



The State Bar of California

OPEN SESSION

AGENDA ITEM

MAY 2021

REGULATION AND DISCIPLINE COMMITTEE II.B

DATE: May 13, 2021

TO: Members, Regulation and Discipline Committee

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence

SUBJECT: Formal Advisory Ethics Opinion 2021-205: Request for Approval for Publication

EXECUTIVE SUMMARY

This agenda item seeks Committee on Regulation and Discipline (RAD) approval for the publication of proposed Formal Ethics Advisory Opinion 2021-205 developed by the Committee on Professional Responsibility and Conduct (COPRAC or the committee), following the close of two public comment periods.

BACKGROUND

COPRAC is charged with developing the State Bar's nonbinding, advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure,² which provides that once the committee has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of RAD for decision.

¹ Each published opinion includes the following statement: "This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although nonbinding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility (See, e.g., *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 459.)

² See Board Resolutions, July 1979, December 2004, and November 2016.

DISCUSSION

This agenda item requests approval for the publication of proposed Formal Advisory Ethics Opinion 2021-205. Before being finalized for publication, while the opinion was still in development and out for public comment, it was designated as proposed Formal Opinion Interim No. 17-0003.

Proposed Formal Opinion Interim No. 17-0003 was drafted by COPRAC, and at its meeting on September 11, 2020, in accordance with COPRAC's procedures, the committee approved the opinion for an initial 90-day public comment circulation.³ Subsequently, at its meeting on January 8, 2021, COPRAC revised the opinion in response to public comments received and approved an additional 60-day public comment period circulation.

The full text of the proposed opinion is provided as Attachment A. The questions addressed in the proposed opinion are:

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?

The opinion digest states:

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

³ See Board Resolution, December 2004.

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 other 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 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.

Public Comment

In response to the second public comment period that ended on March 22, 2021, four public comments were received and are provided as Attachment B.

Rachel MacCratic submitted a comment expressing support for the opinion as drafted.

The Orange County Bar Association (OCBA) submitted a comment in which they offered clarifying edits. Their comment included an observation that the statement of facts contained information indicating the advance consent agreed to was broader than the information contained in the analysis. COPRAC amended the opinion by accepting all of OCBA's proposed edits.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee submitted a comment stating they “agree with the conclusions in this proposed opinion and support its publication.” They also recommended that although sufficiently clear in the opinion, the conclusion could be revised to state that the lawyer may not use confidential information to the disadvantage of the client or former client and that other lawyers in a firm must comply with rule 1.18(d)(2). COPRAC declined to make this revision because they felt, as the commenter noted, that the opinion was clear on these points and that the conclusion accurately reflects the content of the opinion as drafted.

The California Lawyers Association Ethics Committee stated they support the publication of the opinion and believe the opinion “will be useful to California lawyers as they seek to comply with” rule 1.18 of the California Rules of Professional Conduct. They also offered some clarifying edits to the opinion. COPRAC amended the opinion by accepting all of their proposed edits.

At its meeting on April 15, 2021, following consideration of the public comment received, COPRAC approved the opinion for submission to RAD for formal publication. The State Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approves the publication of Formal Ethics Advisory Opinion No. 2021-205.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee, following publication for public comment and consideration of the comments received, and upon the recommendation of the State Bar Standing Committee on Professional Responsibility

and Conduct, approves the publication of Formal Ethics Advisory Opinion 2021-205, attached hereto as Attachment A.

ATTACHMENT(S) LIST

- A.** Formal Ethics Advisory Opinion 2021-205
- B.** Full Text of Public Comments

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2021-205**

- 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 other 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 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 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

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.

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. 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

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.)

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. 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 whether 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 factual information concerning the merits of the case and the likely damage award, indicating that it is 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, and not to disclose any other confidential information or information that is not reasonably necessary to that assessment. 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 person at the Law Firm. Lawyer informs PC that Law Firm will not take the case, explaining Lawyer's reasons and that Lawyer did not share any of PC's information with any other person at the Law Firm. After PC files a lawsuit against Competitor, Competitor seeks to hire Lawyer to represent Competitor against PC. Lawyer believes that the information Lawyer received about PC's financial situation and the merits of the case is material to the case between Competitor and 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 on behalf of Competitor, 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 should Competitor subsequently retain Law Firm, 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:

(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 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)."

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 1.18(b). In addition, except in Scenario 2a, where the information received by the lawyer likely

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.

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 1.4¹⁰) and the inherent duty of loyalty to Competitor.

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

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]: “A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.”

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 prevents disclosure or use of confidential information received from a current client, notwithstanding the lawyer's duties of loyalty and to communicate to another client information that may be material to that 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.¹¹ Accordingly, in each scenario 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 1.9.¹²)

¹¹ A leading non-California case is consistent with the conclusion that in the absence of an exception to the duty of confidentiality, that duty must be honored notwithstanding the duty of loyalty to an existing client. In *A v. B* (1999) 158 N. J. 51 [726 A.2d 924], 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 in the scenario discussed here.

¹² 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,

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 likely 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).¹³ 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 disclose 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).

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.

¹³ 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.

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).¹⁴

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 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.

¹⁴ 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.

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.

In order for a consent to be informed, the lawyer must have "communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct." Rule 1.0.1 (e). 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.¹⁵ 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 disclose such information or use it to the client's disadvantage 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.

¹⁵ 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.

A lawyer who receives material confidential information from a prospective client is prohibited from accepting representation adverse to the prospective client in the same or a substantially related matter absent informed written consent, which may be given in advance of receiving the information (rule 1.9(a) and rule 1.18(b)). Likewise, absent informed written consent, the other members of the lawyer's law firm are prohibited from representing the client 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).

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

Public Comment - Proposed Opinion 17-0003

Commenting on behalf of an organization	No
Name	Rachel MacCratic
City	San Francisco
State	California
Email address	rachel@maccraticlaw.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.	<p>Imagine working in the DoJ or as corporate in-house, where your employer might want to review all your communications through the employer's domain/SMTP.</p> <p>It is our lot to field inquiries from all over because we're lawyers. Some emails turn into prospective clients unwittingly. And, those emails' authors won't always understand the sensitivity or consequence of an attorney's employer's review of a question.</p> <p>Sometimes, hapless prospective clients will demonstrate conflicting interests with the attorney's employer before the employed attorney has an opportunity to warn or ward off third party observation by the current employer-client.</p> <p>Appropriate exercise of the fiduciary duty of undivided loyalty requires attorney control of communications & their confidentiality even from the non-attorney employer. In this day and age, that requires a separation of IT infrastructure between the counselor at law and the non-attorney employer/current client.</p>



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THURGOOD MARSHALL BAR ASSOC.

March 11, 2021

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 Interim No. 17-003

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning Proposed Formal Opinion Interim No. 17-003.

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.

We acknowledge the revisions to the prior draft of Interim No. 17-003 and find the opinion much improved by those revisions. We have only a few comments to this current draft and appreciate the opportunity to comment.

Most substantively, we are concerned that the proposed language of the advance consent in Scenario 4 is supported as permissible with reference, in part, to the authority cited on page 8. The opinion explains that there are two categories into which advance written consents upheld under California law fall: first, where a joint client agrees a lawyer can continue to represent the other joint client and second, consent to "concurrent adverse representation of an identified client" in unrelated matters. COPRAC later concludes that the proposed advance consent in the opinion is permissible because "it is limited to representation of an identified opponent or opponents" (Opinion at 15) and points out in footnote 16 that the advance consent here is not a general one, permitting representation in "unspecified matters" or of "unspecified adverse clients." However, the advance consent stated in the facts of the opinion is not so limited. As stated therein, "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." (Opinion at 5 (emphasis added)). This consent is not limited to a single identified opponent or

opponents nor is it limited to representation in only PC's case. This consent permits Law Firm to act adversely to PC in the same or a substantially related matter. That is a more generally framed advance consent than the opinion's later discussion suggests. There does not appear to be ample authority cited in the opinion to support this more general consent. We suggest that the terms of the proposed consent be limited to representing Competitor in PC's case, as a more generally framed advance consent does not find support in the authorities COPRAC relies on in concluding the proposed advance consent is permissible.

Along those lines, because of the importance of the requirement that any advance consent be informed, the opinion would benefit from expressly stating what it takes for consent to be informed. The opinion does not state anywhere in its 16 pages what it means for consent to be "informed," but rather simply states that it assumes the consent is informed. We think a simple sentence at the beginning of the last paragraph before the "Conclusion" on the page 15 would suffice, such as "To be informed, consent must be given after the lawyer has disclosed the relevant facts and circumstances and the material risks, including the actual and reasonably foreseeable adverse consequences of the proposed course of conduct. Rule 1.0.1(e). Assuming PC's advance consent is informed" Without this, we remain concerned that practitioners could erroneously conclude that the advance consent language contained in Scenario 4 would itself be sufficient and miss the additional requirement to disclose in writing the actual and reasonably foreseeable adverse consequences of the conflict to which advance consent is requested.

On page 4, we did not understand inclusion of the second to last sentence before the "Scenario 4" heading. That sentence states: "Lawyer believes that the information Lawyer received about PC's financial situation and the merits of the case are materially adverse to PC's interests." The proper inquiry for conflicts analysis is not whether information will be adverse, but rather whether the interests of another client in a matter are adverse to a prospective client's interests and whether confidential information obtained from the prospective client is material to the matter. The relevant adversity is as between the new client and prospective client; not between the prospective client and confidential information imparted. If the sentence remains, it should be changed to the effect that Lawyer believes that the information Lawyer received from PC is material to the case between Competitor and PC.

At page 12, last paragraph, the opinion states that authorities recognize that the duty of confidentiality overrides "the lawyer's subsequent duties of loyalty." We do not understand the use of "subsequent" here, as the authorities, especially *Flatt*, do not focus on only subsequent duties of loyalty but also concurrent duties of loyalty.

Less substantively, we believe the word "disclosure" in the last paragraph of 13, under Scenario 2b, should be "disclose."

Re: Proposed Formal Opinion Interim No. 17-003

March 11, 2021

Page | 3

Thank you for your consideration of our comments and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read "Larisa Dinsmoor", is written over a light blue rectangular background.

Larisa Dinsmoor

2021 President

Orange County Bar Association

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 Bradley
City	Beverly Hills
State	California
Email address	ebradley@rosensaba.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
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_on_Revised_COPRAC_17-0003.pdf (61k)

March 17, 2021

Dena M. Roche, 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: March 22, 2021

Dear Ms. Roche 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). We previously submitted comments to the prior version of this proposed opinion, and we thank COPRAC for its consideration of those comments. We agree with the conclusions in this proposed opinion and support its publication.

However, we suggest that the following be made clear in the Conclusion: (i) that the lawyer may not use confidential information “to the disadvantage of the client or former client” (see rule 1.8.2); and (ii) that other lawyers in a firm must comply with all requirements of rule 1.18(d)(2). Although these two points are clarified in the proposed opinion, because of its length, readers might only rely on the Digest and/or Conclusion.

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

Respectfully submitted,



Elizabeth L. Bradley
Chair
Professional Responsibility and Ethics Committee

March 18, 2021

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 (Duties to Prospective Clients
and Ethical Screening)

Dear COPRAC members:

On behalf of the California Lawyers Association Ethics Committee (CLAEC) and in response to the State Bar of California's request for public comment, we respectfully submit this letter in support of Proposed Opinion 17-0003. CLAEC appreciates the opportunity to provide comment on this revised proposed opinion.

CLAEC provided comments to the first version of this proposed opinion. We appreciate COPRAC's consideration of those comments. CLAEC supports the publication of this opinion and believes the opinion will be useful to California lawyers as they seek to comply with California Rules of Professional Conduct, rule 1.18. Please consider the following comments.

First, in Scenario 2a, the opinion discusses whether Lawyer has a duty to disclose to Competitor, a current firm client, the fact that Prospective Client (PC) intends to sue Competitor. This is an issue for which there is little current guidance, as the opinion recognizes. The tension is between the limited duties Lawyer owes PC and the duties Lawyer owes Competitor, as a current client. COPRAC's conclusion—that Lawyer may not disclose the facts to Competitor—appears sound, given the duty of confidentiality owed to PC under rule 1.18. However, the discussion leading to that conclusion is confusing and potentially misleading. On page 12, the opinion cites two ethics opinions that look at conflicts that arise between concurrent clients and states that “[i]mplicit” in those opinions “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.” The reference to “subsequent” duties is unclear, since both cited opinions concern two currently represented clients. Further, and perhaps more important, the opinions do not suggest that a duty of confidentiality “overrides” other duties: the issue is how to balance duties owed to each client, where the duty owed to one impedes duties owed to

the other. None of these overrides any others; indeed, COPRAC Opinion 2003-163 concludes that Lawyer must withdraw because Lawyer may not fulfill the duties owed to all clients.

A simpler conclusion would recognize that the duty of confidentiality set forth in rule 1.18 prevents the disclosure or use of the information, as expressly set forth in rule 1.18(b), notwithstanding other, competing duties owed to Competitor.

Second, in footnote 12, there is a reference to “the duty of loyalty to an existing or prospective client.” There is no support cited for the conclusion that rule 1.18 creates a duty of loyalty to a prospective client, as opposed to what is primarily a duty of confidentiality, and we suggest that be deleted, unless there is some authority to support the view that a lawyer owes a duty of loyalty to a prospective client. Additionally, the New Jersey case cited in that footnote adds little to the analysis, and we suggest omitting it.

Third, later in Scenario 2a, the opinion concludes that “Lawyer may be permitted to represent Competitor against PC.” (p. 13) One reason cited for this conclusion is that the confidential information Lawyer received from PC concerning its intention to sue Competitor “is rendered immaterial by the fact that PC has now sued.” That may not in fact be true, as the opinion recognizes later in that same paragraph: the fact that PC was considering a lawsuit, and the timing of that consideration, as well as the basis on which PC considered suing Competitor (the “basis of the claim”, which was information the facts state was disclosed to Lawyer by PC), are all facts protected by the duty of confidentiality, and under certain circumstances disclosure or use of those facts may prejudice PC. We do not disagree with the conclusion reached, but suggest that at a minimum the word “likely” be inserted before “immaterial.” (For these same reasons, we suggest adding the word “likely” before “ceases to be material” on page 10-11.)

Lastly, footnote 11 states that “[t]he duty of loyalty implicates the biblical injunction against “serving two masters” (Matthew 6:24).” The quotation is from *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 286, which should be cited immediately after the quotation. *Flatt* cites the biblical phrase as an analogy, not as a duty that applies to California lawyers (which of course it is not): “The mandatory rule of disqualification in cases of dual representations involving unrelated matters—analogueous to the biblical injunction against ‘serving two masters’ (Matthew 6:24)—is such a self-evident one that there are few published appellate decisions elaborating on it.” (*Ibid.*) The analogy drawn in *Flatt* is between the rule of mandatory disqualification in cases of dual representation of clients with conflicting interests (litigation adversaries) and the biblical injunction, rather than between the duty of loyalty and the biblical injunction as suggested by the first sentence in footnote 11. Scenario 2a does not involve dual

representation of clients with conflicting interests and does not involve conflicting duties of loyalty. We believe the reference to “serving two masters” is inapt in this context, as are the reference to the rule of mandatory disqualification in the second sentence in footnote 11 and the statement “the duty of loyalty may arise without potential breaches of confidentiality.” We suggest deleting footnote 11 in its entirety.

Thank you for your consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read "David Majchrzak", written in a cursive style.

David Majchrzak
Co-Chair
California Lawyers Association Ethics
Committee