

Draft prepared for the July 24, 2020 COPRAC Meeting

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**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
DRAFT FORMAL OPINION INTERIM NO. 17-0003  
DUTIES TO PROSPECTIVE CLIENTS 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 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 prohibited from representing the client 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.

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An interviewing lawyer who receives material confidential information from a prospective client is prohibited from accepting representation materially adverse to the prospective client in the same or a substantially related matter absent informed written consent. That prohibition 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 reasonable 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 to determine a conflict of interest, 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.

The prohibition against accepting a representation that is materially adverse to a prospective client resulting from the receipt of that prospective client's material 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), 1.4, 1.6, 1.7, 1.8.2, 1.9, 1.10, 1.16 and 1.18 of the Rules of Professional Conduct of the State Bar of California.<sup>1</sup>

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

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<sup>1</sup> Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

STATEMENT OF FACTS

**Facts Common to Each Scenario:**

A person or entity ("PC") consults with a lawyer ("Lawyer") about retaining Lawyer and Lawyer's firm ("Law 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. Law Firm does not take PC's case.

**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. Lawyer does not provide PC with any guidance about what PC should disclose to Lawyer or caution PC against the disclosure any material confidential information. Instead, Lawyer begins asking PC open ended questions about PC's business and PC's potential claims against Competitor. 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, including Competitor, would materially damage PC's case. Shortly after the interview, Lawyer advises PC that Law Firm will not take PC's case. Subsequently, Competitor seeks to retain Law Firm to defend Competitor in the matter brought by PC. Law Firm is prepared to set up an effective ethical screen isolating Lawyer who met with PC<sup>2</sup>.

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<sup>2</sup> 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. Co.* (2010) 183 Cal. App. 4<sup>th</sup> 776, 810, citing *Speedee Oil, supra*, 20 Cal. 4<sup>th</sup> 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;

**Scenario 2a**

At the outset of the interview, Lawyer advises PC that Lawyer has not agreed to represent PC and that the interview is designed to see only if Law Firm would have a conflict of interest in representing PC. Lawyer advises PC that PC should limit the disclosure of basic facts to the information that Lawyer needs to determine whether the Lawyer or Law Firm have a conflict of interest that would prevent representation, such as the identity of the parties and the nature of the claim. Lawyer also cautions PC not to disclose to Lawyer any other confidential information or any information that is not reasonably necessary to assist Lawyer in determining if there is a conflict of interest because PC and Lawyer have not yet formed an attorney-client relationship. PC provides the name of the defendant and the subject matter of the suit, but nothing more. The conflict search reveals the prospective defendant Competitor is an existing client of Law Firm. Law Firm declines PC's representation because of the conflict of interest. Lawyer believes that the use or disclosure of the fact that PC may bring suit against Competitor could materially harm PC by alerting Competitor to the threatened litigation. On the other hand Lawyer understands that the prospective suit is material to Competitor, since it would disrupt Competitor's current plans for a public offering.

**Scenario 2b**

Same facts as Scenario 2a, except that during the preliminary discussion to determine whether there would be a conflict of interest in Law Firm's representation of PC, and despite Lawyer's admonitions, PC volunteers confidential material information relating to PC's claim which if disclosed to or used for the benefit of Competitor would be damaging to PC's case against Competitor. None of Lawyer's questions would naturally have elicited such information.

**Scenario 3**

PC clears Law Firm's conflict inquiry. Lawyer and PC would like to continue discussions about whether Law Firm can and should take on PC's case. PC would like Lawyer to proceed on an hourly fee basis. The Lawyer therefore asks for financial information demonstrating PC's ability to pay hourly fees for the type of matter involved. Lawyer cautions PC not to disclose to Lawyer any other confidential information or any information that is not reasonably necessary to assist Lawyer in determining if PC is able to pay Law Firm's hourly fees because PC and Lawyer have not yet formed an attorney-client relationship. PC provides financial information to Lawyer which shows PC's inability to finance the litigation on an hourly basis. PC then asks Lawyer if Law Firm would handle the case on a contingency basis. In response, Lawyer asks for more information concerning the facts and merits of the case and the likely damage award, indicating

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4. Procedures preventing a disqualified attorney from sharing in the profits from the representation<sup>2</sup>; and
  5. Continuing education in professional responsibility.

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

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that it was necessary to assess the potential value of the claim, the extent of work involved and any resulting fee. Lawyer again cautions PC to limit PC's disclosure of information to Lawyer to only the information being requested. After receiving and reviewing PC's information, Lawyer decides against recommending that Law Firm take the case, but Lawyer does not share any of PC's information, the related analysis that Lawyer conducted or any conclusions that Lawyer reached with any other member of Law Firm. Lawyer informs PC that Law Firm will not take the case, explaining Lawyer's reasons and that Lawyer did not share of PC's information with any other member of Law Firm. 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 Lawyer and to comply with the requirements of rule 1.18(d)(2).

### Scenario 4

PC has cleared conflicts. Law Firm is prepared to take the case on an hourly basis. However, PC is interviewing several law firms and wants to evaluate Lawyer and Law Firm by giving Lawyer material, confidential information about the case, so that Lawyer can prepare a memorandum analyzing the case, including its strengths and weaknesses, and setting forth a proposed strategy and budget. Lawyer and Law Firm agree to accept the information and to perform the evaluation, at no charge, if PC will agree that, if Law Firm is not retained, 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) Lawyer who conducted the interview and any other lawyers or support personnel within Law Firm who receive confidential information would be screened from the case and (2) PC agrees that 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 submits a presentation to PC, but PC does not hire Law Firm. After PC brings suit, the defendant, Competitor, seeks to hire 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 governed primarily by rule 1.18 of the California 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.

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(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)<sup>3</sup>.  
(Rule 1.18, Comment [2]<sup>4</sup>; .)

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 the lawyer's law firm (Rule 1.18(c)) except as may be permitted under rule 1.18 (d). Rule 1.18 (c)-(d)<sup>5</sup>. However, 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(d)(1) contemplates a bilateral informed consent from both the prospective client and the affected client. Rule 1.18(d) 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

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<sup>3</sup> Rule 1.18, Comment 2 provides: " A person who by any means communicates information unilaterally to a lawyer, without a reasonable expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice is not a "prospective client" within the meaning of paragraph (a). In addition a person who discloses information to a lawyer after th lawyer has stated his or her unwillingness or inability to consult with the person (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr. 2d 456], or who communicates information to a lawyer without a good faith intention to seek legal advice or representation is not a prospective client within the meaning of paragraph (a) "

<sup>4</sup> 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.)

<sup>5</sup> 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. 4<sup>th</sup> 556, 565.

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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.

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. 4<sup>th</sup> 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).<sup>6</sup>

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<sup>6</sup> 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



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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 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 Judge James Selna’s Order on Motion to Disqualify in *SkyBell Technologies Inc. v. Ring*, No. 18-cv-0014 (C.D. Cal. Sept. 18, 2018), interpreting rule 1.18 and duties to prospective clients.) 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 against, among others, 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.) , stating “there must be some type of preceding or concurrent affirmative act that is carried out by the attorney to limit the

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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. 5<sup>th</sup> 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.*

disclosure.... Skybell's representatives were never informed ... that they should withhold any information and were actually encouraged to provide all the information they could."(*Id.*)

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.*

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In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit

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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 law firm must undertake affirmative actions to avoid exposure to more information than is 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 determine whether the representation is ethically proper.

### **Discussion of Scenarios**

In all of the scenarios, Lawyer received information that is protected by the obligation of confidentiality and that is material. Rule 1.18 (b) and (c). 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 prohibited 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, in the absence of an effective informed consent, Lawyer and Law Firm need to satisfy the conditions necessary for an effective ethical screen set forth in rule 1.18(c) and (d) (2) in order for the Law Firm to be permitted to represent Competitor.

#### **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 Law Firm may represent Competitor.

#### **Scenario 2a**

In this scenario, Lawyer has learned that PC plans to sue a current client of Law Firm, 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 developments related to the representation. While there is no reported California case on point here, the weight of ethics opinions is that Lawyer may not use or disclose the information acquired from PC to Law Firm’s existing client, Competitor,

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367 notwithstanding Lawyer's duty to communicate (Rule 1.4)<sup>7</sup> and the inherent duty of loyalty to  
368 Competitor.<sup>8</sup>

369 In *Flatt v. Superior Court* (1994) 9 Cal 4<sup>th</sup> 275, the California Supreme Court held that an  
370 lawyer's duty of loyalty to an existing client not only precluded the lawyer from representing a  
371 prospective client against the existing client but also insulated the lawyer from liability in failing  
372 to advise the prospective client of the potential statute of limitations of any claim the  
373 prospective client may have against the lawyers existing client. The court in *Flatt*, however, did  
374 not address the obligation, if any, of the lawyer to disclose to the existing client the information  
375 the prospective client provided to the lawyer. However, rule 1.6 and Business and Professions  
376 Code section 6068(e)(1) contain no exception that would authorize such disclosure. Further,  
377 case law and prior opinions from this Committee and local bar committees demonstrate that in  
378 such a context the duty of confidentiality remains paramount so that disclosure to Competitor  
379 is not permitted.

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

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

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

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<sup>7</sup> 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

<sup>8</sup> The duty of loyalty implicates the biblical injunction against "serving two masters (Matthew 6:24)." (*Flatt v. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> at 286.) The duty of loyalty has been found to be sufficiently important that a mandatory rule of disqualification in cases of dual representation involving unrelated matters is firmly entrenched in California law. *Flatt v. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> 286. Moreover the duty of loyalty may arise without potential breaches of confidentiality. (*Id.*)

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 3<sup>rd</sup> 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.)<sup>9</sup>

Should PC later sue Competitor, however, Lawyer would likely be permitted to represent Competitor against PC, 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 Lawyer received no other information that would be material to the resolution of the case. Rule 1.18 (c).<sup>10</sup> Further, even if Lawyer were prohibited from representing Competitor, a timely screen and compliance with rule 1.18(d)(2) should permit Law Firm to represent PC because, unlike in Scenario 1, Lawyer took reasonable steps to obtain no more information than was necessary to determine whether Lawyer or Law Firm had a conflict of interest.

#### **Scenario 2b**

Unlike scenario 2a, PC volunteers material confidential information to Lawyer during the interview even though the Lawyer had instructed the client not to provide such information and Lawyer's questions did not seek to elicit such information.

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<sup>9</sup> 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.

<sup>10</sup> 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.

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As with the other scenarios, PC was engaged in a good faith effort to obtain legal representation, and the Lawyer indicated a willingness to discuss that possibility. Therefore, under rule 1.18(b) Lawyer may not use or disclose the confidential information. And, because Lawyer has acquired material confidential information from PC, even though Lawyer instructed Lawyer not to disclosure such information, Lawyer is prohibited from acting adversely to PC in the same or substantially related matter. (Rule 1.18(c)). However, because Lawyer took reasonable measures to avoid the disclosure of any more information than was reasonably necessary to determine whether to accept the representation, Law Firm would not be prohibited from representing Competitor if Law Firm timely establishes an effective ethical screen and complies with the requirements of rule 1.18 (d) (2).

### Scenario 3

As with the other scenarios, Lawyer is prohibited from representing Competitor and may not use or disclose the confidential information received from PC. On the other hand, Law Firm should be able to represent Competitor with a timely and adequate screen and compliance with the rule 1.18(d)(2) because at all times the Lawyer made reasonable efforts to avoid disclosure to more information than was 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 other than information to determine whether the engagement is ethically permissible. For example, it may be reasonable to request information from a perspective client 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, Lawyer advised PC to disclose only the information that was necessary to determine whether PC would be able to pay anticipated fees on an hourly basis. Finally, when PC requested instead that Law Firm undertake the cases on a contingent basis, Lawyer advised the client that it should provide no more information than needed to permit Lawyer to assess the likelihood of success and the amount of a recovery from which fees would be paid. In each instances, Lawyer cautions PC against disclosing more information that is reasonably necessary for Lawyer's inquiry. Under the circumstances, each of these classes of information was no broader than reasonably necessary for Lawyer to decide whether it would recommend to Law Firm to accept the case on the terms proposed by PC. In addition, after receiving and reviewing PC's information and deciding against recommending that Law Firm take the case, Lawyer does not share any of PC's information, the related analysis that Lawyer conducted or any conclusions that Lawyer reached with any other member of Law Firm.

Under these facts, it is the Committee's opinion that Lawyer's affirmative efforts to secure no more information than necessary to determine whether to undertake PC's representation

would permit Law Firm to represent Competitor if Law Firm timely set up an ethical screen and complied all the requirements of rule 1.18(d)(2).<sup>11</sup>

**Scenario 4:**

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

The availability of ethical screening for Law Firm, independent of informed consent under these facts, is more problematic since not only has Lawyer obtained information that was necessary for Law Firm's 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 Law Firm; information that Lawyer did not require to decide that Law Firm was both willing and able to take the case. It is doubtful that the scope of information received by Lawyer and the interviewing team that PC insists on providing in order to evaluate 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 any confidential information and the resulting screening arrangement so that Law Firm could represent Competitor. Moreover, PC gave advanced written consent to the firm's representation of Competitor, provided that any lawyers who received its confidential information in the course of the beauty contest were timely screened from the matter.

Assuming PC gave its informed written consent in compliance with applicable case law and as described in Comment [9] to rule 1.7, PC's advanced consent to both Law Firm's future representation of Competitor and the screening arrangement is ethically proper. It is limited to a single identified client and single matter, and provides sufficient disclosure under the reasoning of *Zador Corp. v. Kwan*, *supra*, 31 Cal. App. 4<sup>th</sup> 1285 and *Elliott v. McFarland Unified School Dist.*, *supra*, 165 Cal. App. 3d 562.<sup>12</sup> In addition, 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. Furthermore, here PC is

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<sup>11</sup> 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.

<sup>12</sup> 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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486 sophisticated and represented by its own in house counsel and specifically invited the  
487 disclosure in order to meet its own objectives.

## 488 CONCLUSION

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

496 An interviewing lawyer who receives material confidential information from a prospective client  
497 is prohibited from accepting representation adverse to the prospective client in the same or a  
498 substantially related matter. That prohibition is imputed to other members of the law firm  
499 unless the interviewing lawyer took reasonable measures to obtain only that information  
500 reasonably necessary to determine whether to represent the existing client and the law firm  
501 promptly undertook the screening measures specified in Rule 1.18 (d) (2). Reasonable  
502 measures include advising the prospective client to provide only identified information that the  
503 lawyer needs to decide whether to undertake the representation and limiting questioning of  
504 the client so as to elicit only such information. The information reasonably necessary to  
505 determine whether to represent the prospective client is that which a reasonable lawyer in the  
506 situation of the interviewing attorney would require to determine whether the proposed  
507 representation was both ethically proper and economically acceptable. Such information may  
508 include information relating to the client's reputation or financial condition, the merits of the  
509 claim, and the likely range of recoveries.

510 The prohibition against accepting a representation that is materially adverse to a prospective  
511 client resulting from the receipt of that prospective client's material confidential information  
512 can be waived with the informed written consent of both the prospective client and any  
513 affected client of the law firm. (Rule 1.18 (d) (1). Correspondingly, a prospective client may  
514 give advance consent to the law firm acting adversely to the prospective client in the same  
515 matter or substantially related matters. (Rule 1.9(a) and Rule 1.18(b))

516 This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of  
517 the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of  
518 California, its Board of Trustees, any persons, or tribunals charged with regulatory  
519 responsibilities, or any licensee of the State Bar.