

Rule 1.18 Duties To Prospective Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

- (a) A person* who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.
- (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code § 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 paragraph (c), representation of the affected client is permissible if:
 - (1) both the affected client and the prospective client have given informed written consent,* or
 - (2) the lawyer who received the information took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client; and
 - (i) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.

Comment

[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 be avoided if the informed written consent* of both the prospective and affected clients is obtained. See Rule 1.0.1(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.

[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.

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Synopsis of Public Comments

TOTAL = 7 **A = 4**
 D = 1
 M = 2
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-25b	Bar Association of San Francisco (Banola) (01-13-17)	Yes	A		<p>We support proposed Rule 1.18 because it provides important guidance to lawyers practicing in California on what duties are owed to prospective clients in contrast to former clients. We also believe the proposed Rule will enhance the ability of lawyers and clients to communicate regarding potential new matters.</p> <p>While the Committee recognizes that a few California cases address duties to prospective clients in the disqualification context and that California Evidence Code § 951 addresses this duty in regard to the attorney-client privilege, there is otherwise no clear guidance for California lawyers. As part of their risk management practice, members of our Committee have counseled clients on duties to prospective clients and recommended that prospective clients be included in the law firms' conflict check procedures. Law firms that do not include prospective clients as part of their conflict check procedures may be unaware they have a conflict of interest in accepting a new representation.</p>	No response required.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					As a result, the firms may unknowingly accept a new representation that is materially adverse to the interests of a prospective client, or fail to implement effective screening measures to avoid the conflict of interest. Alerting lawyers to duties owed to prospective clients through Proposed Rule 1.18 will require lawyers and law firms to incorporate such risk management best practices in order to comply with the rule, and, consequently, will help to avoid imputation of confidential information and late discovery of such conflicts.	
Y-2016-18b	Lamport, Stanley (01-09-17)	No	M		<p>The screening provisions in paragraph (d)(2) should be removed from the rule.</p> <p>The fundamental problem with unconsented screening is that the prospective client cannot object to the screen and has no way to verify that the prospective client's confidential information is not available to the lawyers representing the prospective client's current adversary.</p>	The Commission believes that the proposed rule strikes an appropriate balance between the policies of protecting confidential information of a prospective client on the one hand, and allowing access to legal services without imposing the same disqualification consequences as in the case of a current or former client on the other. The commenter has identified some of the policy reasons against screening that the Commission fully considered. The Commission believes that

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						the proposed rule, including the provision for unconsented screening would effectuate better public protection than the status quo of not having any rule at all. Given the importance of confidentiality to a lawyer's effective provision of legal services, a rule addressing prospective client duties is appropriate. Some provisions of the rule are already the law in California and do not establish new standards. Accordingly, placing these provisions in the disciplinary rules will alert lawyers to these important duties. The rule focuses on how a lawyer must conduct themselves during a consultation to protect not only the prospective client but also to protect current clients from losing the lawyer of their choice, thus enhancing compliance with duties and public protection, and promoting confidence in the legal profession.
Y-2016-23a	Sall, Spencer, Callas & Krueger (Sall) (01-09-17)	Yes	M		Adoption of the rule in its current form is opposed and the provisions on screening should be deleted entirely or substantially limited.	Generally, the Commission believes that the rule strikes an appropriate balance between protecting confidential information of a prospective client and allowing

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					<p>1. No screening of potential clients is appropriate except where screening would be permitted by proposed rule 1.10 and screening is never appropriate where a lawyer is engaged in conduct that essentially is side-switching on a client.</p> <p>2. Even if screening is permitted, the scope of subdivision (d)(2) is overbroad.</p>	<p>access to legal services without imposing the same disqualification consequences as in the case of a current and former client.</p> <p>1. The Commission believes that paragraph (c) protects against situations in which the lawyer who consults with a prospective client “switches sides” in the same matter. Side switching in cases such as <i>Henriksen</i> and as discussed in <i>Kirk</i> involved lawyers who were shown to have had significant involvement in the prior matter. Paragraph (c) would prohibits such a lawyer from representing a client with materially adverse interests in the same or a substantially related matter.</p> <p>2. Under the proposed rule, whether a lawyer can be screened to avoid imputation of the lawyer’s disqualifying conflict to the firm depends on a number of factors, including the level of information the lawyer receives. (Compare proposed rule 1.10(a)(2).) Screening is not available if the lawyer failed to take</p>

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						reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. If the amount of information the firm has considered in making that determination is substantial and includes disqualifying information, screening would not be available under paragraph (d).
Y-2016-21s	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	D		1. Neither this proposed rule nor proposed rule 1.0 defines “materially adverse” or why the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawyers and makes it more difficult to prosecute a violation.	1. The term “materially adverse” is not intended to be given a one-size-fits-all construction and is not susceptible to a simple blackletter definition. As in the case of other rules using the same term (e.g., rule 1.9), the term must be applied in a manner that appreciates the particular facts and circumstances of the matters under consideration. This is the case in the jurisdictions that have adopted a version of this rule. Generally, ethics opinions provide explanatory guidance on applying the term. (See, e.g., New York City Bar Ass’n Op. 2013-01 (10/1/13); see also New York State Bar

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					2. OCTC is also concerned about the use of the term “knowingly” in paragraph (c) and in the other conflict rules.	Ass’n Op. 1103 (7/15/2016) (applying the term in the context of NY Rule 1.9). The Commission anticipates that a similar approach to clarifying the term would be the case in California. 2. The term “knowingly” is a defined term in rule 1.0.1(f) and includes the concept that “[a] person’s knowledge may be inferred from circumstances.” The Commission believes this is the appropriate standard for paragraph (c) of this rule.
Y-2016-7n	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17)	Yes	A	1.18	COPRAC supports the adoption of proposed Rule 1.18	No response required.
Y-2016-13	US Department of Justice (DOJ) (Ludwig) (01-06-2017)	Yes	A	1.18	In our September 27, 2016 letter, we wrote to “support the adoption of [a] proposed Rule that addresses a lawyer’s obligations with respect to information communicated in confidence to a lawyer by a prospective client.” We appreciate the Commission’s willingness to reconsider its decision to omit such a rule and support proposed Rule 1.18 as drafted.	No response required.