

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 lawyer, may the interviewing lawyer disclose or use that information?
2. When the interviewing lawyer is disqualified because the lawyer has received material confidential information from a prospective client, under what conditions is ethical screening available so that other lawyers in the lawyer's law firm may represent other clients who are adverse to the prospective client in the same or substantially related matters?
3. To what extent can a prospective client give advanced informed written consent to permit an interviewing lawyer's law firm to be adverse to a former prospective client in the same or substantially related matter in circumstances where the interviewing lawyer would be personally disqualified and screening would otherwise be insufficient to ensure that law firm's right to do so.

DIGEST

When a person is a prospective client within the meaning of Rule 1.18 (a), the interviewing lawyer owes the prospective client the same duty of confidentiality owed an existing or former client pursuant to Rules 1.6 and 1.9 even though no lawyer-client relationship thereafter ensues. (Rule 1.18(a)) The lawyer may not use or disclose such information without the prospective client's informed written consent. (Rule 1.18(b), Rule 1.9(a)) This is so even if the information would be material to the representation of an existing client of the lawyer or the lawyer's law firm. The duty of confidentiality to the prospective client outweighs the duty to inform the current client.

An interviewing lawyer who receives material confidential information from a prospective client is personally disqualified from accepting representation adverse to the prospective client in the same or a substantially related matter absent informed written consent. That disqualification is imputed to other members of the law firm unless the interviewing lawyer took reasonable measures to obtain only that information reasonably necessary to determine whether to represent the existing client and the law firm promptly undertook the screening measures specified in Rule 1.18 (d) (2). Reasonable measures include advising the client to provide only identified information that the lawyer needs to decide whether to undertake the representation and limiting questioning of the client so as to elicit only such information. The information reasonably necessary to determine whether to represent the prospective client is that which a reasonable lawyer in the situation of the interviewing attorney would require to determine whether the proposed representation was both ethically proper and economically acceptable. It includes information beyond what is required to determine whether the representation is ethically permissible and may include information as to whether the client's position is tenable, and, in appropriate circumstances, may include information relating to the client's reputation or financial condition, the merits of the claim, and the likely range of recoveries.

CLEAN

The disqualification of a lawyer or law firm resulting from the receipt of a prospective client's confidential information can be waived with the informed written consent of both the prospective client and any affected client of the law firm. (Rule 1.18 (d) (1). A prospective client may give advance informed written consent to the law firm acting adversely to the prospective client in the same matter or substantially related matters. (Rule 1.9(a), Rule 1.18(b))

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

A person or entity ("PC") consults with a lawyer ("Lawyer") with a view toward retaining Lawyer and Lawyer's firm to prosecute a misappropriation of trade secret claim against its Competitor ("Competitor"). The Lawyer conducts the interview to determine whether Lawyer can and should represent PC. Lawyer does not take on PC's case.

Scenarios :

Scenario 1

At the outset of the interview, Lawyer advises PC that Lawyer has not agreed to represent PC and that the decision will be made after the interview and subject to law firm's approval. During the interview PC provides confidential information about the merits of the case and about PC's 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 Lawyer declines to represent PC. Subsequently, Competitor seeks to retain Lawyer and Lawyer's law firm adverse to PC. The law firm is prepared to set up an effective ethical screen isolating Lawyer who met with PC¹.

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 non-lawyer 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.*

67 **Scenario 2a**

68 At the outset of the interview, Lawyer advises PC that the interview is preliminary in nature
 69 and is designed to see if Lawyer's law firm would have a conflict of interest in representing PC
 70 and that PC should limit the disclosure of basic facts to the information that Lawyer needs to
 71 determine whether the Lawyer or his law firm have a conflict of interest that would prevent
 72 representation, such as the identity of the parties and the nature of the claim. PC provides the name
 73 of the defendant and the subject matter of the suit, but nothing more. The conflict search reveals
 74 the prospective defendant Competitor is an existing client of the firm. Lawyer declines PC's
 75 representation because of the conflict of interest. Lawyer believes that the use or disclosure of the
 76 fact that PC may bring suit against Competitor would materially harm PC by causing Competitor
 77 to immediately secure counsel and potentially compromise the investigation of the case by
 78 restricting the ability to interview key witnesses who are employees of Competitor. On the other
 79 hand Lawyer understands that the prospective suit is material to Competitor, since it would disrupt
 80 Competitor's current plans for a public offering.

81 **Scenario 2b**

82 Same facts as Scenario 2a, except that during the preliminary discussion to determine
 83 whether there would be a conflict of interest in Lawyer's law firm representing PC, PC volunteers
 84 confidential material information relating to the claim which if disclosed to or used for the benefit
 85 of Competitor would be damaging to PC's case against Competitor. None of Lawyer's questions
 86 would naturally have elicited such information.

87 **Scenario 3**

88 PC clears the law firm's conflict inquiry. Lawyer and PC continue their discussions. PC
 89 would like Lawyer to proceed on an hourly fee basis. The Lawyer therefore asks for financial
 90 information demonstrating PC's ability to pay hourly fees for the type of matter involved. PC
 91 provides financial information to Lawyer which shows PC's inability to finance the litigation on
 92 an hourly basis. PC then asks Lawyer if he and his law firm would handle the case on a

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)

contingency basis. In response, Lawyer 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, Lawyer and his law firm declined to take the case. After PC sues, Lawyer is approached to represent Competitor adverse to PC. Lawyer believes that the information received about PC's financial situation and the merits of the case are materially adverse to the interests of PC. Law firm is prepared to initiate a timely and effective screen of the interviewing lawyer.

Scenario 4

PC has cleared conflicts. The Lawyer's law firm is prepared to take the case on an hourly basis. However, PC is interviewing several law firms and wants to evaluate Lawyer's law firm by giving the law firm material, confidential information about the case, so that the law firm can prepare a memorandum analyzing the case, including its strengths and weaknesses, and setting forth a proposed strategy and budget. Lawyer and the law firm agree 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 Lawyer who conducted the interview and any other lawyers or support personnel within Lawyer'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. Lawyer and his firm submit a presentation to PC, but PC does not hire Lawyer 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.

Discussion

The analysis of these four scenarios is largely governed by Rule 1.18 of the Rules of Professional Conduct, which provides in full as follows:

Rule 1.18 Duties to Prospective Client

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

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

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

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

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

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

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

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

Under the express language of Rule 1.18, a duty of confidentiality arises even when no lawyer client relationship ensues 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]² ; *People v. Gionis* (1995) 9 Cal.4th 1196.)

² 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.)

The lawyer'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 as well as Lawyer's law firm (Rule 1.18(c)) except as may be permitted under Rule 1.18 (d). Rule 1.18 (c)-(d)³. 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) will not apply if both the affected client and the prospective client have given their informed written consent to the representation (Rule 1.18 (d) (1)). Alternatively, if the lawyer has taken reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client and establishes an effective ethical screen of the interviewing lawyer (1.18(d)(2)) the firm wide prohibition of Rule 1.18(c) will not be triggered.

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). The Restatement of the Law Governing Lawyers at comment c to Section 15 [A Lawyer's Duties to a Prospective Client] also recognizes advance consents in the context of an interview with a prospective client:

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*) or on the prospective client's agreement that any information disclosed during the consultation is not to be treated as confidential (see § 62). 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. A prospective client may also consent to a representation in other ways applicable to a client under § 122.

³ 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.

The validity of an advance consent will turn on “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 that the client will have the requisite understanding.” (Rule 1.7 Comment [9]). The experience and sophistication of the client, and whether the client is independently represented, are also relevant in determining whether the client reasonably understands the risks involved. (*Id.* See also *Visa U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003); *Simpson Strong-Tie Company, Inc. v. Ox-Post International, LLC*, 2018 WL 3956430, *13 (N. D. Cal. 2018)).

To date, the cases where an advanced written consent have been upheld under California law tend to fall into two categories. First, such consents have been upheld when a joint client agrees that if the joint relationship ends it will not seek to prevent counsel from proceeding adversely to it on behalf of the other joint client or clients. *Zador Corp. v. Kwan*, (1995) 31 Cal. App. 4th 1285; *Elliott v. McFarland Unified School Dist.* (1985) 165 Cal. App. 3d 562. A second class of cases involve advance consents to concurrent adverse representation of an identified client in unrelated matters. *Visa U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003).⁴

As an alternative to an informed consent, Rule 1.18 (d) (2) also permits firm wide representation if three conditions are met. First, the lawyer who received the material confidential information must have taken “reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client” Second, the prohibited lawyer must be timely screened from participation in the matter and any portion of the fee. Third, the prospective client is given written notice.

With respect to the first requirement, the lawyer who received the information has the burden of showing that the lawyer took reasonable measures to avoid exposure to more

⁴ Conversely, federal courts applying California law have declined to enforce general more open ended advance waivers of the right to disqualify a law firm from acting adversely to the consenting client in unrelated matters. *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”). However, there is authority from other jurisdictions enforcing such a general consent against a sophisticated client represented by counsel. *Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013). The California Supreme Court has expressly declined to express a view on the validity of more broadly framed advance consents. *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, 6 Cal. 5th 59, 86 (2018). Instead, the Supreme Court rested its decision invalidating the consent in that case upon the fact that the law firm had failed to disclose a known existing concurrent loyalty conflict with an existing client. *Id*

information than was reasonably necessary to determine whether to represent the prospective client. (Commission response to written dissent of Robert Kerr, p.4.) If the lawyer cannot demonstrate that the lawyer took such measures, then screening is not available. See: *SkyBell Technologies Inc. v. Ring*, 2018 WL 601-6156.

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

The Rule does not expressly limit the information a reasonable lawyer would require to determine whether representation should occur to a conflict inquiry. Instead, it addresses information reasonably necessary for the lawyer to decide whether the lawyer is willing to represent the client. Information reasonably necessary reflects an objective standard and will depend on the nature of the case and the representation. Such information could include information about the prospective client and its business or the merits of the case that is far more extensive than needed to determine whether representation is ethically permissible. A contrary reading of the rule which would permit screening only in cases involving information necessary for ethical compliance would reduce the class of cases in which screening made a difference to an inconsequential number, since most conflict inquiries will not result in the communication of material confidential information. 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.*

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....

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, in appropriate circumstances, exceed the information required to do a conflicts inquiry.

Discussion of Scenarios

In all of the scenarios Lawyer received information that is protected by the obligation of confidentiality and that that is material. Rule 1.18 (c) and (). Accordingly, Lawyer owes a duty to PC not to use or disclose information received as result of the consultation. Rule 1.18 (b). In addition, except in Scenario 2a, where the information received by the lawyer ceases to be material at the time that PC files a suit against Competitor, Lawyer 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. Further, to prevent the law firm's disqualification in the absence of an effective informed consent, Lawyer 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 Lawyer to represent Competitor nor has the Lawyer taken any measures—let alone reasonable measures—to ensure that the Lawyer would receive 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 lawyer to limit the disclosure and the lawyer should advise prospective client to withhold any information deemed “confidential”].) Accordingly, neither Lawyer nor his law firm may represent Competitor.

Scenario 2a

In this scenario, Lawyer has learned that PC plans to sue a current client, Competitor. This information is material to both PC and to Competitor. Consistent with the analysis under Scenario 1, Lawyer owes a duty to PC not to use or disclose information received as result of the consultation. On the other hand, Lawyer 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 Lawyer may not use or disclose the information acquired from PC to his law firm's

310 existing client, Competitor notwithstanding Lawyer’s duty to communicate (Rule 1.4)⁵ and the
311 inherent duty of loyalty to Competitor.⁶

312 In *Flatt v. Superior Court* (1994) 9 Cal 4th 275, the California Supreme Court held that an
313 lawyer’s duty of loyalty to an existing client not only precluded the lawyer from representing a
314 prospective client against the existing client but also insulated the lawyer from liability in failing
315 to advise the prospective client of the potential statute of limitations of any claim the prospective
316 client may have against the lawyers existing client. The court in *Flatt*, however, did not address
317 the obligation, if any, of the lawyer to disclose to the existing client the information the prospective
318 client provided to the lawyer. However, Rule 1.6 and Business and Professions Code section
319 6068(e)(1) contain no exception that would authorize such disclosure. Further, case law and prior
320 opinions from this Committee and local bar committees demonstrate that in such a context the duty
321 of confidentiality remains paramount so that disclosure to Competitor is not permitted.

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

327 In LA County 528 (2017), LA County 528, the opinion concluded that an lawyer engaged
328 by an insurance carrier to defend the interests of an insured is prohibited from disclosing to the
329 insurance carrier information obtained from the insured that could provide a basis for the insurance
330 carrier to deny coverage.

331 In *A v. B*, 158 A. J. 51(1999) a law firm represented a husband and wife jointly in planning
332 their estates. Through an error in the firm’s conflict system, the firm started to represent a woman

⁵ 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

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.*)

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 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 any exception to the duty of confidentiality that would permit disclosure here.

Inherent in the logic of these decisions and comments to Rule 1.6 is the implicit recognition that the duty of confidentiality overrides the lawyer's subsequent duties of loyalty and to communicate to his or her other client information that may be material to the client's representation. (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 Lawyer has a duty not to use or disclose the information imparted by PC absent application of Rule 1.6 (b) or PC's informed consent. (Rule 1.18(b), referring to Rule 1.9.)⁷

Should PC later sue Competitor, however, Lawyer will be free to act adversely to PC on behalf of Competitor, because the confidential information that Lawyer 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).⁸ Further, even if Lawyer were 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 to determine whether Lawyer or law firm had a conflict of interest. Rule 1.18 (d) (2)

Scenario 2b

Unlike scenario 2a, PC volunteers confidential, material information to Lawyer, who had instructed the client not to provide such information and whose questions did not seek to elicit such information.

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, Lawyer may not use or disclose the confidential information. As a result, Lawyer is personally disqualified from acting adversely to PC, because the Lawyer has acquired material

⁷ 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.

⁸ 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.

confidential information. On the other hand, the Lawyer'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.

Scenario 3

As with Scenario 2a, Lawyer is personally disqualified and may not use or disclose the confidential information received from the prospective client. On the other hand, Lawyer's law firm should be able to prevent 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, Lawyer 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 of success and the amount of a recovery from which fees would be paid. Under the circumstances, each of these classes of information was no broader than reasonably necessary for the law firm to decide whether it was willing to accept the case on the terms proposed by PC. Nevertheless, 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 Lawyer's affirmative efforts to secure no more information than necessary to determine whether undertake PC's representation should entitle PC's law firm to avoid disqualification from acting adversely to PC by setting up an effective ethical screen.⁹

Scenario 4:

Consistent with the discussion under Scenario 2a and 3, Lawyer 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 Lawyer 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 Lawyer obtained information that was necessary for his decision to represent PC, but, at PC's request, Lawyer has obtained information and provided analysis and work product to PC in order to persuade PC to retain Lawyer and his firm, information that the firm itself did not require to decide that it was both willing and able to take

⁹ 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.

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.

Here, however, PC is prepared to give informed written consent to any conflict created by Lawyer's receipt of confidential information and the resulting screening arrangement so that Lawyer'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., surpa*, 165 Cal. App. 3d 562.¹⁰ 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 Prevent 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 lawyer 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 Lawyer's conflict of interest inquiry.

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

- a. only secure such information as is reasonably necessary to address the case intake factors that the firm has identified as critical, including, but not limited to,

¹⁰ 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.

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i. whether the clients legal position appears legally and factually tenable;

ii. Whether the client had prior representation in the matter and the circumstances resulting in the termination of the attorney-client relationship with former counsel; and

iii. whether the client and lawyer can work out reasonable financial accommodations to undertake the representation.

b. put in writing the admonitions provided to the prospective client and require the prospective client to sign an acknowledgment that the prospective client has been instructed not to disclose any confidential information that the client does not want shared with other parties.

3. That to the extent the Lawyer and Client must engage in a more detailed substantive discussion of the prospective client's case or business, financial or emotional circumstances in order to determine whether the lawyer should take the case, the lawyer should have the Client execute an advance consent and waiver that is explains in detail the relevant circumstances and specific material risks that the consent entails. (Comment 9, Rule 1.7) The explanation should provide a comprehensive explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences to the client of those representations.

Where the circumstances may be appropriate having a non-lawyer conduct the interview may reduce the risk of disqualification of the law firm, since imputation of confidential information to the firm may not be implicated under Rule 1.18 which refers only to lawyers as does Rule 1.10 which does exempt non-lawyers from the imputation rules. (See Comment (2).)[LET'S DISCUSS]

CONCLUSION

An interviewing lawyer owes the prospective client the same duty of confidentiality owed an existing client pursuant to Rule 1.6, even though no lawyer-client relationship thereafter ensues. (Rule 1.18(a)) The lawyer may not use or disclose such information without the prospective client's informed consent. (Rule 1.18(b)) This is so even if the information would be material to, or a significant development in connection with, the representation of, an existing client of the lawyer or the lawyer's law firm—the duty of confidentiality to the prospective client outweighs the duty to inform the current client.

An interviewing lawyer who receives material confidential information from a prospective client is personally disqualified from accepting representation adverse to the prospective client in the same or a substantially related matter. Likewise, the other members of the lawyer's law firm are disqualified unless the interviewing lawyer took reasonable measures to obtain only that information reasonably necessary to determine whether to represent the existing client and the law firm promptly undertook the screening measures specified in Rule 1.18 (d) (2). Reasonable measures include advising the prospective client to provide only identified information that the

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472 lawyer needs to decide whether to undertake the representation and limiting questioning of the
473 client so as to elicit only such information. The information reasonably necessary to determine
474 whether to represent the prospective client is that which a reasonable lawyer in the situation of the
475 interviewing attorney would require to determine whether the proposed representation was both
476 ethically proper and economically acceptable. Such information, may include information relating
477 to the client's reputation or financial condition, the merits of the claim, and the likely range of
478 recoveries.

479 The disqualification of a lawyer or law firm resulting from the receipt of a prospective
480 client's confidential information can be waived with the informed written consent of both the
481 prospective client and any affected client of the law firm. (Rule 1.18 (d) (1). Correspondingly, a
482 prospective client may give advance consent to the law firm acting adversely to the prospective
483 client in the same matter or substantially related matters. (Rule 1.9(a) and Rule 1.18(b))