

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

### **Commission Drafting Team Information**

**Lead Drafter:** Dean Zipser

**Co-Drafters:** Lee Harris, Tobi Inlender, Dean Stout, Mark Tuft

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### **I. CURRENT CALIFORNIA RULE**

There is no California rule counterpart to ABA Model Rule 1.18.<sup>1</sup>

### **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

#### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.18

Vote: 15 (yes) – 0 (no) – 0 (abstain)

#### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 1.18

Vote: X (yes) – X (no) – X (abstain)

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. COMMISSION'S PROPOSED RULE 1.18 (CLEAN)**

#### **Rule 1.18 Duties To Prospective Client**

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<sup>1</sup> 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](#).

- (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.

#### **IV. COMMISSION’S PROPOSED RULE 1.18 (REDLINE TO ABA MODEL RULE 1.18)**

##### **Rule 1.18 Duties To Prospective Client**

- (a) A person\* who ~~consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter,~~ 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 ~~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
    - (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 to enable the prospective client to ascertain compliance with the provisions of this Rule.

## 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." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyerlawyer-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] ~~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 consultationinterview 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 1.0.1(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.

[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 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. RULE HISTORY

Although the origin and history of Model Rule 1.18 was not the primary factor in the Commission's consideration of proposed Rule 1.18, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 397 - 406, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

## VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**  
(In response to 45-day public comment circulation):

1. Neither this proposed rule nor proposed rule 1.0 defines "materially adverse" or whay the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawayers and makes it more difficult to prosecute a violation..
2. OCTC is concerned about the use of the term "knowingly" in paragraph (c) and in the other conflict rules.

- **State Bar Court:** No comments received from State Bar Court.

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

seven comments, including the above comment from OCTC, were received. Four agreed with the proposed rule. One disagreed, two agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony disagreed with the Commission's recommendation to not adopt a version of Model Rule 1.18.

## **VIII. 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](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.<sup>2</sup>

Every jurisdiction except California and six others<sup>3</sup> has adopted some version of ABA Model Rule 1.18. Nine jurisdictions have adopted the 2012 rule verbatim,<sup>4</sup> ten

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<sup>2</sup> The 2012 amendments were made 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.

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

<sup>4</sup> 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.



adopted the 2002 version verbatim and have not since amended their rules,<sup>5</sup> nineteen jurisdictions have adopted a version of the rule that is a substantially similar variation of the Model Rule,<sup>6</sup> and six have a substantially modified version of Model Rule 1.2.<sup>7</sup>

**IX. 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 owed to a prospective client, which is defined as 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.

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

<sup>6</sup> 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.

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



- (3) Proposed rule 1.18 would also be one of several rules that similarly follow the 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 (c) for imprecise

model rule language (“significantly harmful”) so as to remove ambiguities regarding the rule’s application and to enhance compliance and enforcement.

- (9) Nearly every jurisdiction has adopted a version of Model Rule 1.18, first adopted by the ABA in 2002.
- 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 **other lawyers in the screened** lawyer’s firm 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. Even if the other, non-screened firm lawyers had not been exposed to the prospective client’s information in a consultation, 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,” and include other language derived from Cal. Evid. Code § 951.
- 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. These 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 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. Importantly, it is specified that the written notice “enable the prospective client to ascertain compliance with the provisions of this Rule,” thus providing clear guidance as to the scope of notice that must be provided. (See paragraph **Error! Reference source not found.**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).

6. 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 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 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.

2. Recommend adoption of a new 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?

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

### **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.

### **E. Alternatives Considered:**

None.

**X.     RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

That the Board of Trustees of the State Bar of California adopt proposed Rule 1.18 in the form attached to this report and recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 1.18 in the form attached to this Report and Recommendation.





Robert L. Kehr  
Commission Member  
Telephone: (310) 651-6500  
e-mail: rlkehr@kscllp.com

M E M O

To: Randall Difuntorum  
Kevin Mohr

From: Robert L. Kehr

Date: January 31, 2017

Re: Dissent to proposed Rule 1.18

This message states my dissent from proposed Rule 1.18(d)(2), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

I generally support proposed Rule 1.18. It is consistent with Evid. C. § 951 and related case law, and I believe that placing in the Rules a lawyer's confidentiality duty to prospective clients will make the point more accessible to lawyers and enhance client protection. I nevertheless dissent from this proposal as to proposed paragraph (d)(2).

Proposed paragraph (c) generally prohibits a representation adverse to a person who provided material confidential information to a lawyer while seeking to hire the lawyer. As a general rule, when a lawyer has a conflict based on confidentiality or loyalty obligations, the prohibition applies to all firm lawyers (and this is stated correctly in the second sentence of proposed paragraph (c)).<sup>1</sup>

Proposed paragraph (d)(2) would create an exception, permitting the personally prohibited lawyer's firm to accept the adverse representation by creating a non-consensual ethics screen designed to separate the personally prohibited lawyers from the balance of the firm. That paragraph has a threshold requirement that the personally prohibited lawyer "took reasonable\* measures to avoid exposure to more information than was reasonably\* necessary to determine whether to represent the prospective client ...."

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<sup>1</sup> The imputed knowledge rule generally presumes that client confidential information obtained by one lawyer in a law firm is deemed to be possessed by all other lawyers in the firm. This presumption "is based on the common-sense notion that people who work in close quarters talk with each other, and sometimes about their work." *Elan Transdermal v. Cygnus Therapeutic Systems*, 809 F. Supp. 1383, 1390 (N.D. Cal. 1992); *Rosenfeld Construction Co. v. Superior Court*, 235 Cal. App.3d 566, 573 (1991); and *Chadwick v. Superior Court*, 106 Cal. App.3d 108, 116 (1980).

Most Rule 1.18 situations will have no need for the proposed paragraph (d)(2) exception because it is common practice for lawyers to limit their initial communications with prospective clients to basic information needed to check for possible conflicts of interest. For example, if a prospective client calls a lawyer because “I’ve been sued by Mr. X”, the lawyer can determine that the firm represents Mr. X, decline the engagement, and have no resulting conflict of interest because the lawyer obtained no confidential information.<sup>2</sup>

What, then, might be involved in a lawyer obtaining information beyond the identities of the parties or participants, but that would come within the standard of avoiding “exposure to more information than was reasonably\* necessary to determine whether to represent the prospective client”? Here are a few examples:

- A prospective client’s ability to pay fees and litigation costs often is important, and in that situation firms can insist on obtaining detailed financial information about the prospective client “to determine whether to represent the prospective client”. This could include asset and income information, business or employment prospects, and the availability of family members or others to assure payment of fees and costs.
- A lawyer sometimes wants to be certain that the client does not have unreasonable expectations about the representation and can be expected to handle settlement negotiations and other litigation aspects in a practical way. This would cause the lawyer to dig into the client’s motivations. To take one example, a lawsuit intended for strategic business purposes could make the prospective client rigid and cause the client to insist on litigation tactics with which the lawyer might not be comfortable.
- Some representations depend on the client’s credibility, particularly in litigation heavily dependent on disputed findings. A lawyer in that situation can be expected to draw out the prospective client to take the client’s measure as a witness. This also could involve inquiry about other potential witnesses and other sources of relevant information.

The lawyer in any of these situations might spend hours with the prospective client, and might learn private business, financial and personal information of the most sensitive sort, but still qualify for the paragraph (d)(2) exception because the lawyer avoided “exposure to more information than was reasonably\* necessary to determine whether to represent the prospective client.” That prospective client then would be faced with an adversary armed with all that confidential information in what, as one commenter pointed out, amounts to side-switching – the clearest and most serious confidentiality violation.

Non-consensual side-switching is problematic. One reported California appellate opinion that permits it, *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776 (2010), presents a rare factual situation. It remains to be seen now the appellate courts will deal with non-consensual screening in varying factual settings. The fundamental problem with unconsented screening is that the prospective client cannot object to the screen and has no way to verify that the

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<sup>2</sup> One example of this self-discipline is that many law firm web sites permit a reader to email a firm lawyer but direct the reader to not disclose any confidential information.

prospective client's confidential information is not available to the lawyers representing the prospective client's current adversary.

One of the goals of the standards governing lawyer conduct is to engender client trust in lawyers and in their advice. Appropriate legal advice guides clients in lawful conduct, which protects the clients' interests, avoids injuries to others, prevents disputes, and reduces the burden on the courts. Quite obviously, a lawyer can supply full and reliable legal advice only if the client fully discloses all potentially relevant information to the lawyer, and a client will do that only if the client trusts the lawyer to not misuse the client's information. A lawyer operating without a command of the facts will supply incomplete, misleading, and even incorrect advice to the client. Without that trust, clients will not fully disclose themselves, as a result will not receive full and reliable advice, and won't trust the advice they do receive. Appellate courts considering non-consensual screening will need to consider whether the practice interferes with these goals.

It also is important that proposed paragraph (d)(2) would create a rigid disciplinary standard that, for example, would apply to all firms without regard to size or organization. See *Filippi v. Elmont Union Free School Dist. Bd. of Educ.*, 722 F. Supp. 2d 295, 307-08 (E.D.N.Y. 2010) (screening rejected because firm had only six lawyers and citing other cases in which screening was rejected due to firm size, one being a fifteen-lawyer firm) and *Hitachi, Ltd. v. Tatung Co.*, 419 F. Supp. 2d 1158, 1165 (N.D. Cal. 2006) (where court determined ethics screen insufficient because the matter was being handled by one of six members of an intellectual property group in an office of a large firm and the tainted member was one of the six members in the same office). This proposed rigid system also would apply without regard to the sensitivity of the information obtained by the screened lawyer. See, e.g., *Energy Intelligence Grp., Inc. v. Cowen & Co., LLC*, 2016 U.S. Dist. LEXIS 92176, \*11 (S.D.N.Y. 2016).

For these reasons, I respectfully dissent from proposed Rule 1.18(d)(2) and would leave the topic of non-consensual screening to development by the courts.

