

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
PROPOSED FORMAL OPINION INTERIM NO. 17-0003
DUTIES TO PROSPECTIVE CLIENTS AND ETHICAL SCREENING

- ISSUES:**
1. When a prospective client has provided confidential information to an interviewing lawyer, may the interviewing lawyer disclose that information or use it to the prospective client's disadvantage?
 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 other lawyers in 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 is screened from the representation but the precondition for screening in Rule 1.18 (d) has not been met because the interviewing lawyer did not take the "reasonable measures" required by that rule?

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 to an existing or former client pursuant to rules 1.6 and 1.9 even though no lawyer-client relationship thereafter ensues. The lawyer may not use or disclose such information without the prospective client's informed written consent. This is true 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 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 information that is reasonably necessary to determine whether to represent the existing client and the law firm promptly undertook the screening and measures specified in rule 1.18(d)(2). Reasonable measures include advising the client to provide only identified information that the lawyer reasonably needs to decide

CLEAN

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 a 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, 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. 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.

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.¹

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") about retaining Lawyer and Lawyer's firm ("Law Firm") to prosecute a misappropriation of trade secret claim against its competitor ("Competitor"). Lawyer conducts an 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 of any material confidential information. Instead, Lawyer

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

CLEAN

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 ethical screen isolating Lawyer who met with PC.²

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 only determine whether 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 Lawyer or Law Firm has 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 lawsuit, but nothing more. The conflict search reveals the prospective defendant Competitor is an existing client of Law Firm, which is currently advising Competitor in connection with an upcoming public offering. Law Firm declines PC's representation because of the conflict of interest.

² Rule 1.0.1(k) provides 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.4th 776, 810 [108 Cal.Rptr.3d 620], citing *Speedee Oil, supra*, 20 Cal.4th at pp. 1142, 1151-1152 and 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 representation; and
5. Continuing education in professional responsibility.

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

CLEAN

95 Lawyer believes that the use or disclosure of the fact that PC may bring suit against Competitor
96 could materially harm PC by alerting Competitor to the threatened litigation. On the other hand
97 Lawyer understands that the prospective suit is material to Competitor, since it would disrupt
98 Competitor's current plans for a public offering.

99 *Scenario 2b*

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

105 *Scenario 3*

106 PC clears Law Firm's conflict inquiry. Lawyer and PC would like to continue discussions about
107 whether Law Firm can and should take on PC's case. PC would like Lawyer to proceed on an
108 hourly fee basis. Lawyer therefore asks for financial information demonstrating PC's ability to
109 pay hourly fees for the type of matter involved. Lawyer cautions PC not to disclose to Lawyer
110 any other confidential information or any information that is not reasonably necessary to assist
111 Lawyer in determining whether PC is able to pay Law Firm's hourly fees because PC and Lawyer
112 have not yet formed an attorney-client relationship. PC provides financial information to
113 Lawyer which shows PC's inability to finance the litigation on an hourly basis. PC then asks
114 Lawyer if Law Firm would handle the case on a contingency basis. In response, Lawyer asks for
115 more factual information concerning the merits of the case and the likely damage award,
116 indicating that it is necessary to assess the potential value of the claim, the extent of work
117 involved and any resulting fee. Lawyer again cautions PC to limit PC's disclosure of information
118 to Lawyer to only the information being requested, and not to disclose any other confidential
119 information or information that is not reasonably necessary to that assessment. After receiving
120 and reviewing PC's information, Lawyer decides against recommending that Law Firm take the
121 case, but Lawyer does not share any of PC's information, the related analysis that Lawyer
122 conducted or any conclusions that Lawyer reached with any other person at the Law Firm.
123 Lawyer informs PC that Law Firm will not take the case, explaining Lawyer's reasons and that
124 Lawyer did not share any of PC's information with any other person at the Law Firm. After PC
125 files a lawsuit against Competitor, Competitor seeks to hire Lawyer to represent Competitor
126 against PC. Lawyer believes that the information Lawyer received about PC's financial situation
127 and the merits of the case are materially adverse to PC's interests. Law Firm is prepared to
128 initiate a timely and effective screen of Lawyer and to comply with the requirements of rule
129 1.18(d)(2).

130 *Scenario 4*

131 PC has cleared conflicts. Law Firm is prepared to take the case on an hourly basis. However, PC
132 is interviewing several law firms and wants to evaluate Lawyer and Law Firm by giving Lawyer
133 material, confidential information about the case, so that Lawyer can prepare a memorandum

CLEAN

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, which provides:

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:

CLEAN

(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 Business and Professions 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. (Rule 1.18, Comment [2];³ California State Bar Formal Opinion No. 2003-161 at p. 6).⁴

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 and the lawyer's law firm from acting adversely to the person in the same or a substantially related matter(Rule 1.18(c), except

³ This paragraph departs from 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") Rule 1.18, Executive Summary, p. 2.)

⁴ 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 the 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)."

CLEAN

as may be permitted under rule 1.18(d). Rule 1.18(c)⁵-(d).⁶ 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 a timely and effective ethical screen of the interviewing lawyer (rule 1.18(d)(2)), the firm wide prohibition of rule 1.18(c) will not be triggered.

Rule 1.18(d)(1) requires 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.” California State Bar Formal Opinion No. 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, § 15, Comment c [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

⁵ In contrast to the materiality standard of Rule 1.18 (c), ABA Model Rule 1.18 (c) requires personal disqualification of the lawyer only if the lawyer has received information from the prospective client that “could be significantly harmful to the person.” This difference between these two standards is beyond the scope of this opinion.

⁶ 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., California State Bar Formal Opinion No. 2003-161, at p. 9. If the lawyer did not get information that is confidential, for example, because the information was already generally 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 [163 Cal.Rptr.3d 135].)

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.* (N.D. Cal. 2003) 241 F.Supp.2d 1100, 1106; *Simpson Strong-Tie Company, Inc. v. Ox-Post International, LLC* (N.D. Cal. 2018) 2018 WL 3956430, *13.

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 [37 Cal.Rptr.2d 754]; *Elliott v. McFarland Unified School Dist.* (1985) 165 Cal.App.3d 562 [211 Cal.Rptr. 802].) 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.* (N.D. Cal. 2003) 241 F.Supp.2d 1100.)⁷

As an alternative to informed consent, rule 1.18(d)(2) also permits representation by other lawyers in the firm 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 must be 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

⁷ Conversely, federal courts applying California law have declined to enforce more generally 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.* (N.D. Cal. 2018) 2018 WL 6619981 (“any and all conflicts of interest which presently exist, or may hereafter exist”), *Lennar Mare Island, LLC v. Steadfast Ins. Co.* (E.D. Cal. 2015) 105 F.Supp.3d 1100 (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.* (C.D. Cal. 2015) 98 F.Supp.3d 1074 (any existing or future client in any matter not substantially related; open-ended as to time); *Concat LP v. Unilever, PLC* (N.D. Cal. 2004) 350 F.Supp.2d 796 (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* (N.D. Tex. 2013) 927 F.Supp.2d 390.) The California Supreme Court did not consider the validity of more broadly framed advance consents. (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.* (2018) 6 Cal.5th 59, 86 [237 Cal.Rptr.3d 424].) 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.*)

than was reasonably necessary to determine whether to represent the prospective client.⁸ 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, Inc.* (C.D. Cal. 2018) 2018 WL 6016156, 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 that the firm had taken reasonable steps at this stage of the discussions. (*Id.* at p. 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 pp. 7-9.), stating “there must be some type of preceding or concurrent affirmative act that is carried out by the attorney to limit the disclosure Skybell’s representatives were never informed . . . that they should withhold any information and were actually encouraged to provide all the information they could.” (*Id.*)

Neither rule 1.18 nor the Comments to the rule 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*, at p. 9). Our analysis of the term starts with the observation that the standard is an objective one: the question is what a reasonable lawyer, would regard as necessary to make a decision whether to represent the client. It is apparent that the standard is also designed to be responsive to the particulars of the lawyer’s practice and the prospective client’s case.

Clearly, the term encompasses any information reasonably 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, information about the merits to permit a preliminary judgment that the prospective client’s position is not frivolous. But the rule as

⁸ See the Board of Trustees of the State Bar of California Agenda Item 701 from the March 10, 2017 meeting at Attachment C-1 [Reports & Recommendations for Rules 1.0-1.18], at p. 950 [Commission’s Response to Dissent Submitted by Robert Kehr on the Recommended Adoption of Proposed Rule 1.18(d)(2)].

written is not limited to the information reasonably required to determine whether representation is permissible. Instead it reaches all types of information relevant to the decision whether to represent a client. Such information could include information about the prospective client and its business, the nature of any proposed transaction, or the merits of the case that is far more extensive than needed to determine whether representation is ethically permissible.

This conclusion is supported by the Restatement (Third) 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 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.* (emphasis added)

* * *

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 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 both protected by the duty of confidentiality and is material to the representation. Rule 1.18(b) and (c).⁹ Accordingly, Lawyer owes a duty to PC not to use or disclose information received as result of the consultation. Rule

⁹ Each of the scenarios other than Scenario 4 involves a single lawyer conducting the intake of the prospective client and making the decisions concerning whether to undertake the representation. In many firms, however, intake decisions will involve sharing client confidential information with multiple lawyers, including lawyers having a management or supervisory role in the firm. Where such sharing occurs, the disqualification and screening rules outlined here will apply to all lawyers who received such information.

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 must satisfy the conditions necessary for an effective ethical screen set forth in rule 1.18(c) and (d)(2) in order for Law Firm to be permitted to represent Competitor.

Scenario 1

Here, PC has not provided informed consent for Lawyer to represent Competitor nor has Lawyer taken any measures—let alone reasonable measures—to ensure that Lawyer would receive no more information than was reasonably necessary to determine whether or not to represent the prospective client. (Rule 1.18(c) and (d); *accord, SkyBell Technologies, Inc. v. Ring, Inc.* (C.D. Cal. 2018) 2018 WL 6016156 [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, notwithstanding Lawyer’s duty to communicate (rule 1.4)¹⁰ and the inherent duty of loyalty to Competitor.¹¹

¹⁰ Rule 1.4 Communication with Client, paragraph (a)(3) and Comment [1] states:

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

¹¹ The duty of loyalty implicates the biblical injunction against “‘serving two masters’ (Matthew 6:24).” The duty of loyalty has been found to be sufficiently important that, except in limited circumstances, 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 at 284, 286.) Moreover the duty of loyalty may arise without potential breaches of confidentiality. (*Id.*)

CLEAN

In *Flatt v. Superior Court* (1994) 9 Cal 4th 275 [36 Cal.Rptr.2d 537], the California Supreme Court held that a lawyer's duty of loyalty to an existing client not only precluded the lawyer from representing a prospective client against the existing client but also insulated the lawyer from liability in failing to advise the prospective client of the potential statute of limitations of any claim the prospective client may have against the lawyers existing client. The court in *Flatt*, however, did not address the obligation, if any, of the lawyer to disclose to the existing client the information the prospective client provided to the lawyer. However, rule 1.6 and Business and Professions Code section 6068(e)(1) contain no exception that would authorize such disclosure. Further, case law and prior opinions from this Committee and local bar committees demonstrate that in such a context, the duty of confidentiality remains paramount so that disclosure to Competitor is not permitted.

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

In Los Angeles County Bar Association Opinion No. 528 (2017), the opinion concluded that a lawyer engaged by an insurance carrier to defend the interests of an insured is prohibited from disclosing to the insurance carrier information obtained from the insured that could provide a basis for the insurance carrier to deny coverage.

Implicit in the logic of these authorities, and of the Comments to rule 1.6, is the 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. (Rule 1.6, Comment [1], citing *In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371]). The Committee has found no authority that would suggest that the rule should be otherwise with respect to disclosures made by either a prospective client or a previous client.¹² Accordingly, in each scenario Lawyer has a duty not to use or disclose the information

¹² Cases from other jurisdictions are consistent with the conclusion that in the absence of an exception to the duty of confidentiality, that duty trumps the duty of loyalty to an existing or prospective client. In *A v. B* (1999) 158 N. J. 51, a law firm represented a husband and wife jointly in planning their estates. Through an error in the firm's conflict system, the firm undertook to represent a woman in a paternity action against the husband. When the firm realized the error, it withdrew from the representation against the husband and asked the husband for consent to disclose the existence of the illegitimate child to the wife, but the husband refused. The New Jersey Supreme Court held that the information was confidential, but that the broad New Jersey exception to confidentiality for fraud prevention permitted the firm to disclose to the wife. California has not recognized an exception to the duty of confidentiality that would permit disclosure here.

imparted by PC absent application of rule 1.6(b) or PC's informed consent. (Rule 1.18(b), referring to rule 1.9.)¹³

Should PC later sue Competitor, however, Lawyer may be permitted to represent Competitor against PC. The confidential information that Lawyer received from PC concerning its intention to sue Competitor is rendered immaterial by the fact that PC has now sued, a fact now known by Competitor. Moreover, lawyer took reasonable measures to limit the client's disclosures to information reasonably necessary to assess the existence of a conflict and was successful in doing so. Accordingly, unless some aspect of the initial consultation with Lawyer, such as its timing, remains material, Lawyer should not be personally prohibited from undertaking the representation. Rule 1.18 (c).¹⁴ Further, even if Lawyer were personally prohibited from representing Competitor, a timely screen and compliance with rule 1.18(d)(2) would permit Law Firm to represent Competitor 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 PC not to provide such information and Lawyer's questions did not seek to elicit such information.

As with the other scenarios, PC was engaged in a good faith effort to obtain legal representation, and 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 PC 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

¹³ 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."

In some circumstances, the lawyer's inability to use or disclose a prospective client's confidential information for the benefit of an existing client may give rise to a potential conflict under rule 1.7(b) because it gives rise to a significant risk that the representation of the existing client may be materially impaired by the firm's obligations to the former prospective client. In such situations, if the lawyer cannot obtain informed consent to the conflict, the lawyer may be required to withdraw from representing the existing client. (Rule 1.16.) A full discussion of these issues is beyond the scope of this opinion.

¹⁴ For example, the timing of PC's consultation with Lawyer may be relevant to the existence of a defense under the statute of limitations or the doctrine of laches that turns on when the client discovered the existence of a claim or, in a family law case, to the date of marital separation.

CLEAN

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, 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 prospective 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 that Law Firm undertake the cases on a contingent basis, Lawyer advised PC 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 instance, 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 is 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).¹⁵

Scenario 4

¹⁵ The screen should be timely if it is set up promptly after the initial consultation with Competitor. Screening involves "the isolation of a lawyer from participation in a matter." Rule 1.0.1 (k). Until Competitor has consulted Law Firm, there is no "matter" in which the personally disqualified lawyers who participated in the beauty contest can participate or from which they can be isolated.

CLEAN

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 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 insisted 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 Law Firm to represent Competitor.

Here, however, in consideration of Law Firm's agreement to perform an initial evaluation of the case, PC has given advanced written consent to Law Firm's representation of Competitor adverse to PC, provided that any lawyers who received its confidential information in the course of the beauty contest were timely screened from the matter.

Assuming PC's advance consent was informed within the meaning of Rule 1.01 (e), it would be ethically proper, because it is consistent both with applicable case law and the other criteria set forth in Comment [9] to rule 1.7. Like the consent in *Zador Corp. v. Kwan, supra*, 31 Cal.App.4th 1285 it is limited to representation of an identified opponent or opponents.¹⁶ In addition, with this advanced consent, PC waived only its claim to be able to disqualify by imputation lawyers who were not involved in the beauty contest; in contrast, the consent in *Zador* permitted adverse representation by the same lawyers who had previously acted for the consenting client. Finally, consistent with Comment [9], PC is sophisticated and represented by its own in-house counsel, and specifically invited the disclosure in order to meet its own objectives.

CONCLUSION

An interviewing lawyer owes a prospective client the same duty of confidentiality owed to an existing client whether or not a 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 true 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.

¹⁶ 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.

CLEAN

466 A lawyer who receives material confidential information from a prospective client is prohibited
467 from accepting representation adverse to the prospective client in the same or a substantially
468 related matter absent informed written consent, which may be given in advance of receiving
469 the information (rule 1.9(a) and rule 1.18(b)). Likewise, absent informed written consent, the
470 other members of the lawyer's law firm are prohibited from representing the client unless the
471 interviewing lawyer took reasonable measures to obtain only that information reasonably
472 necessary to determine whether to represent the existing client and the law firm promptly
473 undertook the screening measures specified in rule 1.18(d)(2).

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



**ORANGE COUNTY
BAR ASSOCIATION**

PRESIDENT

SCOTT B. GARNER

PRESIDENT-ELECT

LARISA M. DINSMOOR

TREASURER

DANIEL S. ROBINSON

SECRETARY

MICHAEL A. GREGG

IMMEDIATE PAST PRESIDENT

DEIRDRE M. KELLY

DIRECTORS

ALEXANDER W. AVERY

ANTOINETTE N. BALTA

JOHN K. BECKLEY

KATE CORRIGAN

SHIRIN FOROOTAN

KELLY L. GALLIGAN

JOHN S. GIBSON

JOSH JI

MICHAEL S. LEBOFF

ADRIANNE E. MARSHACK

TERESA A. MCQUEEN

TRACY A. MILLER

JAMES Y. PACK

MELISSA A. PETROFSKY

THOMAS A. PISTONE

MARY-CHRISTINE SUNGAILA

YOLANDA V. TORRES

MEI TSANG

DARRELL P. WHITE

CHRISTINA M. ZABAT-FRAN

ABA REPRESENTATIVE

RICHARD W. MILLAR, JR.

CEO/EXECUTIVE DIRECTOR

TRUDY C. LEVINDOFSKE

AFFILIATE BARS

ASSOC. OF BUSINESS TRIAL LAWYERS,

OC CHAPTER

CELTIC BAR ASSOC.

FEDERAL BAR ASSOC.,

OC CHAPTER

HISPANIC BAR ASSOC. OF OC

IRANIAN AMERICAN BAR ASSOC.,

OC CHAPTER

ITALIAN AMERICAN LAWYERS

OF OC – LEX ROMANA

J. REUBEN CLARK LAW SOCIETY

OC ASIAN AMERICAN BAR ASSOC.

OC CRIMINAL DEFENSE BAR ASSOC.

OC JEWISH BAR ASSOC.

OC KOREAN AMERICAN BAR ASSOC.

OC LAVENDER BAR ASSOC.

OC TRIAL LAWYERS ASSOC.

OC WOMEN LAWYERS ASSOC.

THURGOOD MARSHALL BAR ASSOC.

December 18, 2020

Angela Marlaud

Office of Professional Competence, Planning and Development

State Bar of California

180 Howard Street

San Francisco, California 94105-1639

Via Email: angela.marlaud@calbar.ca.gov

Re: Proposed Formal Opinion No. 17-0003

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning Proposed Formal Opinion No. 17-0003.

Founded over 100 Years ago, the OCBA has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors made up of practitioners from large and small firms, with varied civil and criminal practices, of different ethnic backgrounds and political learnings, has approved these comments prepared by the Professionalism and Ethics Committee.

At 15 pages, with four distinct scenarios (one with subparts), the opinion is very long. Overall, we support the conclusions reached in the draft opinion, but we express concern that the opinion is long and the effort to address all these scenarios is perhaps too ambitious. The opinion would be improved by removing unnecessary discussion, and perhaps by considering the possibility of crafting separate companion opinions, especially for scenario 4.

In the third issue framed on page 1, there is a reference to whether “screening would otherwise be insufficient.” This is somewhat confusing because it is not clear what is “insufficient” about the screen. In context, it seems what is meant is that the conditions for screening set forth in rule 1.18(d) have not been satisfied thereby ensuring the law firm’s right to establish a screen. We believe the opinion would benefit from expressly so stating.

In the discussion of scenario 2a at pp. 11-12, the discussion of the New Jersey case, *A v. B*, distracts from the opinion and is not directly on point. We suggest that the discussion of *A v. B* be removed. The conclusion about the difference between ethics provisions in New Jersey versus California is not essential. Moreover, California has adequate authority in *Flatt v. Superior Court* and other cited opinions to address the issue. Further addressing the length of the opinion, the discussion on p. 12 could be simplified and reduced by stating the conclusion (that the duty of confidentiality implicitly overrides the duty of loyalty) and citing to the prior opinions and authority, without analysis of the details of each.

We also found curious the reference to California State Bar Formal Op. 2003-163, when Formal Op. 2016-195 provides more comprehensive authority and discussion of the duty of confidentiality and limitations upon the lawyer's ability to disclose confidences of a potential client or existing client. Perhaps the point at p. 12 of the draft opinion would be better supported with reference to Formal Op. 2016-195.

We have concerns with the statement in the first sentence of the last paragraph on p. 12. The opinion should not offer guidance to lawyers about likely results, as it suggests pushing the envelope on what may be an uncertain ethical question. Speaking in terms of whether representation would "likely be permitted" is too indefinite and may mislead lawyers. The opinion should reach a conclusion whether the representation against PC is ethically permitted or not, and in what circumstances. Moreover, the circumstances described suggest that the intent to file a lawsuit is the *only* relevant information the Lawyer obtained. Those circumstances are highly unlikely. In most consultations, Lawyers learn other information that would normally be imparted by PC to influence the Lawyer's decision whether or not to represent. An example might be the Lawyer's receipt of temporal information, such as when the PC first discovered the claim, the grounds upon which the claim is based or other factors hinted at in footnote 11. Another temporal example might be the discussion of facts establishing a date of separation in a family law case. This information may be very material to the merits of the PC's claim. The statement here that representation would likely be permitted is based upon a narrow assumption of facts that would rarely exist.

The statement is also based on the assumption that the fact, timing or content of the consultation is not material. The opinion should expressly state it is making that assumption, particularly in light of the suggestion in footnote 11 that such information may in fact somehow be relevant to the case against Competitor such that Lawyer's inability to disclose it is a material limitation. We agree that the fact, timing or content of the consultation could remain material to the underlying case even after the lawsuit is filed, but the conclusion that this would create only a rule 1.7 conflict is incomplete because under such circumstances, Lawyer's representation of Competitor would also be prohibited by rule 1.18.

At several points in the scenarios and the opinion, the Committee uses the word "should" to describe what should or might be allowed, what the Lawyer should do, or a likely outcome. Most rules are focused on things that a lawyer must or shall do. Speaking in terms of "should" provides indefinite guidance and leads to uncertainty regarding how a rule will be applied. We recommend that the opinion be reviewed to be less uncertain in this regard.

At page 9 of the opinion, there is a discussion at some length of the *Skybell* decision and in regard to steps taken to limit the acquisition of information in an initial consultation. While important, we believe the discussion is much longer than it needs to be. In the third paragraph on page 9, there is also a reference to an argument ["it has been argued..."] without citation. This discussion is not necessary for the conclusion reached – that the language of rule 1.18 should not be read so narrowly. This discussion could be much reduced in length and the conclusions regarding interpretation of rule 1.18 presented without reference to what may have been argued by an unidentified source.

December 18, 2020

3 | Page

We express concern about the draft opinion's reference to the *Shepard Mullin* decision in footnote 6 on page 8. COPRAC characterizes the opinion with the statement that the Supreme Court expressly declined to state a view on the validity of more broadly framed advance consents suggests that the issue was before the Court, but it for some reason "declined" to state a position. What the Supreme Court said, though, was that it had no occasion in that case to decide whether a blanket advance waiver would have been sufficient because the issue was not before it based on the facts of that case. The opinion should clarify that.

The sentence at the last full paragraph immediately prior to the conclusion, on page 15, which references *Zador v. Kwan* and *Elliott v. McFarlane*, speaks of advance consent and expressly concludes the disclosures described in the opinion were sufficient, but the opinion offers no facts to support that conclusion.

Finally, we suggest that if a screen is required in certain circumstances, the opinion should more fully address the need for timeliness and immediacy. In the discussion of scenario 4 on page 14, the opinion concludes that it is doubtful an ethical screen would be effective. Then, on page 15, the opinion makes reference to the advance consent "notwithstanding the existence of an effective ethical screen." This statement is confusing in the context of that discussion. If there were any hope to have an effective ethical screen from the outset, would it not have to shield all the other lawyers in the firm from the information at the time it was initially being learned from PC in order to avoid the presumption that confidential information has been shared? We believe this discussion requires clarification and is perhaps too complex to be part of an already lengthy opinion.

Thank you for your consideration of our comments and suggestions.

Sincerely,

A handwritten signature in dark ink, appearing to read "S.B. Garner", with a stylized flourish at the end.

Scott B. Garner
2020 President
Orange County Bar Association

December 28, 2020

Committee on Professional Responsibility and Conduct (COPRAC)
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Formal Opinion Interim 17-0003 (Duty to Prospective Client)

Dear COPRAC members:

On behalf of the California Lawyers Association Ethics Committee and in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing Proposed Formal Opinion Interim 17-0003 and appreciate the opportunity to comment on the proposed opinion.

We support COPRAC's overall conclusions and applaud its efforts to address the issues presented in the opinion. One overall comment that we have, though, is that, at 15 pages of relatively dense material, the opinion runs the risk of being less useful to practitioners in need of guidance on these important subjects. We have found that often times, the longer an opinion is, the less likely it is to be read thoroughly or in its entirety. COPRAC may want to consider shortening the opinion where appropriate. Some of our specific comments below may assist in that effort:

1. There is a lengthy discussion in the third paragraph on page 12 of the out-of-state case *A v. B*. We question the necessity of citing to this out-of-state authority when the in-state authorities cited in the opinion already support the propositions for which *A v. B* is offered. Moreover, out-of-state authorities can be of limited value in California because its articulation of the rules often differs from the Model Rules and the rules adopted in other states. Removing this citation would have the benefit of shortening the opinion as well. Should COPRAC decide to keep the discussion, the citation should be changed to 158 N.J. 51.
2. There is also a somewhat lengthy argument at the bottom of page 9 through the top of page 10 addressing whether the information "reasonably necessary to determine whether to represent the prospective client" under 1.18(d)(2) is limited to the information sufficient to run a conflict check. We believe the subject is a good one to raise and that the committee reaches the correct conclusion. But it

could do so more efficiently and more effectively by eliminating the refutation of an argument from an uncited source. This discussion starts by stating that “[i]t has been argued . . .” that this limitation applies, and then, at length, rebuts the argument. There is no citation to the authority, if any, in which that argument has been made. Moreover, it appears to this committee that if actually made, the argument would not be a very good one. The extensive discussion needlessly lengthens the opinion. We suggest simply reaching the conclusion without setting up an alternative argument. At a minimum, if the alternative argument remains, its source, *i.e.*, the person(s) who have made it, should be identified.

3. The point addressed in footnote 11 is an interesting one, positing that there may be circumstances in which a lawyer’s inability to disclose “the fact, timing or content of the initial consultation” could present a material limitation on the lawyer’s ability to represent an adverse party, thereby requiring withdrawal. However, it seems that if that information could present a material limitation on the lawyer’s representation of the adverse party, then it would have also of necessity somehow been material to the matter, in which case the lawyer was prohibited by rule 1.18(c) from representing the adverse party in the first instance. The point in this footnote also seems somewhat at odds with the opinion’s conclusion that the otherwise confidential information that the lawyer learned was rendered moot and immaterial by the fact that the lawsuit was filed. However, if “the fact, timing or content of the initial consultation” was somehow material to the adverse representation, as the footnote posits, then it strikes us that the representation by the consulting lawyer would have been prohibited by rule 1.18(c) altogether. We can envision circumstances (e.g., where there may be a statute of limitations based on when the prospective client knew it had a claim) in which the information Lawyer obtained would not be rendered moot and immaterial by filing the lawsuit. In such a case, the fact, timing, or content of the initial consultation would be material and representation by the consulting lawyer prohibited. The lawyer’s firm may be able to represent the adverse party under those circumstances, but the consulting lawyer could not. In concluding the otherwise confidential information became moot and immaterial, the opinion necessarily assumes that the fact, timing, or content of the initial consultation is not material to the adverse matter. For clarity, the opinion should state it is making that assumption. We agree that the point about potential 1.7 conflicts in footnote 11 is worth making, but the footnote should clarify that a 1.7 situation would arise only if the materiality of the fact, timing, or content of the initial consultation did not become known until after the lawyer undertook the adverse representation, in which case the lawyer’s continued representation would not

only be prohibited by rule 1.18, but could also be barred by rule 1.7, with withdrawal required.

4. We are concerned with the opinion's conclusion in the first full paragraph of page 15 that the advance waiver described in the opinion "provides sufficient disclosure under the reasoning of *Zador*." That is because the opinion does not describe the reasonably foreseeable adverse consequences that were disclosed to the client. The only description of the terms of the advance waiver (which is in the first paragraph of page 5) omits those disclosures. We understand why the opinion does not endeavor to lay out the actual disclosures sufficient to make the consent "informed," and agree with that approach, but then the opinion should not conclude that the disclosures themselves are sufficient under a specific body of case law. Instead, because it appears that the opinion is assuming that the unidentified disclosures were sufficient, it should either so state, or just remove as unnecessary all of the language in the sentence after the words "a single matter." This would avoid the risk that the reader might rely on the opinion's conclusion that the disclosures were sufficient to mean that the advance waiver described earlier in the opinion is itself "sufficient" under *Zador* and *Elliott*, which is not necessarily the case.
5. Later in the first full paragraph on page 15, the discussion of the scope of the advance waiver is somewhat misleading and could also benefit from a more precise explanation. The opinion states PC waived only the right to insist on imputed disqualification "notwithstanding the existence of an effective ethical screen." However, it strikes us that if a timely and effective ethical screen were erected, PC would generally not have the right to insist on imputed disqualification. What PC has actually waived is the right to insist on imputed disqualification notwithstanding the receipt by Lawyer of more confidential information than was reasonably necessary to determine whether to take the case. We think the opinion should so state.
6. The first full sentence on page 13 concludes that a timely screen and compliance with rule 1.18(d)(2) "should" permit Law Firm to undertake the representation of Competitor (the opinion here says "PC" but we believe it intended to say "Competitor"). Under those circumstances, the rule explicitly permits the Law Firm to represent Competitor; we do not believe that conclusion should be hedged with the word "should."

7. Finally, the opinion does not address the timing of the ethical screen. To be effective, is it necessary to erect a screen between the consulting lawyer(s) and other lawyers in the firm immediately after PC's case is declined, or is it sufficient to erect the screen only after Competitor contacts Law Firm? We believe the latter is the correct approach. Regardless, timing is a critical factor in a screen's effectiveness that COPRAC should consider addressing in the opinion.

Thank you for your attention and opportunity to comment.

Sincerely,



Neil J Wertlieb
Co-Chair
California Lawyers Association Ethics
Committee

Public Comment - Proposed Opinion 17-0003

Commenting on behalf of an organization	Yes
Professional Affiliation	Los Angeles County Bar Assn. Professional Responsibility and Ethics Committee
Name	Elizabeth L. Bradley
City	Beverly Hills
State	California
Email address	eb Bradley@rosensaba.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Please see attached comment letter.
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	LACBA_PREC_Comment_Letter_re_Proposed_Formal_Opinion_Interim_No._17-0003.pdf (232k)



Los Angeles County Bar Association

1055 West 7th Street, Suite 2700 | Los Angeles, CA 90017-2553

Telephone: 213.627.2727 | www.lacba.org

Stephen M. Bundy, Esq.
Chair, Standing Committee on
Professional Responsibility and Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Request for Public Comment on Proposed Formal Opinion Interim
No. 17-0003 (Duty to Prospective Client)
Deadline for Comments: January 4, 2021

Dear Mr. Bundy and Members of the Committee,

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to submit the following comments on proposed Interim Opinion No. 17-0003 (Duty to Prospective Client).

While we agree with much of the proposed opinion, we do have these comments and suggestions:

1. We believe the word "material" should be removed from the first line of Issue 1. As explicitly recognized in rule 1.18(b), a lawyer's confidentiality duty applies to all information received in the interview except as discussed under Issue 2. The body of the proposed opinion is right on this, but the statement of Issue 1 is not.
2. We also believe Issue 1 is incorrect regarding the use of confidential information. A lawyer is barred from using that information only to the extent the use is "to the disadvantage of the [prospective] client." See rule 1.8.2. Example: Lawyer is an expert in a narrow field, such as the purchase, sale, and lease of manufacturing space in City X. Prospective client tells Lawyer that he is thinking of leasing a particular manufacturing space on particular terms. That information now becomes Lawyer's store of information that can be used in advising other clients on going lease rates in the area so long as the lawyer does not reveal the prospective client's identity or role. The overly broad prohibition on "use" also appears in the third line of the first paragraph of the Scenario 2a analysis on p. 11 and three lines after that; in the last full paragraph on p. 12; in the incomplete paragraph at the foot of p. 13; and in the first paragraph of the Conclusion. We recommend that Issue 1 be revised along the following lines:

~~"When a prospective client has provided material confidential information to an interviewing lawyer, may the interviewing lawyer disclose that information or use that information it to the disadvantage of the prospective client?"~~

3. In the second paragraph of the Digest, the requirements of rule 1.18(d)(2) are mentioned, except the written notice to the PC is left out.
4. Scenario 3 includes the following language:

"Lawyer cautions PC not to disclose to Lawyer ... confidential information ... that is not reasonably necessary to assist Lawyer in determining whether PC is able to pay Law Firm's hourly fees"

A lawyer under rule 1.18 should be obligated to be specific about what is needed because the lawyer has not taken "reasonable measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client" if the lawyer leaves it to the prospective client to figure out what the needed information encompasses. This problem comes up again in the last full sentence on p. 13 and the first full sentence on p. 14. *Skybell Technologies, Inc. v. Ring, Inc.*, 2018 WL 6016156, at *7 (C.D. Cal. 9/18/18), an opinion on which Interim Opn. 17-0003 relies, recognizes this:

"It is not enough that the information the attorney received, in hindsight, was reasonably necessary to determine whether to represent the prospective client. There must be some type of preceding or concurrent affirmative act that is carried out by the attorney to limit the disclosure. Scalisi states in his declaration that during the communications between Orrick and SkyBell, SkyBell's representatives were never informed by Orrick that they should withhold any information and were actually encouraged to provide all of the information they could. (Scalisi Decl., Docket No. 48-2 ¶ 15.) While Orrick claims that it was reasonable for it to believe that SkyBell was well-advised by independent counsel as to the scope of the disclosures it should be making, this does not constitute an affirmative act on the part of Orrick to limit its exposure. (Opp'n, Docket No. 53 at 17.)"

Indeed, a previous State Bar formal opinion recognizes that a lawyer should not leave it up to a prospective client to determine what might be "confidential" information, or to recognize what adverse consequences might be in store for the prospective client if the information were disclosed. See State Bar Form. Opn. 2005-168, at pp. 4-5.

5. Scenario 3 has two points where the lawyer is asking for more information. The second time, the lawyer is asking for information to determine whether the firm should handle the case on a contingency basis, and the lawyer "again cautions PC to limit PC's disclosure of information to Lawyer to only the information being requested." That language is off from the language we cited in the preceding paragraph, but a cure would be to have Lawyer give the same warning in getting the information to evaluate whether to take the case on an hourly basis.

6. Five lines up from the end of Scenario 3 there is a reference to a "member" of the Law Firm. "Member" is not a defined term, and we are concerned it could be read as limited to partners and shareholders. We recommend instead that the reference be to "other firm lawyers." However, even if broadened to clarify the requirement includes all firm lawyers, shouldn't paralegals also be included? For example, the screening memo approved in *UMG Recordings, Inc. v. Myspace, Inc.*, 526 F. Supp. 2d 1046, 1054 (C.D. Cal. 2007) extended the screening to "staff members." The question is not whether the personally prohibited lawyer has shared information with another firm lawyer but whether the personally prohibited lawyer has been screened in order to prevent participation, and the prohibited lawyer could participate by sharing information with a paralegal.
7. The organization of the lengthy first sentence of the next paragraph at the foot of p. 6, could be rearranged as follows for clarity:

"The lawyer's duty to a prospective client prohibits use of confidential information to that person's disadvantage or the disclosure of the information 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 and the lawyer's law firm 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)."
8. In the penultimate line of the incomplete paragraph at the top of p. 7, we recommend inserting "timely" before "effective."
9. At the beginning of the first complete paragraph on p. 7, we recommend changing "contemplates" to "requires." Informed consent is not what someone has in mind but something that is mandated by the rule.
10. Later in the same line, we would remove "bilateral." We would not expect the consents from the prospective client and the affected "client or former client" to be a single writing. The disclosures to each would be different and almost certainly would include information of one that should be shielded from the other.
11. In the third line of that same paragraph, we are not certain what is intended by the word "alone." The correct question is whether the lawyer can obtain the prospective client's screening consent in advance. The paragraph as a whole is confusing. We believe the Discussion section would be well-served by the inclusion of subheadings throughout. See below. It appears to us that the focus of the four paragraphs (including the indented paragraph) on pp. 7-8 is whether an advance consent BY THE PROSPECTIVE CLIENT can **substitute** for the consent required under 1.18(d)(1), which would usually be given after the conflict has arisen. We do not believe that such an advance consent obviates the requirement of obtaining the other affected client's informed consent, but the use of the word "alone" seems to suggest that is the position of COPRAC. We believe this point needs to be clarified. The question being answered is whether

the prospective client can give advance consent. The affected client in its example gives consent, so we don't think COPRAC meant to have the "alone" mean that the affected client's consent isn't needed.

12. Later in the same sentence, we believe it is inaccurate to speak of the consent being in advance "of the conflict having arisen." The correct statement would be in advance: "... of the prospective client providing confidential information to the lawyer."
13. In the portion of footnote 5 on p. 7, we would change "publicly" to "generally." The § 6068(e)(1) duty of confidentiality can apply to public information that is not generally known. See *In the Matter of Johnson*, 4 Cal. St. Bar Ct. Rptr. 179 (2000) (lawyer disciplined for disclosing the public information that client had been convicted of a felony where there was no dispute the client had communicated the information to his lawyer confidentially). We also note that, although 1.9(c)(1) permits "use" of information that "has become generally known," there is not a similar exception in 1.9(c)(2) for a lawyer who might seek to "reveal" information.
14. The middle paragraph on page 8 speaks of "firm wide representation", but that is not correct because the intake lawyer(s) must be screened. It would be better to be specific as to "other firm lawyers." Also, "firm wide" should be "firm-wide" because it is a compound adjective.
15. The last complete paragraph on p. 9 (Beginning: "Neither rule 1.18") has a sentence that begins "It has been argued" That calls for a source citation. It is possible that what COPRAC has in mind is: "It could be argued" The latter needs no citation.
16. Footnote 9 on p. 11 speaks of a mandatory loyalty disqualification, and *Flatt* does say that, but it also says: "Even though the simultaneous representations may have *nothing* in common, and there is *no* risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required*. Indeed, *in all but a few instances*, the rule of disqualification in simultaneous representation cases is a *per se* or "automatic" one. *Flatt v. Superior Court*, 9 Cal. 4th 275, 284 (1994) (Emphasis added). We recommend that the full quotation be included.
17. On p. 12, there is a typo in the *A v. B* citation. It should be to "N.J." (it's a NJ Supreme Court opinion). We also note that the California Style Manual has a preference for citation to a regional reporter, although it does state that the official report ("N.J.") can be cited the first time the case is cited. See CSM § 1:28. The regional report citation should be to 726 A.2d 924 (N.J. 1999).
18. Footnote 11 states: "There may be circumstances where, for some reason, the lawyer'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. Under

such circumstances, the lawyer may be required to withdraw. (Rule 1.16.).” We recommend that the rule’s actual language, “materially limiting,” be substituted for “materially impairment of” and that it be specified that it is the representation of “Competitor” that would be limited:

“... to the extent that the lawyer’s compliance with the duty not to use or disclose that information might creates a significant risk of ~~a material impairment~~ materially limiting of the representation of Competitor. Under such circumstances, the lawyer may be required to withdraw. (Rule 1.16.)

In addition to the foregoing points, we have the following comments:

19. As noted above in paragraph 11, we think this lengthy opinion would be a good deal more user friendly if it were to include subheadings in the Discussion section. As examples:

- a. A subheading before the first full paragraph on page 7 could read:
“Advance Consent from Prospective Client”
- b. A subheading before the second full paragraph on page 8 could read:
“Ethical Screening Requirements Under Rule 1.18(d)(2)” or simply use the following “Reasonable measures to avoid exposure to more information than necessary to determine representation” before third full paragraph on page 8, since that’s the only one of the requirements that is addressed (and really the heart of the opinion.)

20. The opinion refers to the intake lawyer as if there is only one (though there is some mention that more might be involved, *i.e.*, the reference to “team,” in scenario 4). This might not be accurate. Although rule 1.18 speaks of the consulting “lawyer” in the singular, we believe that the decision to represent a client, particularly in a large firm, might not be made only by a single interviewing lawyer, or that the interviewing lawyer will not disclose confidential information to others in the firm to assist the interviewer to make a reasoned decision or so that a committee of lawyers can participate in the decision whether to accept or decline a representation. We believe that any firm lawyer who is made privy to the confidential information the PC has revealed subsequently should be personally prohibited from the representation of the “other client” and appropriately screened. Perhaps the opinion could recognize the realities of a law firm’s decision-making process in a footnote.

Thank you for the opportunity to comment on the Proposed Formal Opinion.

Respectfully submitted,



Elizabeth L. Bradley
Chair
Professional Responsibility and Ethics Committee

From: [Andrew Tuft](#)
To: [Tuft, Andrew](#)
Subject: Fw: Interim Op. 170003
Date: Tuesday, January 5, 2021 8:43:49 AM

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

----- Forwarded Message -----

From: Mark Tuft <mtuft@cwclaw.com>
To: 'andrewtuft@yahoo.com' <andrewtuft@yahoo.com>
Sent: Monday, January 4, 2021, 05:10:53 PM PST
Subject: Interim Op. 170003

1. The statement in the first paragraph on page 10 under heading "Discussion of the Scenarios" that Rule 1.18(b) and (c) preclude the use or disclosure of confidential information "that is material to the representation" is misleading. Rule 1.18(b) precludes the use of confidential information protected by 6068(e) and Rule 1.6 regardless of materiality, except as permitted under Rule 1.9. Secondly, "the phrase material to the representation" is ambiguous. Presumably, you are referring the representation of Competitor, but that is not clear from the sentence. The paragraph at the bottom of page 6 is more accurate.
2. In Scenario 2a, the Committee states that PC's plan to sue Competitor is "material" to both PC and Competitor, since it would disrupt Competitor's current plans for a public offering. It is unclear whether that means the lawyer or the lawyer's firm currently represents Competitor in that matter? If so, the analysis on pages 11-13 is incomplete. If not, how then is the information "material" to the representation of Competitor? Assuming the lawyer is precluded from disclosing the information to Competitor, couldn't that create a material limitation conflict of interest and might the conflict be non-consentable under Rule 1.7(d)? The draft opinion gives the impression that the lawyer or the lawyer's firm could continue to represent Competitor and not have to consider whether it would have to withdraw. (See, e.g., LA 528). Footnote 11 seems to touch on the issue but is insufficient to avoid misleading lawyers regarding the duties to Competitor in the situation presented. Even if Rule 1.7 is not implicated would the duty of communication under 1.4(a)(3) present a conflict problem for the lawyer and the lawyer's firm?
3. An important omission in the draft opinion is the distinction between representing a client with interests "materially adverse to those of a prospective client in the same or a substantially related matter" if information protected by 6068(e) and Rule 1.6 is material to the matter in Cal Rule 1.18(c) with Model Rule 1.18(c) which deals with receipt of information from the prospective client that "could be significantly harmful to the person."
4. Scenario 3 is narrowly limited to the situation where only the consulting lawyer in the law firm acquires information reasonably necessary to evaluate the merits of the case and the client's ability to pay rather than the more common situation where other lawyers and firm staff are involved in the evaluation and decision-making process. Typically, the decision whether to take the case is made by management or a committee of the firm. Would the Committee be willing to opine on this more realistic situation? Either way, the digest does not include this critical limitation and could mislead the reader.

5. Some of the wording in the draft opinion is imprecise. For example, Scenarios 3 and 4 refer to PC “clears” the law firm’s conflict inquiry or had “cleared’ conflicts. It would be more precise to state that Lawyers – not clients – clear conflicts.

Mark L. Tuft
Cooper, White & Cooper LLP
201 California St.
17th Floor
San Francisco, CA 94111
(415) 433-1900
(415) 765-6215 (Direct Line)
(415) 433-5530 (Fax)
(415) 309-1735 (Cell)
[mail to:mtuft@cwclaw.com](mailto:mtuft@cwclaw.com)

Certified Legal Malpractice Specialist
California State Bar Board of Legal Specialization