

17-0003 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 the interviewing attorney disclose or use that information?
2. What constitutes reasonable measures to avoid receiving more information than is reasonably necessary to determine whether to represent the prospective client in order to utilize an ethical screen?
3. What steps can the interviewing attorney's law firm undertake to implement an effective ethical screen?
4. To what extent is an advanced consent and waiver effective to allow an interviewing attorney's law firm to be adverse to a former prospective client.

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

Facts Common to Each Scenario

An individual ("PC") consults with an attorney ("Attorney") with the view toward retaining Attorney to prosecute a misappropriation of trade secret claim against its Competitor ("Competitor"). The Attorney conducts the interview to determine whether he can and should represent PC. Attorney does not take on PC's case.

Scenarios :

Scenario 1

At the outset of the interview, the attorney advises PC that he has not agreed to represent PC and that the decision will be made after the interview and subject to his law firm's approval. During the interview PC provides confidential information about the merits of the case and about his ability to finance the case. The disclosure of such information or use of it for the benefit of an opponent would materially damage PC's case. The Attorney declines to represent PC.

35 Subsequently, Competitor seeks to retain Attorney and Attorney's law firm adverse to PC. The
36 law firm is prepared to y set up an effective ethical screen isolating Attorney who met with PC¹.

37 **Scenario 2a**

38 At the outset of the interview, Attorney advises PC that the interview is preliminary in
39 nature and is designed to see if Attorney's law firm would have a conflict of interest in
40 representing PC and that PC should limit the disclosure of basic facts to the information that the
41 attorney needs to determine whether the Attorney or his law firm have a conflict of interest that
42 would prevent representation, such as the identity of the parties and the nature of the claim. PC
43 provides the name of the defendant and the subject matter of the suit, but nothing more. The
44 conflict search reveals the prospective defendant Competitor is an existing client of the firm.
45 Attorney declines PC's representation because of the conflict of interest. Attorney believes that
46 the use or disclosure of the fact that PC may bring suit against Competitor would materially harm
47 PC by causing Competitor to immediately secure counsel and potentially compromise the
48 investigation of the case by restricting the ability to interview key witnesses who are employees
49 of Competitor. On the other hand Attorney understands that the prospective suit is material to
50 Competitor, since it would disrupt Competitor's current plans for a public offering.

¹ Rule 1.01(k) indicates that "'screened' means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under the rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter." Additionally, Rule 1.18(d)(2) requires that the prohibited lawyer be "apportioned no part of the fee therefrom" and "written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions."

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) Some of the recognized elements of an effective ethical screen include:

1. Physical, geographic, and departmental separation of attorneys;
2. Prohibitions against and sanctions for discussing confidential matters;
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 representation¹; and
5. Continuing education in professional responsibility.

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

Scenario 2b

Same facts as Scenario No. 2a, except that during the preliminary discussion to determine whether there would be a conflict of interest in Attorney's law firm representing PC, PC volunteers confidential material information relating to the claim which if disclosed to or used for the benefit of Competitor would be damaging to PC's case against Competitor. None of Attorney's questions would naturally have elicited such information.

Scenario 3

PC clears Attorneys conflict inquiry. Attorney and PC further their discussions. PC would like Attorney to proceed on an hourly fee basis. The Attorney therefore asked for financial information demonstrating PC's ability to pay hourly fees for the type of matter involved. PC provides financial information to Attorney which suggests PC's inability to finance the litigation on an hourly basis. PC then asked Attorney if he and his law firm would handle the case on a contingency basis. In response, Attorney asks for more information concerning the facts and merits of the case and the likely damage award, indicating that it was necessary to assess the potential value of the claim, the extent of work involved and any resulting fee. After receiving and reviewing such information, Attorney and his law firm declined to take the case. After PC sues, Attorney is approached to represent Competitor adverse to PC. Attorney believes that the information received about PC's financial situation and the merits of the case are materially adverse to the interests of PC.

Scenario 4

PC has cleared conflicts. The Attorney's law firm is prepared to take the case on an hourly basis. However, PC is interviewing several law firms and wants to evaluate Attorney's law firm by giving the law firm material, confidential information about the case and requests that the law firm prepare a memorandum analyzing the case, including its strengths and weaknesses, and setting forth a proposed strategy and budget. Attorney and the law firm agrees to accept the information and to perform the evaluation, at no charge, if PC will agree that, if the law firm is not retained, the law firm will be free to act adversely to PC in the same or a substantially related matter, including representing the prospective defendant, Competitor; in PC's case under the following conditions: (1) the Attorney who conducted the interview and any other lawyers or support personnel within Attorney's law firm who receive confidential information would be screened from the case and (2) PC agrees that the law firm's client in any subsequent litigation relating to the subject matter of the prospective engagement, including Competitor, can be informed of, and will be required to consent to, the screening arrangement and the reasons for it. PC, acting through its assistant general counsel, gives written consent to the arrangement. Attorney and his firm submit a presentation to PC, but PC does not hire Attorney or his law firm. After PC brings suit, the defendant, Competitor, seeks to hire the law firm to represent it against PC. Competitor has consented to the representation after being informed of the consultation and the screening arrangements.

89 **Discussion**

90 Under these scenarios can Attorney or his law firm represent Competitor against PC and,
91 if so, under what circumstances? The analysis of these four scenarios is largely governed by
92 Rule 1.18 of the Rules of Professional Conduct, which provides in full as follows:

93 **Rule 1.18 Duties to Prospective Client**

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

97
98 (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated
99 with a prospective client shall not use or reveal information protected by Business and
100 Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a
101 result of the consultation, except as rule 1.9 would permit with respect to information of a
102 former client.

103
104 (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially
105 adverse to those of a prospective client in the same or a substantially related matter if the
106 lawyer received from the prospective client information protected by Business and
107 Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the matter,
108 except as provided in paragraph (d). If a lawyer is prohibited from representation under
109 this paragraph, no lawyer in a firm* with which that lawyer is associated may
110 knowingly* undertake or continue representation in such a matter, except as provided in
111 paragraph (d).

112
113 (d) When the lawyer has received information that prohibits representation as provided in
114 paragraph (c), representation of the affected client is permissible if:

115
116 (1) both the affected client and the prospective client have given informed written
117 consent,* or

118
119 (2) the lawyer who received the information took reasonable* measures to avoid
120 exposure to more information than was reasonably* necessary to determine
121 whether to represent the prospective client; and

122
123 (i) the prohibited lawyer is timely screened* from any participation in the
124 matter and is apportioned no part of the fee therefrom; and

125
126 (ii) written* notice is promptly given to the prospective client to enable the
127 prospective client to ascertain compliance with the provisions of this rule.

128 Comment

129
130 Under the express language of Rule 1.18, a duty of confidentiality arises even when no
131 lawyer client relationship develops when (1) a person consults a lawyer for the purpose of

retaining the lawyer or securing legal advice from the lawyer in the lawyer's professional capacity, and (2) as a result of the consultation, the lawyer receives information that is protected by B& P Code Section 6068 (e) and Rule 1.6—that is, information that is confidential. (Rule 1.18 (b)). To qualify as a prospective client, the person consulting the lawyer must have (1) a good faith intention to seek legal advice or representation and (2) a reasonable expectation, based on the lawyer's conduct, that the lawyer is willing to discuss the possibility of forming a lawyer client relationship or providing legal advice. (*Id.*, Comment [2]; Formal Opinion 2003-161 at p. 6 . A client who communicates with the lawyer in order to ensure the lawyer's subsequent disqualification is not a prospective client. If the client communicates information unilaterally, without any indication from the lawyer that the lawyer is willing to be consulted with a view to representation, or if the client communicates information after the lawyer has stated his or her unwillingness or inability to consult, then the lawyer's conduct cannot be said to imply a willingness to be consulted, and no duty of confidentiality can be implied. (Rule 1.18, Comment [2]; *People v. Gionis* (1995) 9 Cal.4th 1196.)

The attorney's duty to a prospective client forbids use or disclosure of the confidential information disclosed except as would be permitted under Rule 1.9 (relating to former clients), and, if the information is material to the matter, bars the lawyer from acting adversely to the person in the same or a substantially related matter. Rule 1.18 (c)-(d)². However, while a lawyer who has received confidential information from a prospective client is disqualified if the confidential information is "material to the matter" (Rule 1.18(c)), both the individual and firm wide prohibitions on representation in Rule 1.18 (c) can be avoided if both the affected client and the prospective client have given their informed written consent to the representation (Rule 1.18 (d) (1)). Alternatively, the firm wide prohibition can be avoided if the lawyer has taken reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective and establishes an effective ethical screen (1.18(d)(2)).

Rule 1.18(c) contemplates a bilateral informed consent from both the prospective client and the affected client. Rule 1.18(c) does not address whether such consent can be given by the prospective client alone in advance of the conflict having arisen. On the other hand, other provisions of the Rules indicate that in appropriate circumstances such consents may be enforceable. Comment [9] to Rule 1.7 expressly states that Rule 1.7 "does not preclude an informed written consent to a future conflict in compliance with applicable case law." (Formal Opinion 1989-115 is to the same effect, stating that "an advance waiver of both conflict of interest and confidentiality protections is not, *per se*, invalid. *Id.* at 3).

² Confidentiality applies not only to attorney-client privileged communications but also to all other "information gained in the professional relationship that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client." *See, e.g.*, Formal Opinion 2003-161 at 9. If the lawyer did not get information that is confidential, for example, because the information was already publicly known at the time it was communicated, then the lawyer is not disqualified from acting adversely to the prospective client in the same or substantially related matters. *Id.* at 8; *In re Marriage of Zimmerman* (1993) 16 Cal. App. 4th 556, 565.

166 The validity of an advance consent will turn on “the extent to which the client reasonably
167 understands the material risks that the consent entails. The more comprehensive the explanation
168 of the types of future representations that might arise and the actual and reasonably foreseeable
169 adverse consequences to the client of those representations, the greater the likelihood that the
170 client will have the requisite understanding.” (Rule 1.7 Comment [9]). The experience and
171 sophistication of the client, and whether the client is independently represented, are also relevant
172 in determining whether the client reasonably understands the risks involved. (*Id.* See also *Visa*
173 *U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003); *Simpson Strong-*
174 *Tie Company, Inc. v. Ox-Post International, LLC*, 2018 WL 3956430, *13 (N. D. Cal. 2018)).

175 To date, the cases where an advanced written consent have been upheld under California
176 law tend to fall into two categories. First, such consents have been upheld when a joint client
177 agrees that if the joint relationship ends it will not seek to prevent counsel from proceeding
178 adversely to it on behalf of the other joint client or clients. *Zador Corp. v. Kwan*, (1995) 31 Cal.
179 App. 4th 1285; *Elliott v. McFarland Unified School Dist.* (1985) 165 Cal. App. 3d 562. A second
180 class of cases involve advance consents to concurrent adverse representation of an identified
181 client in specified but unrelated matters. *Visa U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d
182 1100 (N.D. Cal. 2003). Conversely, federal courts applying California law have declined to
183 enforce general more open ended advance waivers of the right to disqualify a law firm from
184 acting adversely to the consenting client in unrelated matters.³ There is authority from other
185 jurisdictions enforcing such a general consent against a sophisticated client represented by
186 counsel.⁴

187 The California Supreme Court has expressly declined to express a view on the validity of
188 more broadly framed advance consents. *Sheppard, Mullin, Richter & Hampton, LLP v. J-M*
189 *Manufacturing Company, Inc.*, 6 Cal. 5th 59, 86 (2018). Instead, the Supreme Court rested its
190 decision invalidating the consent upon the fact that the law firm had failed to disclose a known
191 existing concurrent loyalty conflict with an existing client. *Id.*

192 As an alternative to an informed consent, Rule 1.18 (d) (2) also permits the firm wide
193 disqualification in Rule 1.18 (c) to be avoided if three conditions are met. First, the attorney who
194 received the material confidential information must have taken “reasonable measures to avoid
195 exposure to more information than was reasonably necessary to determine whether to represent
196 the prospective client” Second, the prohibited attorney must be timely screened from

³ *United States ex rel. Bergelectric Corp. v. Sauer, Inc.*, 2018 WL 6619981 (N.D. Cal. 2018) (“any and all conflicts of interest which presently exist, or may hereafter exist”), *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100 (E.D. Cal. 2015) (waiver with respect to “any other client either generally or in in any matter in which [the consenting client] may have an interest” is “broad, general and indefinite”); *Western Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074 (C.D. Cal. 2015 (any existing or future client in any matter not substantially related; open-ended as to time); *Concat LP v. Unilever, PLC*, 350 F. Supp. 796 (N.D. Cal. 2004) (consent to present and future representation of any existing or new clients adverse to consenting client is unenforceable “boilerplate”).

⁴ See, e.g., *Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013).

197 participation in the matter and any portion of the fee. Third, the prospective client is given
198 written notice.

199 With respect to the first requirement, the lawyer who received the information has the
200 burden of showing that the lawyer took reasonable measures to avoid exposure to more
201 information than was reasonably necessary to determine whether to represent the prospective
202 client. (Commission response to written dissent of Robert Kerr, p.4.) If the lawyer cannot
203 demonstrate that the lawyer took such measures, then screening is not available. See: *SkyBell*
204 *Technologies Inc. v. Ring*, 2018 WL 601-6156.

205 Neither the Rule nor the Comments thereto define what constitutes information
206 “reasonably necessary to determine whether to represent the prospective client. The only
207 reported decision construing Rule 1.18 also declined to take a position on that issue. *Skybell*
208 *Technologies*, supra.⁵ It has been argued that such information is limited solely to the
209 information necessary to determine whether the lawyer is ethically permitted to undertake the
210 case, such as information necessary to check conflicts and perhaps, in a litigation context,
211 sufficient information about the merits to permit a preliminary judgment that the prospective
212 client’s position is not frivolous. We do not think that the language can be read so narrowly.

213 The Rule does not expressly limit the information a reasonable lawyer would require to
214 determine whether representation should occur to a conflict inquiry. Instead, it addresses
215 information reasonably necessary for the lawyer to decide whether the lawyer is willing to
216 represent the client. Information reasonably necessary reflects an objective standard and will
217 depend on the nature of the case and the representation. Such information could include
218 information about the prospective client and its business or the merits of the case that is far more
219 extensive than needed to determine whether representation is ethically permissible. In addition,
220 a contrary reading of the rule which would permit screening only in cases involving information
221 necessary for ethical compliance would reduce the class of cases in which screening made a
222 difference to an inconsequential number, since most conflict inquiries will not result in the
223 communication of material confidential information. This conclusion is supported by the
224 Restatement (3rd) of the Law Governing Lawyers, §15. . There, the reporters comment (c), §15,
225 provides in pertinent part:

226 It is often necessary for a prospective client to reveal and for the
227 lawyer to learn confidential information (see §59) during an initial
228 consultation prior to their decision about formation of a client-
229 lawyer relationship. For that reason, the attorney-client privilege is
230 attaches to communications of a prospective client (see §70,
231 Comment *e*). The lawyer must often learn such information to
232 determine whether a conflict of interest exists with an existing

⁵ In *dicta*, however, the Court in *Skybell* 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 ... 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.”]

client of the lawyer *or the lawyer's firm and whether the matter is one that the lawyer is willing to undertake.*

oOo

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...." [Should this go in the discussion of conflict of advance waivers?]

Apart from the *dicta* in *Skybell* suggesting that the information necessary for a firm to determine whether to represent a client may go beyond the information necessary to clear conflicts. (*SkyBell*, *Id.* at 9), The New Jersey Supreme Court in *O. Builders & Associates, Inc. v. Yuna Corp. of NJ* (2011) 206 N. J. 109, 125 came to the same conclusion. Quoting liberally from the Restatement (3rd) of the Law Governing Lawyers §15(2) 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 whether the lawyer may properly accept representation without undue risk of prohibitions if no representation ensues.

O' Builders, Id. at 125

To summarize, in order to satisfy the requirements of Rule 1.18(d)(2) an interviewing firm must undertake affirmative actions to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client. The Committee concludes that such information may, under the circumstances, exceed the information required to do a conflicts inquiry.

Discussion of Scenarios

In each of the four scenarios, Attorney is personally disqualified from acting adversely to PC in the same or a substantially related matter without informed written consent from PC and the affected client, Competitor, or an effective advanced consent, because during the interview Attorney received information that is protected by the obligation of confidentiality that is

material to the resolution of the case. Rule 1.18 (c) and (d). None of the scenarios involve such informed consent. Accordingly, Attorney owes a duty to PC not to use or disclose information received as result of the consultation. Rule 1.18 (b). Further, to avoid disqualification in the absence of an effective informed consent, Attorney and his law firm need to satisfy the conditions necessary for an effective ethical screen set out in Rule 1.18(c) and (d) (2).

Scenario 1

Here the Prospective client has not provided informed consent for Attorney to represent Competitor nor has he taken any measures—let alone reasonable measures—to ensure that he received no more information than was reasonably necessary to determine whether or not to represent the prospective client. Rule 1.18 (c)-(d); *accord, 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”].) Accordingly, neither Attorney nor his law firm may represent Competitor.

Scenario 2a

Consistent with the analysis under Scenario 1, Attorney owes a duty to PC not to use or disclose information received as result of the consultation. On the other hand, Attorney has a duty to inform his current client of significant and/or material developments. While there is no reported California case, the weight of ethics opinions is that Attorney may not use or disclose the information acquired from PC to his law firm’s existing client, Competitor notwithstanding Attorney’s duty to communicate (Rule 1.4)⁶ and the inherent duty of loyalty to Competitor.⁷

⁶ 1.4 [Communication with Client]

(a)(3) An 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]: “ an 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

⁷ 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.*

296 In *Flatt v. Superior Court* (1994) 9 Cal 4th 275, the California Supreme Court held that an
297 attorney's duty of loyalty to any existing client not only precluded the attorney from representing
298 a prospective client against the existing client but also insulated the attorney from liability in
299 failing to advise the prospective client of the potential statute of limitations of any claim the
300 prospective client may have against the attorneys existing client. The court in *Flatt*, however, did
301 not address the obligation, if any, of the attorney to disclose to the existing client the information
302 the prospective client provided to the attorney. However, Rule 1.6 and Business and Professions
303 Code section 6068(e)(1) contain no exception that would authorize such disclosure. Further, case
304 law and prior opinions from this Committee and local bar committees demonstrate that in such a
305 context the duty of confidentiality remains paramount so that disclosure to Competitor is not
306 permitted.

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

312 In LA County 528 (2017), LA County 528, the opinion concluded that an attorney
313 engaged by an insurance carrier to defend the interests of an insured is prohibited from
314 disclosing to the insurance carrier information obtained from the insured that could provide a
315 basis for the insurance carrier to deny coverage.

316 In *A v. B*, 158 A. J. 51(1999) a law firm represented a husband and wife jointly in
317 planning their estates. Through an error in the firm's conflict system, the firm started to represent
318 a woman in a paternity action against the husband. When the firm realized the error, it withdrew
319 from the representation against the husband and asked the husband for consent to disclose the
320 existence of the illegitimate child to the wife, but the husband refused. The New Jersey Supreme
321 Court held that the information was confidential, but the broad New Jersey exception for fraud
322 prevention permitted the firm to disclose to the wife. California has not recognized such a broad
323 fraud exception to the duty of confidentiality.

324 Inherent in the logic of these decisions and comments to Rule 1.6 is the implicit
325 recognition that the duty of confidentiality is paramount to the attorney's subsequent duty of
326 loyalty to communicate to his or her other client information that may be material to the client's
327 representation. (Comment 1, Rule 1.6, citing *In Re Jordan* (1974) 12 Cal 3rd 575, 580) The
328 Committee has found no authority that would suggest the rule should be otherwise with respect
329 to disclosures made by either a prospective client or a previous client. Accordingly, in each
330 scenario the Attorney has a duty to retain in confidence the information imparted by PC absent
331 application of Rule 1.6 (b) or PC's consent. (Rule 1.18(b), referring to Rule 1.9.)⁸ Moreover, the

Superior Court, supra, 9 Cal 4th 286. Moreover the duty of loyalty may arise without potential breaches of confidentiality. (*Id.*)

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

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).

Should PC later sue Competitor, Attorney will be free to act adversely to PC on behalf of Competitor, because the confidential information that Attorney received from PC concerning its intention to sue Competitor is rendered moot and immaterial by the fact that PC has now sued, a fact now known by Competitor, and the lawyer received no other information that would be material to the resolution of the case. Rule 1.18 (c).¹⁰ As a result, even if Attorney is disqualified, unlike in Scenario 1, a timely and otherwise adequate screen would prevent disqualification, because the lawyer took reasonable steps to obtain no more information than was necessary. Rule 1.18 (d) (2)

Scenario 2b

Unlike scenario 2a, PC volunteers confidential, material information to Attorney, whose questions did not elicit such information. 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.) Nor is a person who communicates information to a lawyer without a good faith intention to seek legal advice or representation. (Id., citing *People v. Gionis* (1995) 9 Cal 4th 1196 [40 Cal Rptr. 2nd 456].)¹¹

Here, PC was engaged in a good faith effort to obtain legal representation, and the Lawyer indicated a willingness to discuss that possibility. Therefore, consistent with the analysis under scenario 2a, Attorney may not use or disclose the confidential information. As a result, Attorney is personally disqualified from acting adversely to PC, because the Attorney has acquired material confidential information. On the other hand, the Attorney's law firm would not be disqualified if it timely establishes an effective ethical screen pursuant to the requirements of rule 1.18 (d) (2), because the lawyer clearly took reasonable measures to avoid the disclosure of any more information than was reasonably necessary to determine whether to accept the representation.

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 There may be circumstances where, for some reason, the Attorney's duty not to use or disclose the fact, timing or content of the initial consultation could create a potential conflict under Rule 1.7 (b) to the extent that the lawyer's compliance with the duty not to use or disclose that information creates a significant risk of a material impairment of the representation.

¹¹ 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.)

Scenario 3

As with Scenario 2a, Attorney is personally disqualified and may not use or disclose the confidential information received from the prospective client. On the other hand, Attorney's law firm should be able to avoid disqualification with a timely and otherwise adequate screen because at all times the lawyer limited disclosure to information reasonably necessary to determine whether to undertake the representation. Information necessary to determine whether to undertake the representation is context dependent and may include information relating to the client's reputation, ability to pay its bills, or, in contingent fee or fee award cases, the merits of the case and recoverable damages. In this case, Attorney initially advised PC to disclose only the information necessary to determine whether a conflict existed. Then, when PC requested representation on an hourly basis, the law firm advised the client to disclose only the information that was necessary to determine whether the client would be able to pay anticipated fees on an hourly basis. Finally, when the client requested instead that the firm undertake the cases on a contingent basis, the law firm advised the client that it should provide no more information than needed to permit the law firm to assess the likelihood and amount of a recovery from which fees would be paid. Under the circumstances, each of these classes of information were reasonably necessary for the law firm to decide whether it was willing to accept the case. The availability of screening independent of informed consent under these facts may be subject to greater uncertainty since it is a question that has yet to be settled. *Skybell*. It is, however, the Committee's opinion that Attorney's affirmative efforts to secure no more information than necessary to determine whether undertake PC's representation should entitle PC's law firm to set up an effective ethical.¹²

Scenario 4:

Consistent with the discussion under Scenario 2a and 3, Attorney and the team who received PC's material confidential information are personally disqualified from representing the defendant Competitor adverse to PC, because they actually received information material to the matter. Again Attorney and the interviewing team may not use or disclose such confidential information.

The availability of screening for the law firm independent of informed consent under these facts is more problematic since not only has Attorney obtained information that was necessary for his decision to represent PC, but, at PC's request, Attorney has obtained information and provided analysis and work product to PC in order to persuade PC to retain Attorney and his firm, information that the firm itself did not require to decide that it was both willing and able to take the case. It is doubtful that information received by a law firm that the prospective client insists on providing in order to evaluate the law firm's qualifications is "reasonably necessary [for the lawyer] to determine whether to represent the prospective client..." and accordingly, it is doubtful that ethical screening would be available and sufficient to permit the law firm to represent Competitor.

¹² The determination of whether reasonable measures were taken to limit information acquired and to limit that information to information reasonably necessary to determine whether an attorney can or should represent a prospective client is plainly an objective, fact dependent inquiry which will be resolved on a case by case basis.

Here, however, PC is prepared to give informed written consent to any conflict created by Attorney's receipt of confidential information and the resulting screening arrangement so that Attorney's firm could represent Competitor. Moreover, PC gave advanced written consent to the firm's representation of Competitor, provided that the lawyers who received its confidential information in the course of the beauty contest were screened from the matter.

This advanced consent should clearly be enforceable. It is specific, limited to a single identified client and a single matter. Such specificity provides sufficient disclosure under the reasoning of *Zador Corp. v. Kwan, surpa.* 31 Cal. App. 4th 1285 and *Elliott v. McFarland Unified School Dist. ,surpra*, 165 Cal. App. 3d 562.¹³ Further, with this advanced consent PC is waiving only the right to insist on imputed disqualification despite an effective ethical screen, a more modest forfeiture than in *Zador* or *McFarland* which upheld consents resulting in the full waiver of the protections afforded a present or former client. Additionally, here PC is sophisticated and represented by its own in house counsel and specifically invited the disclosure in order to meet its own objectives.

Best Practices To Avoid Disqualification

Certain prophylactic steps should be implemented to address possible ethical issues arising from the new client intake process. The steps include, but are certainly not limited to,:

1. During the initial client intake, advising the prospective client of the following:

- a. That until a conflicts check is completed, there is no assurance of an attorney client relationship; and
- b. During the period where conflicts are being reviewed, no information should be exchanged other than that which relates solely to the Attorney's conflict of interest inquiry.

2. After the conflicts of interest is cleared, the Attorney should:

- a. only secure such information that avoids any conflict of interest concerns and addresses the 2 critical case intake factors:
 - i. whether the clients legal position appears legally and factually tenable; and
 - ii. whether the client and attorney can work out reasonable financial accommodations to undertake the representation.
- b. put in writing the admonitions provided to the prospective client and the client should sign an acknowledgment that it has been instructed not to

¹³ Accordingly, it is not necessary to this opinion to address the question of the enforceability of more generally framed advance waivers to conflicts involving unspecified matters or unspecified adverse clients, and we express no view on that issue.

430 disclose any confidential information that the client does not want shared
431 with other parties.

432 3. That to the extent the Attorney and Client must engage in a more detailed
433 substantive discussion of the prospective client's case in order to determine
434 whether the attorney should take the case, The attorney should have the Client
435 execute an advance consent and waiver that is explains in detail the specific
436 material risks that the consent entails. (Comment 9, Rule 1.7) The explanation
437 should provide a comprehensive explanation of the types of future
438 representations that might arise and the actual and reasonably foreseeable adverse
439 consequences to the client of those representations.

440 4. Consider having a non-attorney conduct the interview since Rule 1.18 refers only
441 to attorneys and the representation rule of Rule 1.10 specifically only applies to
442 attorneys. (See Comment (2).)

443

444 **CONCLUSION**

445 [INSERT]