidential. (Rule 1.18(b)). To qualify as a prospective client, the person consulting the
200 lawyer must have (1) a good faith intention to seek legal advice or representation and (2) a
201 reasonable expectation, based on the lawyer's conduct, that the lawyer is willing to discuss the

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202 possibility of forming a lawyer client relationship or providing legal advice. (*Id.*, Comment [2];
203 Formal Opinion 2003-161 at p. 6)³. (Rule 1.18, Comment [2]⁴; .)

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

215 Rule 1.18(d)(1) contemplates a bilateral informed consent from both the prospective
216 client and the affected client. Rule 1.18(d) does not address whether such consent can be given
217 by the prospective client alone in advance of the conflict having arisen. On the other hand,
218 other provisions of the rules indicate that in appropriate circumstances such consents may be
219 enforceable. Comment [9] to rule 1.7 expressly states that rule 1.7 “does not preclude an
220 informed written consent to a future conflict in compliance with applicable case law.” Formal

³ 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 the 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).”

⁴ This paragraph departs from 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.)

⁵ 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. 4th 556, 565.)

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221 Opinion 1989-115 is to the same effect, stating that “an advance waiver of both conflict of
222 interest and confidentiality protections is not, *per se*, invalid. (*Id.* at 3). The Restatement of the
223 Law Governing Lawyers at comment c to Section 15 [A Lawyer’s Duties to a Prospective Client]
224 also recognizes advance consents in the context of an interview with a prospective client:

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

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

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

⁶ 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.

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

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

276 Initially, the firm told SkyBell’s outside patent counsel to provide only so much
277 information as necessary to conduct a conflict search. The court found the firm had taken
278 reasonable steps at this stage of the discussions. (*Id.*, 7.) However, after the conflict search
279 revealed no conflict, attorneys at the disqualified firm participated in several calls and
280 meetings, learned SkyBell’s business objectives and goals for its patent litigation and presented
281 a 40-page proposal containing the firm’s strategic analysis. There was no similar admonition to

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”).) 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 state a view on the validity of more broadly framed advance consents. (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, 6 Cal. 5th 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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282 SkyBell to restrict the information required of the firm to undertake SkyBell’s representation
283 once conflicts had cleared. The court faulted the lawyers for not affirmatively warning SkyBell
284 to limit its disclosure of information after conflicts had cleared (Id. at 7-9.) , stating “there must
285 be some type of preceding or concurrent affirmative act that is carried out by the attorney to
286 limit the disclosure.... Skybell’s representatives were never informed ... that they should
287 withhold any information and were actually encouraged to provide all the information they
288 could.” (Id.)

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

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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.*

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In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit the initial interview to such confidential information as reasonably appears necessary for that purpose. Where that information indicates that a conflict of interest or *other reasons for nonrepresentation* exists, the lawyer should so inform the prospective client or simply decline the representation....

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

338 **Discussion of Scenarios**

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

349 **Scenario 1**

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

359 **Scenario 2a**

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In this scenario, Lawyer has learned that PC plans to sue a current client of Law Firm, Competitor. This information is material to both PC and to Competitor. Consistent with the analysis under Scenario 1, Lawyer owes a duty to PC not to use or disclose information

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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,
367 notwithstanding Lawyer's duty to communicate (Rule 1.4)⁷ and the inherent duty of loyalty to
368 Competitor.⁸

369 In *Flatt v. Superior Court* (1994) 9 Cal 4th 275, the California Supreme Court held that a
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
381 outside lawyer represents a corporation and also simultaneously represents a corporate
382 constituent (the Chief Financial Officer) in an unrelated matter, the duty of confidentiality
383 precluded the lawyer from disclosing the confidences of the CFO to the corporation without the
384 CFO's consent despite the duty to communicate and the duty of loyalty owed to the
385 corporation.

⁷ 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

⁸ The duty of loyalty implicates the biblical injunction against "serving two masters (Matthew 6:24)." (*Flatt v. Superior Court, supra*, 9 Cal 4th 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 4th 286. Moreover the duty of loyalty may arise without potential breaches of confidentiality. (*Id.*)

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

390 In *A v. B*, 158 A. J. 51(1999) a law firm represented a husband and wife jointly in
391 planning their estates. Through an error in the firm's conflict system, the firm started to
392 represent a woman in a paternity action against the husband. When the firm realized the error,
393 it withdrew from the representation against the husband and asked the husband for consent to
394 disclose the existence of the illegitimate child to the wife, but the husband refused. The New
395 Jersey Supreme Court held that the information was confidential, but the broad New Jersey
396 exception for fraud prevention permitted the firm to disclose to the wife. California has not
397 recognized any exception to the duty of confidentiality that would permit disclosure here.

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

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

⁹ 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.

¹⁰ There may be circumstances where, for some reason, the lawyer'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.

415 **Scenario 2b**

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

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

429 **Scenario 3**

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

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454 Under these facts, it is the Committee’s opinion that Lawyer’s affirmative efforts to
455 secure no more information than necessary to determine whether to undertake PC’s
456 representation would permit Law Firm to represent Competitor if Law Firm timely set up an
457 ethical screen and complied all the requirements of rule 1.18(d)(2).¹¹

458 **Scenario 4:**

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

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

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

478 Assuming PC gave its informed written consent in compliance with applicable case law
479 and as described in Comment [9] to rule 1.7, PC’s advanced consent to both Law Firm’s future
480 representation of Competitor and the screening arrangement is ethically proper. It is limited to
481 a single identified client and single matter, and provides sufficient disclosure under the
482 reasoning of *Zador Corp. v. Kwan, supra*, 31 Cal. App. 4th 1285 and *Elliott v. McFarland Unified*
483 *School Dist., supra*, 165 Cal. App. 3d 562.¹² In addition, with this advanced consent, PC waived
484 only the right to insist on imputed disqualification notwithstanding the existence of an effective

¹¹ The determination of whether reasonable measures were taken to limit information acquired and to limit that information to information reasonably necessary to determine whether a lawyer can or should represent a prospective client is plainly an objective, fact dependent inquiry which must be determined on a case-by-case basis.

¹² 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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485 ethical screen, a more modest forfeiture than in *Zador* or *McFarland* which upheld consents
486 resulting in the full waiver of the protections afforded a present or former client. Furthermore,
487 here PC is sophisticated and represented by its own in house counsel and specifically invited
488 the disclosure in order to meet its own objectives.

489

490

CONCLUSION

491 An interviewing lawyer owes a prospective client the same duty of confidentiality owed
492 an existing client whether or not a lawyer-client relationship thereafter ensues. (Rule 1.18(a))
493 The lawyer may not use or disclose such information without the prospective client's informed
494 consent. (Rule 1.18(b)) This is so even if the information would be material to the
495 representation of an existing client of the lawyer or the lawyer's law firm—the duty of
496 confidentiality to the prospective client outweighs the duty to inform the current client.

497 A lawyer who receives material confidential information from a prospective client is
498 prohibited from accepting representation adverse to the prospective client in the same or a
499 substantially related matter absent informed written consent, which may be given in advance
500 of receiving the information (Rule 1.9(a) and Rule 1.18(b)). Likewise, absent informed written
501 consent, the other members of the lawyer's law firm are prohibited from representing the
502 client unless the interviewing lawyer took reasonable measures to obtain only that information
503 reasonably necessary to determine whether to represent the existing client and the law firm
504 promptly undertook the screening measures specified in Rule 1.18 (d) (2).

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