

To: Rules Revision Commission
From: Rule 1.18 Drafting Team
Re: Proposed Rule 1.18 – Public Comment & Reconsideration
Date: August 15, 2016

Recommendation

The drafting team recommends that the Commission revisit its decision at the June 3, 2016 meeting session to recommend rejection of a rule counterpart to Model Rule 1.18.

Background & Discussion

At the June 3, 2016 Commission meeting session, the Commission defeated a motion to approve proposed Rule 1.18, as amended during the meeting, by a 6-8-0 vote [[Zipser, Chou, Harris, Martinez, Stout & Tuft voting yes; Croker, Eaton, Ham, Inlender, Kehr, Kornberg, Langford, Rothschild voting no]. (See 6/2-3/2016 Mohr Meeting Notes, attached).

The Commission has received a single public comment from Richard Zitrin on behalf of several dozen law professors who teach Legal Ethics in California. The law professors wrote:

This rule is particularly important because it codifies what common law supports: that a prospective client who does not “mature” into a client is still entitled to confidentiality. The rule notes that that confidentiality may result in receipt of information that could disqualify a lawyer from representation “adverse to those of a prospective client in the same or a substantially related matter.” This is a rule that protects the public by allowing people to seek representation without fear that a consulted lawyer can use the confidential information received against that client. The absence of this rule favors lawyers over the public. (See 7/26/2016 Law Professors’ Letter re 1.18, attached.)

A substantial majority of the drafting team, four of five, voted in favor approving the rule.

In light of (i) the close vote of the Commission, (ii) a substantial majority of the drafting team favoring a rule, and (iii) the comment received from the California law professors, the drafting team requests that Commission members consider whether the proposed rule should be revisited and discussed at one of the meetings that have been scheduled to consider public comment (August 26, September 30 or October 21-22, 2016).

Attached:

RRC2 - [1.18] - 06-02 & 06-03-16 KEM Meeting Notes - DFT2.1 (06-09-16).pdf

RRC2 - [1.18] - Report & Recommendation - DFT1.4A (05-20-16).pdf

RRC2 - [3-100][1.18] - PubCom - X-2016-32p-Law Professors (Zitrin) [1.18]-PH2.pdf

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

Mohr Meeting Notes

OPEN SESSION

Thursday, June 2, 2016 (10:00 am – 4:30 pm)

Friday, June 3, 2016 (9:00 am – 4:30 pm)

L.A. Downtown Hotel (Thursday)
State Bar of California (Friday)
845 So. Figueroa Street
Room 2C-E, 2nd Floor
Los Angeles, CA 90017

Questions regarding this agenda should be directed to the Commission Coordinator, Randall Difuntorum (415) 538-2161 or the Commission Chair, Justice Lee Edmon (415) 538-2107. Commission members are requested to notify the Commission Coordinator as early as possible in advance of the meeting if they wish to remove any item/s from the consent agenda.

A. Commission Members Present: Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair) [Thursday], Dean Zipser (Co- Vice-Chair); Danny Chou, Nanci Clinch [Thursday], Joan Croker [Friday], Daniel Eaton, James Ham, Lee Harris, Tobi Inlender (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout, Mark Tuft [Friday].

B. Commission Members Absent: George Cardona, Hon. Karen Clopton,

Others Present: Allen **Blumenthal** (OCTC), Randall **Difuntorum** (State Bar); Gordon **Grenier** (State Bar Court)(Friday), Greg Fortescue (S.Ct.), Jason **Lee** (BOT Liaison); Mimi **Lee** (State Bar); Erika **Leighton** (OGC); Edith **Matthai** (Advisor)(Friday); Lauren McCurdy (State Bar), Kevin **Mohr** (Consultant), Heather **Rosing** (Advisor); Andrew Tuft (State Bar); Mr. **Blum**, Mr. **Castaneda**, Amos **Hartston** (Cal. Comm'n on Access to Justice); Diane **Karpman**; Stan **Lamport**, Teresa Schmid (LACBA); Neil **Wertlieb** (LACBA).

C. The order of business is approximate and subject to change. Items scheduled for a particular day may be moved to an earlier or later day.

To Join by Teleconference:

Toll-free dial-in number: 1-855-520-7605

Conference code: 253-541-0212#

OPEN SESSION

I. ACTION.

I. Report and Recommendation on ABA Model Rule 1.18 (Duties to Prospective Clients).

Materials Prepared For/Considered At Meeting:

- RRC2 - [1.18] - Report & Recommendation - DFT1.4A (05-20-16).docx
- May 23, 2016 Marlaud Email re 1.18 to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy & Lee:
1¹
- May 19, 2016 OCTC Memo [Dresser] re 1.18 to RRC2: 1
- May 24, 2016 Kehr Email re 1.18 to Difuntorum & Mohr: 1

FRIDAY, June 3, 2016

1. Chair: Asks Mr. Zipser to summarize the drafting team's proposals regarding proposed Rule
2. Zipser: Summarizes approach team took re rule.
 - a. Explains that it is an attempt at balancing the interests of current clients in retaining the lawyer of their choice and the interests of the prospective client in protecting the confidentiality of information disclosed during a preliminary consultation.
 - b. Notes that same cleanup as for Rules 1.10, 1.11 and 1.12 should be made:
 - (1) Delete (d)(2)(3) [equivalent of 1.10(a)(2)(iv).
 - (2) Insert "[in accordance with Rule 1.0.1(k)]" in subparagraph (d)(2)(i)
 - c. Also notes that not adverse to make changes to paragraph (a) per Mr. Kehr's email to conform the language to that of Evidence Code § 951:
“(a) A person who, directly or through an authorized representative, consults a lawyer for purpose of ~~forming a~~retaining the lawyer-~~client~~ relationship or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.”
3. Stan Lamport: Opposes the rule and screening.
4. Diane Karpman: This is one area where a screen should not be permitted.
5. Tuft: That tees up the policy issue.
 - a. Distinguish between duties to former clients and duties to current clients.
 - b. Should we allow an initial consultation limited to that amount reasonably necessary to determine whether to accept the matter preclude all other lawyers in the firm from taking the adverse position?
 - c. That is the issue. The vast majority of jurisdictions have adopted MR 1.18.
6. Harris: This is a critical issue.
7. Eaton: Asks re whether the rule addresses beauty contest.
 - a. Zipser: Where you delve into the issue and get information so you can respond, then you have crossed the line under the Rule.

¹ Numbers refer to page numbers in E-mail compilation dated 5/30/16.

8. Ham: Agrees with Mr. Zipser on his statement.
 - a. However, does not think this rule has much utility as a disciplinary rule.
 - b. This is an ABA procedural guidance rule; not a disciplinary rule.
9. Rothschild: Client applying for legal services.
 - a. Firm has obtained financial information.
 - b. Clients intentionally try to conflict out the legal services program.
 - c. How do you establish the client's "purpose" not to seek advice but to disqualify the legal services program?
 - d. And who do you screen?
10. Langford: Does not think we need a rule but if we have one, this is good.
 - a. Arguably do not have as much a duty to a prospective client.
 - b. Cites to Flatt case.
 - c. Should permit screening in this situation.
11. Tuft: We have a rule on duties, e.g., confidentiality, to current and former clients, but no rule regarding prospective client.
 - a. Prospective clients should have a rule.
 - b. The current clients of the interviewing lawyer deserve that.
 - c. The issue is whether to permit screening; how much protection is the prospective entitled to.
 - d. The interviewing lawyer is precluded – forever.
 - e. But what about the other lawyers in the law firm?
12. Kehr: When voted against screening, still took comfort that in laterally moving lawyer situation, the screen can be erected before the lawyer arrives at the firm.
 - a. Not true here. You are asking client to believe that the lawyer/lawyers w/ whom the client spoke about the matter did not speak to anyone else and that the tainted lawyer/lawyers can be effectively screened.
 - b. You can't erect the screen before the lawyer arrives
 - c. There is no system in place before a lawyer
13. Ham: Against rule; inviting problems.
 - a. Rule is client-centric.
 - b. He receives a slew of emails seeking his representation; will he be conflicted out through an unilateral, unsolicited email.
14. Rosing: Concerned with unilateral communications.
 - a. There is no duty where it is truly unilateral.
 - b. Comment [2] is thus a problem.
 - c. However, if we have the rule, screening is a necessary step.
 - d. Rainmakers get a ton of people who call them; the rainmakers can't put everyone in the conflict system.
 - e. Screening must be robust; thinks an appropriate screen can be effective.

15. **MOTION** [6/3/2016 @ 2:10 p.m.] [Tuft; Zipser (second)]: Recommend adoption of black letter of proposed Rule 1.18, as amended (paragraph (a)):

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

VOTE: 6-8-0 [Zipser, Chou, Harris, Martinez, Stout & Tuft voting yes; Croker,

Eaton, Ham, Inlender, Kehr, Kornberg, Langford, Rothschild voting no]
MOTION FAILS.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.18 [No California Rule Counterpart]

Lead Drafter: Zipser
Co-Drafters: Harris, Inlender, Stout & Tuft
Meeting Date: June 2-3, 2016

I. CURRENT CALIFORNIA RULE

There is no California rule counterpart to ABA Model Rule 1.18.¹

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

A majority of the drafting team members voted to recommend a proposed new rule as set forth below in Section III. The vote was four in favor of making the recommendation (Zipser, Harris, Stout and Tuft) and one opposed (Inlender).

III. PROPOSED RULE 1.18 (CLEAN)

Rule 1.18 Duties To Prospective Client

- (a) A person who consults a lawyer for purpose of forming a lawyer-client relationship or securing legal advice is a prospective client.
- (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 that the lawyer learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received information that prohibits representation as provided in

¹ Although there is no rule of professional conduct that incorporates the concept embodied in proposed Rule, Evidence Code § 951 is relevant. Section 951 provides:

951. As used in this article, "client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

See also State Bar Formal Ethics Opns. [2003-161](#) and [2005-168](#).

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paragraph (c), representation of the affected client is permissible if:

- (1) both the affected client and the prospective client have given informed written consent, or
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client; and
 - [(iii) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing that information from being disclosed to the firm and its client.]

Comment

[1] As used in this Rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client can be limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Although a prospective client's information is protected by Business and Professions Code § 6068(e) and Rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm is permitted to accept or continue representation of a client with interests adverse to the prospective client. This Rule is not intended to limit the application of Evidence Code § 951 (defining "client" within the meaning of the Evidence Code).

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without 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).

[3] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably appears necessary for that purpose.

[4] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers in a law firm as provided in Rule 1.10. However, under paragraph (d)(1), the consequences of imputation may

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be avoided if the informed written consent of both the prospective and affected clients is obtained. See Rule 1.0(e-1) (informed written consent). In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all prohibited lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited. See Rule 1.0.1(k) (requirements for screening procedures).

[5] Notice under paragraph (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and the screening procedures employed.

IV. PROPOSED RULE 1.18 (REDLINE TO MODEL RULE 1.18)

Rule 1.18 Duties To Prospective Client

- (a) A person who consults ~~with~~ a lawyer ~~about the possibility~~for purpose of forming a ~~client-lawyer~~lawyer-client relationship ~~with respect to a matter~~or securing legal advice is a prospective client.
- (b) Even when no ~~client-lawyer~~lawyer-client relationship ensues, a lawyer who has ~~learned information from~~communicated with a prospective client shall not use or reveal ~~that~~ information protected by Business and Professions Code § 6068(e) and Rule 1.6 that the lawyer learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received ~~information from the prospective client that could be significantly harmful to that person in~~information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is ~~disqualified~~prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received ~~disqualifying~~ information ~~as defined that prohibits representation as provided~~ in paragraph (c), representation of the affected client is permissible if:
 - (1) both the affected client and the prospective client have given informed written consent, ~~confirmed in writing~~, or;
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more ~~disqualifying~~ information than was reasonably necessary to determine whether to represent the prospective client; and

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- (i) the ~~disqualified~~prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (ii) written notice is promptly given to the prospective client; and
- [(iii) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing that information from being disclosed to the firm and its client.]

Comment

[1] ~~Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations~~ As used in this Rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client ~~usually are~~can be limited in time and depth and leave both the prospective client and the lawyer free ~~(, and sometimes required),~~ to proceed no further. ~~Hence, Although a~~ prospective ~~clients should receive some but not all of the protection afforded clients.~~ client's information is protected by Business and Professions Code § 6068(e) and Rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm is permitted to accept or continue representation of a client with interests adverse to the prospective client. This Rule is not intended to limit the application of Evidence Code § 951 (defining "client" within the meaning of the Evidence Code).

[2] ~~A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person~~ Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without ~~any~~ reasonable expectation that the lawyer is willing to discuss the possibility of forming a ~~client-lawyer relationship, and is thus not a "prospective client."~~ client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer-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

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advice or representation, is not a prospective client within the meaning of paragraph (a).

~~[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.~~

[43] In order to avoid acquiring ~~disqualifying~~ information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter ~~should~~must limit the initial ~~consultation~~interview to only such information as reasonably appears necessary for that purpose. ~~Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.~~

~~[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.~~

~~[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.~~

[74] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers in a law firm as provided in Rule 1.10, ~~but~~ However, under paragraph (d)(1), the consequences of imputation may be avoided if the ~~lawyer obtains the~~ informed written consent, ~~confirmed in writing~~, of both the prospective and affected clients is obtained. See Rule 1.0(e-1) (informed written consent). In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all ~~disqualified~~prohibited lawyers are timely screened and written notice is promptly given to the prospective client. ~~See Rule 1.0(k) (requirements for screening procedures)~~. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is ~~disqualified~~. prohibited. See Rule 1.0.1(k) (requirements for screening procedures).

[85] Notice, ~~including~~ under paragraph (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and ~~of~~ the screening procedures employed, ~~generally should be given as soon as practicable after the need for screening~~

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~~becomes apparent.~~

~~[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.~~

V. PUBLIC COMMENTS SUMMARY

1. The Orange County Bar Association ("OCBA") submitted a comment encouraging the Commission develop rules that would permit ethical screening consistent with the ABA Model Rules and *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776.
2. The Bar Association of San Francisco ("BASF") similarly suggested that the Commission develop rules that would permit ethical screening consistent with the ABA Model Rules. In addition to citing to *Kirk*, BASF also suggested the Commission should refer to the guidance provided in *People ex rel Dept. of Corporations v. Speedee Oil Exchange Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1154. The Committee noted that its members "are not fully aligned on the parameters for imputation or screening rules and whether they may be adequately addressed in a disciplinary rule." BASF identified several issues: Should screening be limited where the screened lawyer was not substantially involved in the prior matter? Who should have the burden of proving the adequacy of the screen? Should a mens rea standard, "knowingly," be applied to an imputation rule? How can the effectiveness of a screen be verified?

VI. OCTC / STATE BAR COURT COMMENTS

- JAYNE KIM, OCTC, _____, 2016:
A comment on proposed Rule 1.18 is anticipated.
- RUSSELL WEINER, OCTC, 6/15/2010:
Rule 1.18. Duties to Prospective Clients.
 1. The Commission states that this is a new rule to California, although OCTC believes it is part of the common law, invokes the current rules, or exists in some other rule such as competence, confidences, and conflicts.
 2. OCTC is concerned that subparagraphs (c) and (d) are essentially a repeat of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule.
 3. Many of the Comments are more appropriately placed in treatises, law review articles,

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and ethics opinion. The inclusion of factors in 2A could be confusing and give the impression they are the exclusive factors. Further, if they are to be considered, it should be in the rule.

- **MIKE NISPEROS, OCTC, 9/27/2001:**
OCTC did not comment on ABA Model Rule 1.18 in 2001
- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Model Rule 1.18.** The ABA State Adoption Chart for Model Rule 1.18, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.18,” revised April 21, 2016, is available at:
- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_18.authcheckdam.pdf [Last visited 5/17/16]

Model Rule 1.18 was adopted by the ABA in 2002 as part of the Ethics 2000 Commission’s comprehensive review of the Model Rules. The rule was amended in 2012 as part of the Ethics 20/20 Commission’s review of the Model Rules to determine if any further changes to the Model Rules were warranted in light of the increase in cross-border practice and in the use of technology in providing legal services.²

Every jurisdiction except California and six others³ has adopted some version of ABA Model Rule 1.18. Nine jurisdictions have adopted the 2012 rule verbatim,⁴ ten adopted the 2002

² The 2012 amendments were to paragraphs (a) and (b) as follows:

(a) A person who ~~discusses—consults~~ with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

³ The six jurisdictions that have not adopted any version of Model Rule 1.18 are: Alabama, Georgia, Michigan, Mississippi, Texas and Virginia.

⁴ The nine jurisdictions that have adopted the 2012 version of the Model Rule verbatim are: Delaware, Iowa, Kansas, Louisiana, Massachusetts, Montana, New Mexico, Oregon and West Virginia.

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version verbatim and have not since amended their rules,⁵ nineteen jurisdictions have adopted a version of the rule that is a substantially similar variation of the Model Rule,⁶ and six have a substantially modified version of Model Rule 1.2.⁷

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of a rule patterned on Model Rule 1.18 that sets forth duties to a prospective client, a person who consults with a lawyer in the lawyer's capacity as such for the purpose of obtaining legal services or advice.
 - Pros: There are a number of reasons for recommending the adoption of proposed Rule 1.18:
 - (1) Although the Rules of Professional Conduct historically have not addressed duties owed to a prospective client, being limited to duties owed current and former clients, in certain circumstances a lawyer will incur duties to a prospective client, in particular, a duty to preserve the confidentiality of information the lawyer acquires during a pre-lawyer-client relationship consultation. Given the historical importance of confidentiality to the effective provision of legal services, a rule addressing prospective client duties is appropriate. Placing such a rule in the disciplinary rules will alert lawyers to this important duty, thus enhancing compliance and facilitating enforcement, provide important public protection, and should also promote confidence in a legal profession that honors the confidential information of any person that consults with a lawyer, in turn promoting respect for the administration of justice.
 - (2) Proposed rule 1.18 would be one of the several proposed rules that follow the ABA approach of addressing confidentiality as it applies to current (Rules 1.6, 1.8.2), former (Rule 1.9(c)), and prospective (this Rule, 1.18) clients in several distinct rules. Together these rules provide detailed guidance about the duty of confidentiality by establishing clear standards regarding a lawyer's use or disclosure of confidential information.
 - (3) Proposed rule 1.18 would also be one of several rules that similarly follow the

⁵ The ten jurisdictions are: Alaska, Indiana, Kentucky, Maine, Nebraska, Oklahoma, Rhode Island, South Dakota, Utah and Wisconsin.

⁶ The nineteen jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Maryland, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont and Wyoming.

⁷ The six jurisdictions are: District of Columbia, Nevada, New Jersey, New York, North Dakota and Washington.

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ABA approach of addressing conflicts of interest between and among clients or prospective clients in several separate rules, i.e., rule 1.7 (Conflict Of Interest: Current Clients); rule 1.8.6 (Compensation From One Other Than Client); rule 1.8.7 (Aggregate Settlements); rule 1.9 (Duties To Former Clients); rule 1.10 (Imputation Of Conflicts of Interest: General Rule); rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees); and rule 1.12 (conflicts of interest involving a former judge, arbitrator, mediator or other third-party neutral).

(4) Although there is no California Rule counterpart, the duty to protect confidential information of a prospective client, even if no attorney-client relationship results, is found in Cal. Evid. Code § 951, which does not require the formation of a lawyer-client relationship but instead defines “client” as a person who “consults” with a lawyer in the lawyer’s capacity as a lawyer “for the purpose of securing legal service or advice.” Section 951 is discussed at length in Cal. State Bar Formal Opn. 2003-161, available at

<http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=Insc9lfZpdQ%3d&tabid=838> [last visited 5/16/16]. It will not establish a new standard but will provide guidance to lawyers through a clearly articulated standard on how to comport themselves during a consultation to protect not only the prospective client but also to protect the lawyer’s current clients from losing the lawyer of their choice.

(5) The screening provision of paragraph (d) balances the need for prospective clients to be secure in their secrets and the need for lawyers to obtain sufficient information to determine whether they should – or even can – accept the representation.

(6) The court in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, which involved a prospective client fact pattern, effectively held that ethical screens provided an appropriate balance between the needs of prospective and current clients. Moreover, the California Supreme court implied that an unconsented ethical screen might even be permitted in cases where a lawyer has obtained material information from an opposing party in the very matter at issue. See *People ex rel Dept. of Corporations v. Speedee Oil Exchange Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1154.

(7) The protection of the client’s information is broader than that provided under the Model Rule; the proposed rule protects not only confidential information learned during a consultation but also that information that a lawyer might learn as a result of the consultation, e.g., through subsequent investigation.

(8) Language derived from California case law concerning conflicts of interest (“material” information) has been substituted in paragraph for imprecise model rule language so as to remove ambiguities regarding the rule’s application and to enhance compliance and enforcement.

(8) Nearly every jurisdiction has adopted a version of Model Rule 1.18, first adopted by the ABA in 2002.

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- Cons: There are several reasons not to recommend adoption of a counterpart to Model Rule 1.18.
 - (1) The rule is primarily one of guidance for lawyers as to how to conform their communications during a consultation with a person regarding the provision of legal advice or the formation of a possible lawyer-client relationship. It functions less as a disciplinary rule and thus should not be included in a set of disciplinary rules.
 - (2) In any event, the purported guidance provided by proposed Rule 1.18 is already adequately provided in the Evidence Code, §§ 950 through 962, State Bar Ethics opinions, (e.g., opinions [2003-161](#) and [2005-168](#)), and case law.
 - (3) Paragraph (d)(2), which would permit a lawyer who actually acquired confidential information of a prospective client to be screened would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought. This has the potential to cause great harm to the legal services consuming public.
 - (4) Screening without client consent does not protect clients because it cannot be verified by a client. A client should not be forced to accept screening imposed unilaterally by a law firm. A client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal. There is no reason why a prospective client should feel any less sense of betrayal than a former client with whom the prohibited lawyer had formed a lawyer-client relationship. In either situation, the person who retained or consulted with the client has disclosed confidential information and that information should be protected.
- 2. Recommend adoption of Model Rule 1.18(a), as revised to substitute (i) “for purpose of” for “about the possibility of” and (ii) “or securing legal advice” for “with respect to the matter.”
 - Pros: The first change clarifies that the person communicating with the lawyer must have come with the purpose of forming a relationship or seeking legal advice and not simply to disclose information in an attempt to disqualify the consulting lawyer from representing the opponent. The second change clarifies that a lawyer-client relationship need not be formed for the duty of confidentiality to be imposed on the lawyer. Both changes bring the Model Rule provision in line with the California Evidence Code. (See Evid. Code § 951.)
 - Cons: None identified.
- 3. Recommend adoption of Model Rule 1.18(b), as revised to include a reference to the source of confidentiality in California (§ 6068(e) and Rule 1.6) to clarify what communicated information is at stake and expressly qualifying such information by the

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clause “that the lawyer has learned as a result of the representation.”

- Pros: The protection of the client’s information is broadened by these changes than that provided under the Model Rule; the proposed rule protects not only confidential information learned during a consultation but also that information that a lawyer might learn as a result of the consultation, e.g., through subsequent investigation. The references to § 6068(e) and Rule 1.6 clarifies precisely what information that might be gleaned as a result of the consultation is at stake and is to be protected under this Rule.
- Cons: None identified.

4. Recommend adoption of Model Rule 1.18(c), as revised, but include a reference to the source of confidentiality in California (§ 6068(e) and Rule 1.6) to clarify what communicated information is at stake and substitute “material to the matter” for the Model Rule’s clause, “significantly harmful to that person.” Further, substitute “prohibited” for “disqualified.”

- Pros: The phrase “material to the matter,” language derived from California case law concerning conflicts of interest, is an appropriate substitution for the imprecise and undefined model rule language (“significantly harmful to that person”) and removes ambiguities regarding the rule’s application and to enhance compliance and enforcement. The substitution of “prohibited” for “disqualified” reflects the primary nature of the proposed rule as a disciplinary rather than a civil disqualification standard, and clarifies that actual disqualification is not a prerequisite to a finding that the rule was violated.
- Cons: The substitution of “prohibited” for “disqualified” is a meaningless change as courts will rely on the proposed Rule in disqualification motions just as they cite to the provisions of current rule 3-310 when confronted with a disqualification motion now.

5. Recommend adoption of Model Rule 1.18(d), as revised, which provides that a law firm may continue to represent a current or new client (“affected client”) in the same matter under two conditions: (i) both the prospective client and affected client provide informed written consent; or (ii) the law firm erects a timely screen, notice is promptly provided the prospective client. Paragraph (d) also requires that the prohibited lawyer and any lawyer participating in the matter “reasonably believe” that the screen will effectively prevent disclosure of protected information to the firm or the affected client. (See paragraph 6, below.

- Pros: As noted, [see paragraph 1, “Pros” Nos. (5) & (6)], permitting screening of a lawyer who is prohibited because of information acquired from a consultation with a prospective client, strikes the appropriate balance between the interests of the prospective client in the confidentiality of that person’s information and a law firm’s clients’ ability to retain his or her lawyer of choice.
- Cons: See paragraph 1, “Cons” Nos. (3) and (4).

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6. Recommend adoption of paragraph (d)(2)(iii), which has no counterpart in the Model Rule and is derived from Colorado Rule 1.10(d)(4), and which imposes a duty on lawyers in the screening firm to “reasonably believe” that the screen will effectively prevent disclosure of protected information to the firm or the affected client.
 - Pros: Including this clause, as is also being recommended by the 3-310 Drafting Team for inclusion in the screening provisions of proposed Rules 1.10, 1.11 and 1.12, provides an objective standard (“reasonably believes”) for testing the effectiveness of the screen. It has been included for two reasons: *First*, it provides a better test of the an ethical screen’s effectiveness than does MR 1.10(a)(2)(iii)’s requirement that requires the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client “certifications of compliance with the Rules and with the screening procedures” with which the former client has been provided as required by rule 1.10(d)(2)(ii). The imposition of an objective standard (“reasonably believe”) is more protective of a prospective client’s interests than the Model Rule’s formulaic requirement of providing “certifications” at “reasonable intervals.” As provided in proposed Rule 1.0.1(l), “‘Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” That the lawyers’ reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not, then the partner’s decision would be a “reasonable resolution of an arguable question of professional duty,” so there would be no conflict with rule 5.2(b) as posited in the “Cons,” below. Second, there is no reason why the screening provision in a rule addressing a lawyer’s duty to protect the confidential information of a prospective client should be any different from the screening requirements in a rule that protects the confidentiality interests of a former client.
 - Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission’s proposed rule 5.2(b) is unclear. Proposed rule 5.2(b) provides that: “A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm’s screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?
7. Recommend adoption of five comments derived from Model Rule 1.18:
Comment [1], derived in part from MR 1.18, cmt. [1] and RRC1 proposed Rule 1.18, clarifies that the term “prospective client” includes a person’s “authorized

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representative” (as expressly provided in Evid. Code § 951) and states the rule is not intended to limit the application of section 951.

Comment [2], a substantially truncated version of MR 1.18, cmt. [2], which has been supplemented to draw important distinctions about when the rule applies: (i) a person who communicates with a lawyer with no reasonable expectation the lawyer is willing to represent the person or provide legal advice is not a prospective client; (ii) a lawyer may expressly disclaim a willingness to consult with the person; and (iii) a person who communicates with the lawyer without a good faith intention to seek legal advice or representation is also not a prospective client.

Comment [3], derived from MR 1.18, cmt. [4], cautions lawyers to take care not to expose themselves to more information than necessary to determine whether to accept the representation, such conduct being a prerequisite to the implementation of an ethical screen. (See introductory clause of paragraph (d).)

Comment [4], derived from MR 1.18, cmt. [7], but modified to reflect California law, (e.g., the requirement of “informed written consent”), clarifies the application of paragraph (d). The last sentence provides interpretative guidance regarding the application of paragraph (d)(2)(i).

Comment [5], derived from MR 1.18, cmt. [8], delimits the scope of notice required under paragraph (d)(2)(ii). The last clause has been deleted as repetitive of the rule.

- Pros: All of the proposed comment explain how the rule should be interpreted or applied, the appropriate function of comments in the Rules.
- Cons: Some of the comments restate the rule or state the obvious:
 - Comment [3] is simply another way of stating the requirement stated in the introductory clause of paragraph (d).
 - Comment [4] could be reduced to a simple reference to Rule 1.0.1(k).
 - Comment [5]’s substance belongs in the black letter of the rule as part of paragraph (d)(2)(ii).

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of RRC1’s paragraph (a), which defines “prospective client” in terms similar to Evidence Code § 951.
 - Pros: The language of a rule addressing duties owed to a prospective client, a concept that is also addressed in section 951, should track as closely as possible the language of the latter section.
 - Cons: Paragraph (a), a provision in a disciplinary rule, should not be cluttered by the addition of language describing concepts that are better addressed in a comment. (See Comment [1].) The focus of the provision should be on the client’s intent in consulting with the lawyer: “for the purpose of” either forming a “lawyer-client relationship” or secure legal advice.
2. Recommend adoption of paragraph (d)(2)(ii) in the initial public comment of RRC1’s proposed Rule 1.18, which provided that the written notice provided to the client is to

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“enable the prospective client to ascertain compliance with the provisions of this Rule.”

- Pros: The black letter, not a comment, should delimit what the notice should contain. (See, e.g., MR 1.10(a)(2)(ii).⁸)
- Cons: All that is required in the black letter is that notice is required. The content of the notice is better described in a comment. (See Comment [5].)

3. Recommend that paragraph (d)(2)(ii) require only that the prospective client be informed about the fact of a screen rather than be given notice.
 - Pros: The prospective client is not being represented by the lawyer with respect to the screening and this militates against a broad and detailed notice requirement that might mislead that person into believing that the lawyer is acting in their best interests. If notice is required then the rule or comment should expressly require that the lawyer inform the prospective client that the lawyer is not representing them and that prospective client should seek an independent lawyer for legal advice in connection with the screening.
 - Cons: Simply informing the prior prospective client about the fact of the screen is inadequate information.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Although the concept of proposed Rule 1.18 exists in current law, e.g., Evidence Code § 951, case law, (e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]; *Barton v. United States District Court*, 410 F.3d 1104 (9th Cir. 2005)), and ethics opinions (State Bar Formal Ops. 2003-161 and 2005-168), the proposed rule would nevertheless be a substantive change in that the concept is now being included as a disciplinary rule.

D. Non-Substantive Changes to the Model Rule:

1. The substitution throughout the rule of “lawyer-client” for “client-lawyer” is a non-substantive change. The Commission has used “lawyer-client” throughout the Proposed Rules, (e.g., Rule 1.6) because that is the term used in the Business & Professions and Evidence Codes.

⁸ Model Rule 1.18(d)(2)(ii) requires that when implementing a screen:

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures;

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E. Alternatives Considered:
1. None.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Zipser

- [Date]: Email Comment
- [Date]: Email Comment

Harris

- [Date]: Email Comment
- [Date]: Email Comment

Inlender

- [Date]: Email Comment
- [Date]: Email Comment

Stout

- [Date]: Email Comment
- [Date]: Email Comment

Tuft

- [Date]: Email Comment
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed new rule 1.18 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed new rule 1.18 in the form attached to

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this Report and Recommendation.
XII. DISSENTING POSITION(S)
None.
XIII. FINAL COMMISSION VOTE/ACTION
Date of Vote: Action: Vote: X (yes) – X (no) – X (abstain)



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July 25, 2016

Hon. Lee Smalley Edmon, Chair
and all members
Second Commission for the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105
BY U.S. MAIL and EMAIL c/o Lauren.McCurdy@calbar.ca.gov

Re: Comment on proposed rules of professional conduct

Dear Chair Edmon and members of the Commission:

Please consider this comment on behalf of each of the undersigned, each currently or in the recent past a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and, in some cases, other significant identifying information. The information is for identification purposes only.

Introductory remarks:

Preliminarily, groups of ethics professors have written to the State Bar Board in 2010 and the Supreme Court in 2014¹ concerning the first rules commission's work product. We note the following points made in those letters:

First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law.

Second, we believe that in the past, taken as a whole the proposed rules have fallen short in their charge, first and foremost, to protect clients and the public. Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

We now add to those points. Thus, third, we applaud much of the work product of this second commission. It is significantly more client- and public-protective than the first commission's work product. We also commend this commission for its ability to get these rules

¹ Respectively, Letter of June 15, 2010 to State Bar Board of Governors signed by 30 California law professors who teach legal ethics; and Letter of March 3, 2014 to each member of the California Supreme Court, signed by 55 California law professors who teach legal ethics. These letters are substantively identical. We will refer to them here as the "first ethics professors' letter."

to public comment on a tight timetable while still seeking to meet the goals of both the rules and the charge from the California Supreme Court. There are still important issues – see below, Part II – but many positive steps have been taken.

Fourth, we believe that within the Court’s charge to the second commission, the black-letter rules and brief comments should serve not only as rules of discipline for those lawyers accused of offenses, but as guidance for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Few California lawyers have the level of sophistication that members of the Rules Commission have, and they need this guidance. For the most part, we believe the commission has successfully provided it.

Three preliminary notes:

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about this rules draft. There are a number of issues we have left unaddressed, such as proposed rules 6.1 (not adopted), 3.10, 1.8.10, the chapter 5 series, and others.
2. While the signatories have all concurred in the entire text of this letter, some would have expressed their agreement in somewhat different language than the drafters have used. Additionally, when we refer to other, earlier ethics professors’ letters and reference the pronoun “we,” this should not be taken to mean that the signatories here are identical to those on other letters. We use it for convenience; the signatures on each letter including this one speak for themselves. This letter will be updated during public comment as new signatories are added.
3. We have divided the letter into three parts: first, proposed rules that have been modified since the first commission with which we largely agree; second, rules where we still have significant concerns and thus specific recommendations for modifications; and third, rules on which we have commented without a recommendation either way. **Bolded** rules relate to those rules we believe are most significant.

[TEXT OMITTED]

II. **Rules requiring revision.**

[TEXT OMITTED]

7. **Model Rule 1.18:**

The most recent ABA rule is MR 1.18, which explores the duties to prospective clients. This rule is particularly important because it codifies what common law supports: that a prospective client who does not “mature” into a client is still entitled to confidentiality. The rule notes that that confidentiality may result in receipt of information that could disqualify a lawyer from representation “adverse to those of a prospective client in the same or a substantially related matter.” This is a rule that protects the public by allowing people to seek representation without fear that a consulted lawyer can use the confidential information received against that client. The absence of this rule favors lawyers over the public.

[TEXT OMITTED]