

THE DUTY OF CONFIDENTIALITY OWED TO A PROSPECTIVE CLIENT AND ETHICAL SCREENING

ISSUES

1. When a prospective client has provided material, confidential information to an interviewing attorney, may that information be disclosed or used by the interviewing attorney without the client's informed consent?
2. Can the interviewing attorney or his law firm secure an informed written consent sufficient to permit the attorney's law firm to represent a client with interests materially adverse to the prospective client's.
3. What constitutes reasonable measures to avoid receiving more information than is reasonably necessary to determine whether to represent the prospective client in order to establish an effective ethical screen?
4. What steps can the interviewing attorney's law firm undertake to implement an effective ethical screen?

DIGEST

AUTHORITIES

INTERPRETED: Rules 1.01(e)[“informed consent”];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

Scenarios :

1. Scenario 1

Law firm is approached by a prospective client (“PC”) in a misappropriation of trade secret dispute. The Attorney meets with PC to discuss representing PC in a potential lawsuit against PC for misappropriation of trade secrets threatened by PC's former employer and now competitor (“FE”). During the interview, the attorney advises PC that while he has not agreed to represent PC, that that decision will be made after the

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interview and subject to his law firm's approval, the information they discuss will remain confidential. The Attorney conducts the interview to determine whether he can and should represent PC, PC provides confidential information to the Attorney that is material to PC's defense and possible exposure to FE by disclosing to Attorney that he in fact took proprietary information from FE, but he felt that since he helped develop this information, he had as much right to it as FE. In addition, during Attorney's discussions about PC's ability to pay Attorney, PC indicates that his new company is financially incapable of paying an attorney to take his case to trial so he wants a quick settlement otherwise FE will put him out of business. The Attorney declines to represent PC. Subsequently, another attorney in Attorney's firm undertakes the representation of FE and Attorney's law firm immediately sets up an ethical screen and in doing so:

a. Immediately upon representing FE, the law firm screens Attorney from its files concerning its representation of FE by putting any paper files for FE's case in a locked cabinet and putting FE's electronic files in a password protected file as to which Attorney does not have the password;

b. Immediately upon representing FE, the law firm advises all attorneys in the firm and all staff not to discuss the FE case with Attorney or his staff;

c. Since no part of the fees collected from FE are allocated to any particular attorney within the firm, no segregation of funds is implemented;

d. Immediately notifies PC of the law firm's representation of FE, who consents to such notice going out, and in such notice explains that the law firm has immediately screened Attorney from FE, all attorneys and staff working on FE's case and FE's case against PC as described above;

2. Scenario 2

Same facts as Scenario No. 1, except during the interview, the Attorney advises PC that the interview is preliminary in nature and is designed to see if Attorney's law firm would have a conflict of interest in representing PC and that until he clears conflicts they should understand that there is no assurance an attorney-client relationship will be formed. In addition, Attorney indicates to PC that he should not reveal any confidences at this stage of the interview and PC agrees. During the preliminary discussion to determine whether there would be a conflict of interest in Attorney's law firm representing PC, however, PC volunteers the confidential information described in Scenario 1. None of Attorney's question elicited such information.

3. Scenario 3

Same facts as Scenario No. 1, except during the interview, Attorney advises PC that the interview is preliminary in nature and is designed to see if Attorney's law firm would have a conflict of interest in representing PC and whether this is the type of case Attorney's law firm would want to take. Accordingly, Attorney indicates to PC that he should not reveal any confidences at this stage of the interview, that PC should only disclose information requested and only information that PC would not object to having

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known by others. PC agrees and signs an interview intake sheet to this effect, essentially representing that anything PC says to Attorney will not be deemed confidential, may be disclosed to others and will not be used to prevent Attorney's firm from representing other clients adverse to PC event Attorney does not represent PC. The disclosure does not refer to FE or name or describe the potential other clients. During the interview Attorney asks PC what FE's claim is about. While giving a summary of FE's claim, PC discloses the material information described in Scenario 1.

Discussion

Duties To The Prospective Client

New Rule 1.18 is a rule with no prior counterpart. Rule 1.18 (a) defines a prospective client as "[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 ...". This opinion assumes the interview involved is with a prospective client.

The fiduciary relationship existing between the attorney and a client extends to preliminary consultations by a prospective client with a view to retention of the attorney, although actual employment may not result. (*People Ex Rel. Department Of Corporations V. Speedee Oil, Inc.* (1999) 20 Cal 4th 1135, 1147-48) see also Cal. State Bar Formal Opinion No. 1984-84). This principle has 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.¹

With respect to the duty of confidentiality, Rule 1.6(a) provides that an attorney shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) absent the client giving informed consent or the disclosure is permitted by paragraph (b) of the rule². Business and Professions code section 6068(e)(1)) requires an attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets,

¹ Rule 1.9 provides that a former client may give informed written consent

² Rule 1.6 (b) provides that a lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (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 of, or substantial bodily harm to, an individual, as provided in paragraph (e)

of his or her client.”³ An attorney’s duty to preserve confidentiality of client information involves public policies of paramount importance, is the hallmark of the attorney-client relationship and is designed to promote trust. (*In re Jordan* (1974) 12 Cal 3rd 575, 580); see also *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal app 3rd 934, 945 (see Comment 1, Rule 1.6).

Not all persons who communicate confidential information are entitled to protection under rule 1.18. For example, a person who unilaterally communicates information without a reasonable expectation that the attorney is willing to discuss the possibility of forming a lawyer-client relationship or to provide legal advice is not a “prospective client” within the meaning of rule 1.18 (a). (Comment 2 to rule 1.18) Correspondingly a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person 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) of rule 1.18 (id., citing *People v. Gionis* (1995) 9 Cal 4th 1196 [40 Cal Rptr. 2nd 456])⁴

As the Commission for the Revision of the Rules of Professional Conduct (“Commission”) (Executive Summary, p 2.) has explained, a lawyer may expressly disclaim a willingness to consult with a person and that person would not be a prospective client under the rule. Correspondingly, a person who communicates with the lawyer without a good faith intention to seek legal advice or representation is also not a prospective client under the rule. (Commission, Executive Summary, p 2.))

Disclosure To Existing Client

The duty of confidentiality owed to PC precludes the disclosure of PC's confidential information to FE notwithstanding Attorney’s duty to communicate (Rule 1.4)⁵ and the inherent

³ Rule 1.6 [Confidential information of Client]

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

⁴ This paragraph departs from the ABA Model Rule 1.18 by clearly articulating the scope of qualifying consultations so that a prospective client may not simply disclose information in an attempt to disqualify the consulting lawyer from representing an opponent. (Commission for the Revision of the Rules of Professional Conduct (“Commission”) Executive Summary, p 2.)

⁵ 1.4 [Communication with Client]

duty of loyalty to FE.⁶ In *Flatt v. Superior Court* (1994) 9 Cal. 4th 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, Rule 1.6 and Business and Professions Code section 6068(e)(1) contain no exception that would authorize such disclosure. Further, case law and prior opinions from this Committee and local bar committees demonstrate that in such a context the duty of confidentiality remains paramount so that disclosure to FE is not permitted.

In Opinion No. 2003-163, this Committee opined that when an outside attorney 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, the opinion concluded that an attorney engaged by an insurance carrier to defend the interests of an insured is prohibited from disclosing to the insurance carrier information obtained from the insured that could provide a basis for the insurance carrier to deny coverage.

In *A v. B*, 158 A. J. 51(1999) a law firm represented a husband and wife jointly in planning their estates. Through an error in the firm's conflict system, the firm started to represent a woman in a paternity action against the husband. When the firm realized the error, it withdrew from the representation against the husband and asked the husband for consent to disclose the existence of the illegitimate child to the wife, but the husband refused. The New Jersey Supreme

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

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

⁶ The duty of loyalty implicates the biblical injunction against "serving two masters (Matthew 6:24)." (*Flatt v. Superior Court*, *supra*, 9 Cal 4th at 286). The duty of loyalty has been found to be sufficiently important that a mandatory rule of disqualification in cases of dual representation involving unrelated matters is firmly entrenched in California law. *Flatt v. Superior Court*, *supra*, 9 Cal 4th 286. Moreover the duty of loyalty may arise without potential breaches of confidentiality. (*id*)

Court held that the information was confidential, but the broad New Jersey exception for fraud prevention permitted the firm to disclose to the wife. California has not recognized such a broad fraud exception to the duty of confidentiality.

Inherent in the logic of these decisions and comments to Rule 1.6 is the implicit recognition that the duty of confidentiality is paramount to the attorney's subsequent duty of loyalty to communicate to his or her other client. (Comment 1, Rule 1.6, citing *In Re Jordan* (1974) 12 Cal 3rd 575, 580) The Committee has found no authority that would suggest the rule should be otherwise with respect to disclosures made by either a prospective client or a previous client. Accordingly, in each scenario the Attorney has a duty to retain in confidence the information imparted by PC absent application of Rule 1.6 (b) or PC's consent.(Rule 1.18 (b), referring to Rule 1.9)⁸ Moreover, the confidential information provided to Attorney is imputed to the members of his firm (Rule 1.8.11)⁹ unless the law firm is able to avoid disqualification by implementing a timely and effective ethical screen pursuant to Rule 1.18 (d).

Representation Of FE, a Client adverse to PC

Under these scenarios can Attorney's law firm represent FE against PC or must the Attorney's firm withdraw as required by Rule 1.16? Attorney's representation of FE would be prohibited and would require withdrawal under Rule 1.16(a)(2) and Rule 1.7 (b) (2)¹⁰ unless PC and FE gives the law firm an informed written consent pursuant to Rule 1.18(d)(1) or the law firm is able to establish it set up a timely and effective ethical screen pursuant to Rule 1.18(d) (2).

Informed written consent under rule 1.18 (d) (1)

While Rule 1.18 (d) (1) permits the affected client FE and the prospective client PC to each give informed written consent permitting the ongoing representation of the affected client

⁸ Rule 1.9(b) provides in pertinent part: "a lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formally was associated had previously represented a client (1) whose interests are materially adverse to that person, and (2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent.

⁹ Likewise, neither the Attorney nor his law firm may use the confidential information provided to Attorney under the circumstances presented.(Rule 1.8.2)

¹⁰ Rule 1.16 (a) (2) provides that a attorney shall not represent a client if .. "[t]he attorney knows or reasonably should know that the representation will result in violation of these rules or of the State Bar Act..."

Rule 1.7 (b) provides "a attorney shall not, without informed written consent from each affected client and compliance with paragraph (D), represent a client if there is a significant risk the attorney's representation of the client will be materially limited to the attorney's responsibilities to or relationship with another client, a former client or third person, or by the attorney's own interest."

(FE) to be represented by the interviewing attorney’s law firm, the adequacy of the informed consent will turn on the disclosure of all known material facts and risks to both the affected client and the prospective client.

Comment 9 to Rule 1.7 provides that the effectiveness of an advance consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences to the client of those representations, the greater the likelihood the client will have the required understanding to provide an informed consent.

In *Sheppard Mullin Richter & Hampton LLP v. J-M Manufacturing* (2018) 6 Cal 5th 59 the California Supreme Court considered an advance waiver of conflict of interest under former rule 3-310 (C) (3). There the California Supreme Court observed that informed written consent embodies a core aspect of the duty of loyalty such that the disclosure required for informed consent to dual representation must be measured by a standard of loyalty. Accordingly to be informed, the client’s consent to dual representation must be based on disclosure of all material facts the attorney knows and can reveal. (Id., citing *Image Technology Services, Inc. v. Eastman Kodak Co.* (N. D. Cal. 1993) 820 F.. 1212, 1214-1215, 1217) The *Sheppard Mullen* court held in the context of successive representation that a client’s written consent to waive current and future conflicts in an engagement agreement with the attorney did not constitute an effective consent to attorney’s concurrent representation of an adverse party where the attorney failed to disclose to the client **a known and existing actual conflict** *Sheppard Mullin Richter & Hampton LLP v. J-M Manufacturing, supra*, 6 Cal 5th at 543-544..¹¹ There, a large law firm agreed to represent a manufacturing company in a federal *qui tam* action brought on behalf of a number of public entities. At the same time the law firm represented one of those public entities in unrelated matters to the *qui tam* action. The large firm obtained signed waivers of all such conflicts of interest, current or future, but failed to disclose to either client its representation of the other. This failure to disclose a known existing conflict of interests invalidated the waiver of conflict.

The *Sheppard Mullin* court concluded that because the conflict waiver in issue failed to disclose a current conflict it did not have the occasion to decide whether, or under what circumstances, a blanket advance waiver like the one at issue in *Galderama Laboratories v. Actavis Mid Atlantic, LLC* (N. D. Texas 2013) 927 F. Supp. 2nd 390 would be permissible. (*Sheppard Mullin, supra*, at P 86) In *Galderama*, the court concluded that a general waiver may be effective where the client is an experienced user of legal services represented by independent counsel. (*Calderma, supra*, 920 7 F. Supp 2nd at 396-397, 399-406) It may also be significant that rule 1.7, unlike Rule 3-310 (C) which was in issue in *Sheppard Mullin* , now contains comment 9 to rule 1.7 similar to the model rule 1.7 upon which *Galderama* relied. Comment 7 now provides that the experience and sophistication of the client giving the consent is relevant in determining whether the consent is effective.

¹¹ Several federal courts applying California law have declined to enforce blanket advance waivers on the grounds they insufficiently disclosed the conflicts of interest (*Lennar Mare Island, LLC v. Steadfast Ins. Co.* (E.D. Cal 2015) 105 F 3rd 1100, 1115, 1118; *Western Sugar co-op v. Archer-Daniels-Midland Co.* (C. D. Cal. 2015) 98 F. 3rd 1074, 1082-1084),

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In short, for any informed consent to be effective, at a minimum, the consent and waiver must disclose to the prospective client any material risks associated with the consent, including any actual and existing conflicts of interest. Since Rule 1.18(d)(1) envisions a circumstance in which both the prospective client and the affected client sign an informed written consent. Such a consent would only occur after the interviewing attorney's law firm was requested to represent FE and must disclose to both PC and FE the representation of the other. None of the scenarios presented include an informed written consent by both PC and FE .¹²

Implementing an effective ethical screen under rule 1.18 (d) (2)

Absent an informed written consent by PC and FE Attorney's law firm may nevertheless screen the prohibited Attorney and avoid disqualification under Rule 1.18(c) by limiting the initial interview to only such information as reasonably appears necessary for that purpose and sets up a timely and effective ethical screen.

Rule 1.18 (d) (2)¹³ provides in pertinent part:

(2) the attorney 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 attorney is timely screened from any participation in the matter and is apportioned no part of the fee therefrom¹⁴; 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.(Emphasis added)

Reasonable Measures To Avoid Receiving Confidential Information.

¹² The sequence of disclosures to PC and FE and the details to be shared between them in order to secure an effective informed written consent are outside of the scope of this opinion.

¹³ Rule 1.10 likewise recognizes the potential efficacy of an ethical screen in circumstances of successive representation in order to avoid imputation of knowledge from a "prohibited attorney" and the resulting vicarious disqualification. Rule 1.10 requires that the prohibited attorney did not substantially participate in the same or substantially related matter; was timely screened from participation in the matter, and written notice is given to the affected client to enable the former client to ascertain compliance with the provision of the rule, including a description of the screening procedures employed an agreement by the firm to respond promptly to any written inquiries or objections by the former client.

¹⁴ Paragraph (d)(2) does not prohibit the screened attorney from receiving a salary or partnership share established by independent agreement, but that attorney may not receive compensation directly related to the matter in which the attorney is prohibited.

The first prerequisite to establishing an effective ethical screen under Rule 1.18 is that the attorney who received the information must undertake *reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the 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 "confidential"].

In determining whether the attorney who received the information *took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective* (1.18 (d) (2)), the lawyer bears the burden of showing the lawyer took "reasonable" measures to limit the amount of information learned to that which was reasonably necessary to determine whether to accept representation. (Commission response to written dissent of Robert Kerr, p.4) Neither the language of Rule 1.18 (D) (2) nor the comments of the Commission thereto, suggest the "reasonable" measures should be confined to a simple inquiry as to potential conflicts of interest. Rather, the standard is a practical reasonableness standard that confines the inquiry to only such information as necessary for the Attorney to reasonably determine whether to represent a prospective client, which may include more information than a basic conflicts inquiry. This conclusion is supported by the Restatement (3rd) of the Law Governing Lawyers, §15. There, the reporters comment (c), §15, provides in pertinent part:

It is often necessary for a prospective client to reveal and for the lawyer to learn confidential information (see § 59) during an initial consultation prior to their decision about formation of a client-lawyer relationship. For that reason, the attorney-client privilege is attaches to communications of a prospective client (see § 70, Comment *e*). The lawyer must often learn such information to determine whether a conflict of interest exists with an existing client of the lawyer or the lawyer's firm and whether the matter is one that the lawyer is willing to undertake.

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In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit the initial interview to such confidential information as reasonably appears necessary for that purpose. Where that information indicates that a conflict of interest or other reasons for nonrepresentation exists, the lawyer should so inform the prospective client or simply decline the representation.... The lawyer may also condition conversations with the prospective client on the person's consent to the lawyer's representation of other clients (see §122, Comment *d*) the prospective client's informed consent to such an agreement frees the lawyer to represent a client in a matter and to use in that matter, but only if

the agreement so provides, confidential information received from
the prospective client...."

To date, the only California case to discuss Rule 1.18 (d)'s requirements for utilizing an ethical screen is *SkyBell Technologies Inc. v. Ring*. In *Skybell Technologies, Inc. v. Ring, Inc.*,supra, 2018 WL 6016156, 1. (update and verify) There, the District Judge disqualified a law firm after a defense lawyer joined the firm midstream during a patent lawsuit for which the law firm had once made an unsuccessful marketing pitch to represent SkyBell in enforcing its patents by suing competitors, including Ring, Inc. Although the firm implemented an ethical screen so the Ring defense lawyers would be insulated from the firm's earlier pitch to SkyBell, the law firm was disqualified because the court concluded the firm had not taken reasonable steps "at each stage of the discussion with SkyBell" to avoid exposure to more information than was reasonably necessary to determine whether to represent SkyBell.

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

The court faulted the lawyers for not affirmatively warning SkyBell to limit its disclosure of information after conflicts had cleared (*Id.* at 7-9) The court in Skybell provided scant direction as to what the disqualified firm should have done to undertake reasonable measures, stating "there must be some type of preceding or concurrent affirmative act that is carried out by the attorney to limit the disclosure.... Skybell's representatives were never informed ... that they should withhold any information and were actually encouraged to provide all the information they could.

The opinion in Skybell Technologies suggests that the information reasonably necessary for a firm to determine whether to represent a client may go beyond the information necessary to clear conflicts. SkyBell, *Id.* at 9["it is a close question whether the information...received was reasonably necessary for .. to determine whether to represent Skybell. Nonetheless, the Court need not decide this issue because it has already determined ...any reasonable measures to avoid exposure to such information" were not taken.

The New Jersey Supreme Court in *O. Builders & Associates, Inc. v. Yuna Corp.of NJ* (2011) 206 N. J. 109, 125 quoting liberally from the Restatement (3rd) of the Law Governing Lawyers § 15 (2) supports the conclusion that the information reasonably necessary in order to determine whether to represent a prospective client may go beyond that information required to evaluate any potential conflicts. There, the court observed:

[a] prospective client' s assurance of confidentiality ... must yield to a reasonable degree to the need of the legal system and to the interests of the lawyer and of other clients," and that they "include the need of a lawyer to obtain information needed to determine

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whether the lawyer may properly accept representation without undue risk of prohibitions if no representation ensues.

From the foregoing, in order to satisfy the requirements of rule 1.18 (d) (2) and interviewing firm must undertake affirmative actions to avoid exposure to more information that was reasonably necessary to determine whether to represent the prospective client. That information may under the circumstances exceed the information required to do a conflicts inquiry.

In Scenario 1, Attorney informed PC that the information shared would be confidential. However, the Attorney did not expressly confine the interview to information reasonably necessary for purposes of deciding whether or not to undertake the new matter. Accordingly, under Scenario 1 a fundamental prerequisite to implementing an effective ethical screen failed to occur, resulting in imputation of attorneys confidential information to Attorney's law firm and its ultimate disqualification to represent FE. (Rule 1.18 (c)).

In Scenario 2, PC is presumed to be a "prospective client" within the definition of Rule 1.18. In other words, PC's communication to Attorney does not present as a ploy to later disqualify Attorney and his law firm should they become adverse to him. Nevertheless, Attorney attempted to confine the initial interview to an inquiry regarding information sufficient to do an appropriate conflict of interest determination. However, PC volunteered the information knowing that there was no assurance an attorney-client relationship would be formed and after the attorney specifically advised PC that he should not reveal any confidences at that stage of the interview. Based on these facts, PC essentially unilaterally communicated information without a reasonable expectation that the attorney would in fact represent him or that any information communicated would be deemed confidential.

A prospective client may not simply disclose information in an attempt to disqualify the consulting lawyer from representing an opponent nor communicate with a lawyer with no reasonable expectation the lawyer is willing to represent the person or provide legal (Commission Executive Summary, p. 2). Likewise, an attorney may expressly disclaim a willingness to consult with a person and that person would not be a prospective client under the rule. (Id.) These circumstances demonstrate a lack of a reasonable expectation of confidentiality. Here, Attorney's admonishment to PC not to disclose anything PC wants kept confidential, should preclude any false expectation of confidentiality. Under these facts and since PC unilaterally communicated confidential information to Attorney, an ethical screen may be permitted if Attorney can sustain his burden of proof that the facts are as set forth in Scenario 2 which demonstrate no expectation of confidentiality, but more importantly, that Attorney took reasonable steps to avoid disclosure of information not reasonably necessary to decide whether to represent PC. [Should we not discuss more cases about expectations of confidentiality and estoppel and come up with a group agreement as to the consequences to Attorney? This conclusion somewhat conflates the client's reasonable expectations of privacy with the Attorney's efforts to restrict the flow of information---that very well could be too much of a leap in logic.]

Under Scenario 2, Attorney admonishes PC not to disclose confidential information, but does not indicate the information disclosed may be disclosed to others. This discussion does not

rise to an informed consent by PC. Rule 1.6 (a) permits an attorney to disclose confidential communication if the client gave *informed consent*. In this case, “informed consent means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.” (Rule 1.01(e). Rule 1.6(a) does not require a written consent, but the better practice would be to put such consent in writing and confirm that no confidential information has been disclosed and that the information could be disclosed to others. The absence of such written disclosure with an informed consent, creates a degree of uncertainty for the Attorney. The facts presented in Scenario 2 do not reflect such informed consent, whether in writing or not, since there was, among other reasons, no discussion of the potential disclosure of such information to others or the foreseeable adverse consequences of disclosure.

In Scenario 3, Attorney advised PC that the interview was preliminary in nature in order to determine if there would be any conflicts of interest in representing PC and to determine whether Attorney’s law firm should take the case. Further Attorney advised PC not to reveal any confidences at this stage and to answer only information requested by Attorney. Attorney went further and asked PC the sign an interview intake sheet essentially representing that anything PC choses to disclose to Attorney may be disclosed to others and will not be used as a basis for preventing Attorney’s firm from representing other clients whose interests may be adverse to PC’s in the event Attorney does not represent PC. Disclosure, however does not refer to FE or the potential consequence of actually representing FE adverse to PC. These facts demonstrate PC clearly was a prospective client. While close, Attorney’s disclosure reflects an effort to take reasonable steps to limit the information to what was reasonably necessary to determine whether to represent PC and to make clear to PC that the information imparted would not be treated as confidential should no attorney-client relationship be entered into with the client who expressly waived and consented to any conflict that would arise from utilization of such information. While the steps taken were reasonable and should permit the use of an ethical screen, the question remains whether such steps were sufficient to constitute a consent where no ethical screen would be required. Based on the facts presented in Scenario 3, the written client intake sheet did not contain adequate disclosure of the potential risks in using such information as required by Rule 1.01 and Rule 1.6(a). Thus, the only way Attorney’s firm can represent FE is if an adequate ethical screen were implemented.

The Attributes of an effective Ethical Screen

The elements of an effective ethical screen will vary from case to case, but the two most critical elements are: (1) the screen must be timely in place and (2) imposition of actual preventive measures to guarantee that the information will not be conveyed. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4th 776, 810, citing *Speedee Oil, supra*, 20 Cal. 4th at pp. 1142,1151-1152 & fn. 5) The typical elements of an effective ethical wall are:

1. Physical, geographic, and departmental separation of attorneys;
2. Prohibitions against and sanctions for discussing confidential matters;

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3. Established rules and procedures preventing access to confidential information and files;
4. Procedures preventing a disqualified attorney from sharing in the profits from the representation¹⁵; and
5. Continuing education in professional responsibility.

(*Kirk v. First American Title Ins. Co.*, *supra*, 183 Cal. App. 4th at P. 810-811)

Mechanical adherence to these factors is not conclusive. As the Court in *Kirk* cautioned: “...the inquiry before a trial court considering the efficacy of any particular ethical wall is not to determine whether all of the prescribed list of elements (beyond timeliness and imposition of prophylactic measures) have been established; it is, instead, a case-by- case inquiry focusing on whether the court is satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation. This inquiry raises practical issues. For example, in other jurisdictions where ethical screens have been recognized, the relatively small size of a firm is a factor in determining the efficacy of the screening procedures. (*Dworkin v. General Motors Corp.*, 906 F. Supp. 273 (1995) 279; See e.g. *Van Jackson v. Check ‘n Go of Ill., Inc.* F. Supp. 2d 731 (N.D.Ill. 2000 [Found relative small size of firm undermined efficacy of the ethical screen). In a Canadian Court, for example, the fact that the Attorney in charge of the screen supervised the prohibited lateral attorney caused the screen to fail. (*Budget Car Rentals Toronto Ltd.*) 2008 Can LII 54295 (Ont. S. Ct. Octo.9, 2008), leave to appeal denied, 2008 CanII 65753 (Ont. S. Ct. Nov. 28. 2008).

Faced with the fundamental issue- whether the tainted attorney has exposed others within the firm to confidential information- the efficacy of an ethical screen in a particular context cannot be predicted with certainty. However, there are steps that can be taken that will optimize the efficacy of an ethical screen.

BEST PRACTICES TO AVOID DISQUALIFICATION[Rough, needs work and may not be a good idea]

Certain prophylactic steps can be implemented to address possible ethical ramifications arising from the new client intake process which should be designed to be informative to the client and put both the prospective client and the attorney on an equal footing as to their ability to walk away from the meeting free to either enter into an attorney-client relationship or not, with no adverse consequences to either resulting from the encounter. The steps include, but are certainly not limited to:

1. Consider having a staff person or other non-attorney conduct the preliminary case intake process to ascertain the nature of the case and the necessary information to

¹⁵ By their terms, Rules 1.10 and 1.18 apply to attorneys. As Comment 2 to Rule 1.10 states subsection (a) of Rule 1.10 does not prohibit representation by others in the law firm where the individual prohibited from the matter is a non-attorney such as a secretary or paralegal.

CLEAN

determine if there would be any conflict of interest in representing the prospective client.

2. After conflicts have cleared, the attorney will then seek information necessary to evaluate whether it is the type of case as to which the attorney will want to represent the prospective client. During this interview, Attorney should:

- a. Advise the prospective client to not disclose any information beyond what the attorney has requested and not volunteer information.

- b. Advise the prospective client that the purpose of the interview is to secure only such information that will assist the attorney and the client in deciding whether the Attorney should represent the prospective client, indicating such information will include:

- i. Information to determine whether the prospective client's legal position appears legally and factually tenable that is neither private nor of the type the prospective client would require to remain confidential, explaining to the prospective client that such information will assist the Attorney in making an informed choice to determine whether he or she can or should represent the prospective client.

- ii. The client should be advised such information must be of a nature that the client would be prepared to disclose in non-confidential contexts such as pleadings, correspondence to third parties or discovery responses;

- iii. Sufficient information from the client so that the client and attorney can work out reasonable financial accommodations to undertake the representation; and

- iv. Should the client later change his or her mind as to whether the information . .

3. Have the client sign a writing that is both a case intake sheet with the foregoing warnings and instructions, that:

- a. Summarizes the general information shared; and

- b. Includes a consent and waiver by the prospective client as to the Attorney's use of information shared should the Attorney not represent the prospective client. The consent and waiver must be very specific, list the known and foreseeable material risks of disclosure and most assuredly, describe any known conflicts.

CONCLUSION