

# THE DUTY OF CONFIDENTIALITY AND THE DUTY TO COMMUNICATE

## ISSUES

1. Whether a prospective client's disclosure of confidential information that affects an existing client's case, either positively or negatively, may be disclosed to the existing client under any circumstance where the prospective client does not consent to such disclosure.
2. The extent to which such disclosure may be used by the Attorney's law firm.
3. Whether such disclosure may require the Attorney or his/her firm to withdraw from representing the prospective client or the existing client in pending litigation.
4. The extent to which an ethical screen may preserve the attorney-client relationship with the existing client.

## DIGEST

[TO BE INSERTED]

## AUTHORITIES

**INTERPRETED:** Rules 1.4 [Communication with Client]; 1.6 [Confidential information of Client]; 1.7 [Conflicts of Interest]; 1.8.2 [Use of Current Client's Information]; 1.9 [Duties to Former Clients], 1.10 Imputation of Conflicts of Interest] 1.16 [Declining or terminating representation] and 1.18 [Duties to Prospective Clients]; of the State Bar Rules of Professional Conduct

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

## STATEMENT OF FACTS

### 1. Scenarios :

#### a. First Scenario

An attorney in a public interest law firm that is prosecuting a lawsuit against a chemical manufacturer, whose product is alleged to cause cancer in those who come in contact with it, is interviewing various potential additional plaintiffs to pursue claims against the manufacturer.

During an interview of a potential client (“Prospective Client”) who has been exposed to the product, the Prospective Client, a research doctor who worked at the manufacturing facility and came in regular contact with the product, discloses that during an earlier federal investigation by the FDA into these concerns, management directed him to destroy some unfavorable test results, which he did, keeping a copy in case he ever needed it. This is extremely useful information to aid in the prosecution of the case for the Attorney’s existing clients (“Existing Clients”). In addition, he knows what specific test criteria were used to the reach result the manufacturer now seeks to hide. However, the Prospective Client advises that if this information came out, he fears he could be criminally prosecuted and experience a number of licensing issues.

#### Second Scenario:

During the investigation described in scenario No. 1, the Prospective Client reveals that out of anger and frustration with the company he altered the test results given by the Company to the FDA and to the Attorney’s firm during discovery. The Prospective Client discloses that the altered test results show the chemical would have the potential to cause such harmful results when, in fact, the test results were not so conclusive. The Prospective Client felt it important to get this information off his chest and feels remorseful about his actions, but does not want this information disclosed. This altered test is one of the cornerstones to the Attorney’s firm’s case against the manufacturer.

### **DISCUSSION**

#### **Issues:**

1. Should Attorney decline to represent the Prospective Client?
2. Can Attorney disclose to his Existing Clients any of the information shared by the Prospective Client?
3. Can Attorney use the information provided by the Prospective Client in any way?
4. Can Attorney’s law firm continue to represent their Existing Clients?
5. Are there steps Attorney could have taken to avoid the conflict created by the disclosure of such “confidential” information?

#### **Analysis**

##### *Duties To The Prospective Client*

Where, as here, there is not an express agreement between the parties that there is in fact an attorney-client relationship, an implied in fact attorney-client relationship may exist when the attorney volunteered his services to a prospective client (*Miller v. Metzinger* (1979) 91 Cal app

3<sup>rd</sup> 31, 39).<sup>1</sup> As a result, the fiduciary relationship existing between the lawyer and a client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment may not result. (*People Ex Rel. Department Of Corporations V. Speedee Oil, Inc.* (1999) 20 Cal 4<sup>th</sup> 1135, 1147-48) see also Cal. State Bar Formal Opinion No. 1984-84). The duties of an attorney to a prospective client have recently been codified in Rule 1.18 which provides in pertinent part:

1.18 [Duties to Prospective Clients]:

(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 section 6068 (E) and Rule 1.6 that the lawyer learned as result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.<sup>2</sup>

This opinion assumes that the information imparted to the Attorney by the Prospective Client, under the circumstances presented was imparted as confidential information within the meaning of Rules 1.6 (a)<sup>3</sup> and 1.18.

The duty of confidentiality is broader than the lawyer-client privilege and protects virtually everything the lawyer knows about the client's matter regardless of the source of the information. *Elijah W v. Superior Court* (2013) 216 Cal app 4<sup>th</sup> 140, 151) Not only may the attorney not disclose the confidential information absent one of the exceptions, the Attorney may not use that information to assist him or his law firm in the lawsuit. Rule 1.8.2.<sup>4</sup>

The tension between the clearly recognized duty of confidentiality under the circumstances with the duty of loyalty of Attorney and his firm to the Existing Clients presents an ethical dilemma. *Flatt v. Superior Court, supra*, 9 Cal 4<sup>th</sup> 280-283. The duty of loyalty implicates the biblical injunction against "serving two masters (Matthew 6:24)." (*Flatt v. Superior Court, supra*, 9 Cal 4<sup>th</sup> at 286). The duty of loyalty has been found to be sufficiently important that a mandatory rule of disqualification in cases of dual representation involving unrelated matters is firmly entrenched in California law. *Flatt v. Superior Court, supra*, 9 Cal 4<sup>th</sup> 286. Moreover the duty of loyalty may arise without potential breaches of confidentiality (*id*) it has been said that the duty of loyalty to any existing client cannot be cured by withdrawing from

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<sup>1</sup> For an extensive list of the factors that may be considered in determining whether an implied in fact attorney-client relationship exists, see Formal Opinion No. 2003-161

<sup>2</sup> Rule 1.9 provides that a former client may give informed written consent

<sup>3</sup> Rule 1.6 (a) provides: "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e) (1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule."

<sup>4</sup> Rule 1.8.2 provides: "A lawyer shall not use a client's information protected by Business and Professions Code section 6068, subdivision (e) (1) to the disadvantage of the client unless the client gives informed consent, except as permitted by these rules of the State Bar Act."

the relationship that caused the conflict. *Flatt v. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> 275, 2 880, citing *Truck Ins. Exchange Co. V. Fireman’s Fund Ins. Co.*, *supra*, 6 Cal app 4<sup>th</sup> 1050.

It is well established that an attorney who seeks to simultaneously represent clients with directly adverse interests in the same litigation will be automatically disqualified. *City and County of San Francisco v. Cobra Industries* (2006) 38 Cal 4<sup>th</sup> 839,---- ; citing: *Flatt v. Superior Court* (1994) 9 Cal. 4<sup>th</sup> 275, 284, fn. 3. Moreover, an attorney may not switch sides during pending litigation representing first one side and then the other. (*City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23, 18 Cal.Rptr.3d 403.) That is true because the duty to preserve client confidences (Bus. & Prof.Code, § 6068, subd. (e)) survives the termination of the attorney's representation. (*People Ex Rel. Department Of Corporations V. Speedee Oil, Inc.* (19) 99) 20 Cal 4<sup>th</sup> 1135*People Ex Rel. Department Of Corporations V. Speedee Oil, Inc.* (19) 99) 20 Cal 4<sup>th</sup> 1135, 1147, ). The enduring duty to preserve client confidences precludes an attorney from later agreeing to represent an adversary of the attorney's former client unless the former client provides an “informed written consent” waiving the conflict.(*Id.*)

#### *Disclosure To Existing Client*

In issue here, however, is whether the duty of confidentiality to the Prospective Clients precludes the disclosure of the Prospective Client’s confidential information to the Existing Clients notwithstanding Attorney’s duty to communicate (Rule 1.4)<sup>5</sup> and the inherent duty of loyalty to the Existing Clients. To date, no California case has addressed the issue of preserving a prospective client’s confidences from an existing client to whom the Attorney has both a duty of loyalty and to communicate. In *Flatt v. Superior Court* (1994) 9 Cal. 4<sup>th</sup> 275, the California Supreme Court held that an attorney’s duty of loyalty to any existing client not only precluded the attorney from representing a prospective client against the existing client but also insulated the attorney from liability in failing to advise the prospective client of the potential statute of limitations of any claim the prospective client may have against the attorneys existing client. The court in *Flatt*, however, did not address the obligation, if any, of the attorney to disclose to the existing client the information the prospective client provided to the attorney. However, case law

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<sup>5</sup> 1.4 [Communication with Client]

(a) (3) a lawyer shall “Keep the client reasonably informed about significant developments relating to the representation including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.”

Comment [1]: “ a lawyer will not be subject to discipline under paragraph (a) (3) of this rule for failing to communicate insignificant or irrelevant information. (See Business & Professions Code Section 6068 (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances

124 and several opinions from this Committee and state bar committees from other jurisdictions  
125 demonstrate that in such a context the duty of confidentiality remains paramount.

126 Rule 1.6(a) provides that a lawyer shall not reveal information protected from disclosure  
127 by Business and Professions Code section 6068(e)(1) absent the client giving informed consent  
128 or the disclosure is permitted by paragraph (b) of the rule. Business and Professions code section  
129 6068(e)(1)) requires an attorney “to maintain inviolate the confidence, and at every peril to  
130 himself or herself to preserve the secrets, of his or her client.”<sup>6</sup>A lawyer’s duty to preserve  
131 confidentiality of client information involves public policies of paramount importance. (*In re*

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<sup>6</sup> Rule 1.6 [Confidential information of Client]

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this Rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death, or substantial bodily harm to, an individual, as provided in paragraph (c).

(c) Before revealing information protected by Business and Professions Code section 6068(e)(1) to prevent a criminal act as provided in paragraph (B), a lawyer shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) informed the client, at an appropriate time, of the lawyer’s ability or decision to reveal information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph (b).

(d) In revealing information protected by Business and Professions Code section 6068(e)(1), as provided in paragraph (b), the lawyer’s disclosure must be no more than is necessary to prevent the criminal act, given the information known to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

Jordan (1974) 12 Cal 3<sup>rd</sup> 575, 580); see also *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal app 3<sup>rd</sup> 934, 945 (see Comment 1, Rule 1.6). It is recognized that a lawyer's duty to preserve the confidences of a client promotes trust which is the hallmark of the attorney-client relationship. (Comment 1, Rule 1.6)

The principle of lawyer-client confidentiality applies to information an attorney acquired by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality. (See Comment 2, Rule 1.6) Despite the important public policies promoted by a lawyers adhering to the core duty of confidentiality, Rule 1.6(b) now recognizes that the overriding value of life permits disclosure otherwise prohibited... (See Comment 3, Rule 1.6)

While no California case has directly resolved the tension between a lawyer's duty of confidentiality owed to one client with his/her duty of loyalty to another, as these scenarios set forth, the Prospective Clients' justified expectation of confidentiality should obligate the Attorney to maintain in confidence the information imparted by the Prospective Client and not to use that information or provide that information to the Existing Clients. (Rule 1.9(c)(1)) Specifically, absent a limited exception recognized in rule 1.6(b) [disclosure of information that the lawyer reasonably believes is necessary to prevent a criminal act resulting in death or substantial bodily harm] the Attorney cannot disclose to his Existing Clients or anyone the information provided by the Prospective Client.

In Opinion No. 2003-163, this Committee opined that when an outside lawyer represents a corporation and also simultaneously represents a corporate constituent (the Chief Financial Officer) in an unrelated matter, the duty of confidentiality precluded the attorney from disclosing the confidences of the CFO to the corporation without the CFO's consent despite the duty to communicate and the duty of loyalty owed to the corporation.

In LA County 528 (2017), LA County 528, an attorney is engaged by an insurance carrier to defend the interests of an insured and obtains information that could provide a basis for the insurance carrier to deny coverage, the attorney is prohibited from disclosing that information to the insurance carrier.<sup>7</sup>

In LA 506 (2001), a law firm learned in an interview with a prospective client that the client was considering filing bankruptcy. The prospective client was a defendant in a separate action brought by an existing client of the firm but by a different law firm. LA County 506 concluded that the firm had a duty of confidentiality to the prospective client and that the confidential information could be significant to the existing client, but concluded that no conflict arose between the duty of confidentiality and the duty to communicate, because the law firm was not representing the existing client in the other matter to which the information was relevant. Such a distinction overly limits the duty of loyalty (citations) and does not address the full impact of the duty of confidentiality.

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<sup>7</sup> In LA 508, the committee opined the attorney must withdraw from representation. This discussion of the opinion does not endorse this conclusion.

170 In *A v. B*, 158 A. J. 51(1999) a law firm was representing a husband and wife jointly in  
171 planning their estates. Through an error in the firm's conflict checking system, the firm started to  
172 represent a woman in a paternity action against the husband. When the firm realized the error, it  
173 withdrew from the representation against the husband and asked the husband for consent to  
174 disclose the existence of the illegitimate child to the wife, but the husband refused. The New  
175 Jersey Supreme Court held that the information was confidential, but the broad New Jersey  
176 exception for fraud prevention permitted the firm to disclose to the wife. California has not  
177 recognized such a broad fraud exception to the duty of confidentiality. However, under new Rule  
178 1.6(b), California now recognizes an exception that permits, but does not require, disclosure as is  
179 necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death  
180 of, or substantial bodily harm to, an individual.

181 Apart from the forgoing bar opinions and the New Jersey decision, California has a rich  
182 history of decisions in which the Courts have through motions to disqualify protected the  
183 confidences of previous clients from new or prospective clients.<sup>8</sup> In these cases the Courts have  
184 consistently found that even when there is only a risk of disclosure to an existing client, an order  
185 to disqualify is warranted. Inherent in the logic of these decisions is the implicit recognition that  
186 the duty of confidentiality is paramount to the attorney's subsequent duty of loyalty and to  
187 communicate to his or her other client. (Comment 1, Rule 1.6, citing *In Re Jordan* (1974) 12 Cal  
188 3<sup>rd</sup> 575, 580) The Committee is unaware of any authority that would suggest the rule should be  
189 otherwise with respect to disclosures made by a prospective client as opposed to a previous  
190 client. Likewise, nothing in the case law would suggest an existing client can expect an  
191 attorney's duty of loyalty to him or her to prevail over the attorney's duty of confidentiality to a  
192 prospective client.

193 As to the facts presented by the two hypothetical scenarios, the Committee concludes that  
194 the Attorney has a duty to retain in confidence the information imparted by the Prospective  
195 Client absent application of Rule 1.6 (b). Moreover, the confidential information provided to  
196 Attorney is imputed to the members of his firm. (Rule 1.8.11). Neither the Attorney nor his law  
197 firm may use the confidential information provided to Attorney unless such information would  
198 fall under Rule 1.6(b) limited exception.(Rule 1.8.2)

199 Under scenario 1, the disclosure of the information imparted to the appropriate  
200 authorities could prevent a threatened criminal act [ describe the crime] which would reasonably  
201 appear to threaten either death or substantial bodily harm through exposure to cancer. If the  
202 attorney reasonably believes this to be the case, the attorney may, but is not required to, make  
203 disclosures. (Rule 1.6 (b))

204 Rule 1.6(c) requires the Attorney to undertake certain actions to prevent the client from  
205 engaging in the criminal act before disclosure under the rule is warranted. This exception to  
206 confidentiality does not appear to apply to the scenarios presented, because the Attorney has no  
207 attorney-client relationship with the manufacturer and no means to remonstrate the

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<sup>8</sup> *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal 4th 811, 821-823; *People Ex Rel. Department Of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal 4th 1135, 1148; *Flatt v. Superior Court*, *supra*, 9 Cal 4th at 283; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal 564, 571; *Marriage Of Zimmerman* (1993) 16 Cal app 4th 556, 564-565[cite check]

208 manufacturer. However, if the Prospective Client's failure to turn over the incriminating  
209 evidence is itself deemed a criminal act, Rule 1.6 (b) may be implicated. Such circumstance  
210 would require the Attorney to consider persuading the Prospective Client to voluntarily turn over  
211 the information to the appropriate authorities.<sup>9</sup>

212 Rule 1.6(b) permits an attorney but does not require the attorney to disclose the  
213 information to prevent threatened future fraudulent or criminal activity that could cause death  
214 or serious bodily harm. Rule 1.6(d) requires that such disclosure "must be no more than is  
215 necessary to prevent the criminal act." Here, the Attorney should consider revealing the  
216 information to the appropriate enforcement authorities, leaving it to the authorities to determine  
217 the appropriate steps to take against the manufacturer. Such disclosure could lead to the  
218 disclosure of the identity of the Prospective Client, the source of the information, if under the  
219 circumstances the Prospective Client's identity is necessary for the government authority to  
220 establish a basis for pursuing the crime. Under such circumstance, the Attorney's duty to  
221 communicate with and loyalty to the Prospective Client would require the Attorney to disclose to  
222 the Prospective Client the fact that he intends to advise the authorities of this information. [let's  
223 discuss]

224 Under scenario 2, the Prospective Client's confidential information does not suggest  
225 threatened future criminal activity by the Manufacturer nor the imminent risk of bodily harm.  
226 Accordingly, under scenario 2 disclosure would be inappropriate; however, the fact that the  
227 Prospective Client may have fabricated crucial evidence relied on by the Attorney's law firm in  
228 prosecuting its case against the manufacturer may affect the law firm's ability to continue with  
229 representation of the Existing Clients under Rule 1.16.

#### 230 *Representation Of Prospective Client*

231 Under the circumstances described, can Attorney or his law firm represent the  
232 Prospective Client. Rule 1.7 (b) strongly suggests not. Rule 1.7 (b) provides that a lawyer shall  
233 not without informed written consent represent a client "if there is a significant risk the lawyer's  
234 representation of the client will be materially limited by the lawyers' responsibilities to or  
235 relationship with another client, a former client or third person, or by the lawyer's own interest."

236 Here, under both scenario 1 and scenario 2, Attorney should decline to represent the  
237 Prospective Client, because the interests of the Prospective Client and Attorney's Existing  
238 Clients conflict as to their respective interests in disclosing this information to Existing Client. In  
239 this respect, it would be important to the Attorney and his Existing Clients to be aware of and use  
240 the confidential information imparted by the Prospective Client, but the Prospective Client does  
241 not want such disclosure.

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<sup>9</sup> Whether the Attorney should advise the Prospective Client to seek independent advice from a criminal defense attorney is outside the scope of this opinion.



242 *Continued Representation Of Existing Client*

243 Under these scenarios can Attorney's law firm continue to represent their Existing Clients  
244 against the manufacturer now charged with the information the Prospective Client imparted or  
245 must the Attorney's firm withdraw as required by Rule 1.16?]

246 Under scenario 1, the information imparted would be very helpful to Attorney's Existing  
247 Clients, but if it cannot be disclosed, the question would arise as to whether mandatory  
248 withdrawal under Rule 1.16 (a)(2) is implicated or the provisions of Rule 1.16 (b)(4)(9) or (10)  
249 which provides grounds for permissive withdrawal.<sup>10</sup> Here, Attorney knows that there is  
250 powerful evidence to support Existing Clients' claims against the manufacturer that he and his  
251 law firm cannot use. Attorney may very well believe that he has now been imparted with  
252 information that provides him a direction for discovery that could be very helpful to his Existing  
253 Clients but may, on the other hand, reveal the actions of the Prospective Client which the  
254 Prospective Client shared in confidence. Under such circumstances, under Rule 1.7 (b) his  
255 representation of the Existing Clients would appear to be compromised by the Prospective  
256 Client's desire to keep the information confidential. Attorney knows of this confidential  
257 information that represents critical evidence and as a consequence Attorney's efforts to pursue  
258 the case against the manufacturer will be burdened by the concern that the possibility of later  
259 securing such evidence, no matter how innocently, may cause the Prospective Client to believe  
260 Attorney has used this information in violation of Rule 1.8.2. Such inhibition potentially  
261 compromises Attorney's representation of his Existing Clients and should require withdrawal  
262 under Rule 1.16(a)(2) and certainly warrants permissive withdrawal under Rule 1.16 (b)(4)(9) or  
263 (10).

264 Under scenario 2, if the Attorney concludes that the helpful, doctored report prepared by  
265 the Prospective Client was the critical evidence establishing the manufacturer's liability and the  
266 attorney knows that it is no longer trustworthy evidence, the attorney must determine whether  
267 pursuit of the litigation by the Attorney and his firm would implicate rule 1.16 (a) (1) which  
268 proscribes a lawyer continuing to represent a client if "the lawyer knows or reasonably should  
269 know that the client is bringing an action, conducting a defense, asserting a position in litigation,  
270 or taking an appeal without probable cause and for the purpose of harassing or maliciously  
271 injuring any person."

272 This scenario implicates the issue of probable cause to pursue the case without that  
273 evidence. The facts addressed are insufficient to reach a conclusion in this regard. In addition,  
274 based on the facts presented, there is no evidence that the Existing Clients are aware this  
275 evidence is untrustworthy so their lack of bona fides is not suggested, although Attorney's might  
276 be called into question. Accordingly, Attorney's representation of Existing Clients does not come  
277 with the express terms of Rule 1.16(a)(1). However, the attorney's representation of the Existing  
278 Clients may nevertheless be compromised because the attorney is not in a position to adequately  
279 advise his Existing Clients that the potentially key evidence in their case is founded on unreliable  
280 evidence without violating the duty of confidentiality to the Prospective Client. Likewise, as in  
281 scenario No. 1, Attorney's discovery efforts may be compromised by concerns that his firm's  
282 efforts could reveal the existence of Prospective Client's actions which the Attorney was

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<sup>10</sup> Rule 1.16 provides in pertinent part:

charged with keeping confidential. Correspondingly, the Prospective Client may fear the disclosure of this evidence by Attorney and demand Attorney and his firm withdraw from their representation of Existing Clients. Under such a circumstance, the decisions discussing the duty of confidentiality in the context of successive representation involving substantially the same matter create the presumption of shared confidences. *Flatt v. Superior Court, supra*, 9 Cal 4<sup>th</sup> at 283; *Zador Corp. v. Kwan* (1995) 31 Cal app 4<sup>th</sup> 1285, 1294 [joint clients involving the same matter creates an inherent substantial relationship] Again, such Attorney's representation of Existing Clients would be problematic.

### *Ethical Screen*

Having concluded that Attorney has been exposed to potentially disqualifying confidential information, can Attorney's firm preserve its representation of Existing Clients in light of Rule 1.18(d)(2). That Rule provides that when an attorney has received material, confidential information from a Prospective Client, representation of a client with interests materially adverse to the prospective client is not permissible unless the lawyer who received the information undertook measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client. Here both scenario 1 and scenario 2 demonstrate the Attorney obtained material information at the outset of the consultation and for the reasons above stated, that information impacts the attorney's representation of Existing Clients. Under Rule 1.18(d) where an attorney has received information that prohibits representation, an ethical screen may under the circumstances preserve the attorney-client relationship with Existing Clients. Pertinent to this opinion are the provisions of rule 1.18 (d) (2) which provides:

(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.

Here, the factual scenarios do not suggest that the attorney took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent Prospective Client. The failure to take such measures should be fatal to Attorney's and his firm's continued representation of Existing Clients. (See: *SkyBell Technologies Inc. v. Ring* 2018 WL 601-6156 [there must be some type of preceding or concurrent affirmative act that is carried out by the attorney to limit the disclosure and the attorney should advise prospective client to withhold any information deemed quote confidential"]. Absent such efforts an ethical screen will not suffice to preserve the attorney-client relationship with the Existing Clients.

### *Prophylactic Acts To Avoid Disqualification*

[should we attempt to provide such guidance?]

