

**From:** [Kevin Mohr](#)  
**To:** [McCurdy, Lauren](#); [Difuntorum, Randall](#)  
**Cc:** [JoElla L. Julien](#); [Robert L. Kehr](#); [Mark Tuft](#); [Kevin Mohr G](#); [Harry Sondheim](#)  
**Subject:** RRC - 1.18 [3-100] - III.E. - Agenda Materials  
**Date:** Thursday, March 18, 2010 8:57:49 AM  
**Attachments:** [RRC - 3-100 \[1-18\] - Rule - DFT5.2 \(03-17-10\) - Cf to DFT4.1.doc](#)  
[RRC - 3-100 \[1-18\] - Public Comment Chart - By Commenter - DFT2.2 \(03-18-10\).doc](#)

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Greetings Lauren:

I've attached the following, in Word:

1. Public Comment Chart, Draft 2.2 (3/18/10). Revisions I've made to the chart from the previous draft I circulated to the drafters are highlighted in yellow.
2. Rule 1.18, Draft 5.2 (3/17/10), redline, compared to Draft 4.1 (12/15/09) [the public comment draft].

I have not made revisions to the other submission documents (Dash, Intro, etc.) pending the RRC's decisions concerning suggested revisions to the attached Rule draft.

Notes & comments:

1. I've incorporated the comments of Bob and Mark in the attached documents.
2. In some instances, based on Bob's and Mark's input, I've made suggested changes to the draft Rule that the other drafters have not had an opportunity to review. I've flagged those changes in the footnotes.

Please let me know if you have any questions. Thanks,

Kevin

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**Rule 1.18 Duties to Prospective Client  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

| No. | Commenter   | Position <sup>1</sup> | Comment on Behalf of Group? | Rule Paragraph | Comment   | RRC Response  |
|-----|---|-----------------------|-----------------------------|----------------|---|---|
| 1   | Anonymous   | A                     |                             |                | Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.  | No response required.   |
| 7   | Bar Association of San Francisco, Legal Ethics Committee ("BASF") | M                     |                             |                | <p>Our committee opposes the provision of this rule permitting "non-consensual" screening. The Proposed Rule would significantly depart from existing law and policy concerns. Except in the limited context of government lawyers, California courts have not generally approved the concept of non-consensual screening, despite numerous opportunities to do so (See <i>Sharp v. New Entertainment, Inc.</i> (2008) 163 Cal.App.4<sup>th</sup> 410, 438 fn. 11).</p> <p>No principled reason has been articulated for affording less protection to prospective clients that provide confidential information to lawyers than former clients. Why is a prospective client who consults with a lawyer for the purpose of retaining the lawyer, and provides material confidential information, but does not end up retaining the lawyer, entitled to less protection of his or her confidential information than the prospective client who ends up retaining the lawyer?</p> <p>California case law acknowledges that, in</p> | <p>The Commission disagrees with the commenter's apparent premise that no California court would permit screening in the private lawyer context. Although no California court has expressly held screening should be available in those situations, the Supreme Court is free to approve a Rule of Professional Conduct without there being a predicate for the rule in case law.</p> <p>The commenter's second point is that there is no principled reason to distinguish between prospective clients and former clients in terms of protecting confidential information. However, the Commission agrees with the position of the Restatement of the Law Governing Lawyers, § 15, Comment b, which observes:</p> <p>Prospective clients are like clients in that they often disclose confidential information to a lawyer, place documents or other property in the lawyer's custody, and rely on the lawyer's advice. But a lawyer's discussions with a prospective</p> |

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.18 Duties to Prospective Client  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
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| No. | Commenter | Position <sup>1</sup> | Comment on Behalf of Group? | Rule Paragraph | Comment  | RRC Response  |
|-----|-----------|-----------------------|-----------------------------|----------------|--|---|
|     |           |                       |                             |                | <p>addition to a client's or prospective client's interest in confidential information, other important policies are implicated when considering conflicts and appropriate methods for resolving them. Those policies include the need to maintain the public's trust and confidence in the legal system, to preserve a client's or prospective client's trust in the lawyer he or she consults with and to preserve trust in their ability to communicate freely with the lawyer in confidence. (See <i>People ex. rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.</i> (1999) 20 Cal.4<sup>th</sup> 1135, 1145; <i>Adams v. Aerojet-General Corp.</i> (2001) 86 Cal.App.4<sup>th</sup> 1324, 1334-1335.) We see no reason why these concerns are less important in the context of a "prospective client" who has provided information to the lawyer, as opposed to a former client who has done so.</p> <p>The requirement that the lawyer take "reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client" does not justify non-consensual screening. It is not clear that this provides meaningful protection to a prospective client who has given material confidential information to the lawyer. As the Commission noted in its</p> | <p>client often are limited in time and depth of exploration, do not reflect full consideration of the prospective client's problems, and leave both prospective client and lawyer free (and sometimes required) to proceed no further.</p> <p>Comment [1] states the same rationale in a somewhat abbreviated fashion.</p> <p>Moreover, by recommending the adoption of this Rule, which is based on Model Rule 1.18, the Commission does not suggest that a lawyer should be able to plumb the depths of a prospective client's confidential information and then, with impunity, be able to accept an adverse representation in the same matter or be screened to enable other lawyers in the lawyer's law firm to accept the adverse representation. Rather, a lawyer governed by this Rule and the lawyer's law firm are afforded an opportunity to rebut the presumption of shared confidences with an ethical screen only in situations where the lawyer has not taken "more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client." Rule 1.18(d)(2). A lawyer cannot mine a prospective client's information and then use it to that person's disadvantage.</p> <p>The Commission understands the important role that confidentiality plays in encouraging client candor, typically a prerequisite to a lawyer's effective representation of a client. This Rule</p> |

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| No. | Commenter  | Position <sup>1</sup> | Comment on Behalf of Group? | Rule Paragraph | Comment   | RRC Response   |
|-----|--|-----------------------|-----------------------------|----------------|---|--|
|     |  |                       |                             |                | <p>materials, California has long recognized a duty to protect confidential information of a prospective client even where no attorney-client relationship exists. That concept is codified in Cal. Ev. Code section 951.</p> <p>Allowing non-consensual screening could impair the flow of information between attorney and client. Under the rule as currently drafted, a law firm contacted by a prospective client that receives the prospective client's material confidential information is not required to provide any notice to the prospective client of the potential consequences of the consultation. The law firm may later appear against the prospective client in the same matter in which the prospective client sought the law firm's advice by unilaterally imposing a screen. Such a proposition risks chilling the free-flow of information between the lawyer and potential client.</p> <p>The written notice requirement does not enable the prospective client to verify that its confidences are being appropriately protected.</p> | <p>recognizes that role and balances the need for prospective clients to be secure in their secrets and the need for lawyers to obtain sufficient information to determine whether they should – or even can – accept the representation. Thus, the limited availability of screening under this Rule should not, as the commenter suggests, impair the flow of information between lawyer and client.</p> |
| 8   | Committee on Professional Responsibility and Competence ("COPRAC") | M                     |                             | 1.18(d)        | 1. We generally support adoption of this proposed rule. In particular, we support the inclusion of non-consensual screening in paragraph (d)(2)(i), a concept that apparently   | 1. No response required.   |

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|-----|-----------|-----------------------|-----------------------------|----------------|--|---|
|     |           |                       |                             |                | <p>split your committee 5-5.</p> <p>2. The language of paragraph (d) is confusing in that it does not specify who can represent the affected client. Commenter recommends changing (d) to read:</p> <p>(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client <u>by another lawyer at such lawyer's firm</u> is permissible if." (added language underscored)</p> <p>3. The use of the phrase "prohibited lawyer" in subparagraph (d)(2)(i) is awkward. Commenter recommends the phrase be changed to "the lawyer who received the information."</p> <p>4. Commenter recommends deletion of the sentence, "Hence, prospective clients are entitled to some but not all of the protection afforded clients," in Comment [1]. Commenter believes that this sentence may suggest inappropriately that a lawyer owes a duty of confidentiality to prospective clients that is different than the duty of confidentiality owed to current or past clients. The Commenter sees no difference under existing California law.</p> | <p>2. The Commission did not make the suggested change. Under paragraph (d)(1), if both the prospective client and the affected client consent, the lawyer who consulted with the prospective client can participate in the representation.</p> <p>3. The Commission did not make the suggested change. Although arguably somewhat awkward in this specific context, the term "prohibited lawyer" is used throughout the Rules to denote a lawyer who is prohibited from participating in the representation at issue.</p> <p>4. <b>The Commission agrees that the sentence is misleading and has revised it.</b></p> |

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|-----|---|-----------------------|-----------------------------|----------------|--|---|
| 4   | Los Angeles County Bar Association's Professional Responsibility and Ethics Committee ("LACBA") | M                     |                             | (d)(2)         | <p>We recommend that an additional provision be added, as a subsection to (d)(2), requiring notice to the prospective client, prior to the receipt of confidential information, of the possibility of non-consensual screening. (We agree, as provided in Comment [2], that no screening whatever is necessary where the communication is unilateral and without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship).</p> <p>We recommend that the Commission also provide a Comment to the new, proposed subsection that, where practicable, the required notice to the prospective client of the possibility of non-consensual screening be confirmed in writing.</p> <p>Comment [1] states, among other matters, that "prospective clients are entitled to some but not all of the protection afforded clients." This sentence appears to add nothing to the understanding of Rule 1.18. Moreover, in the absence of further extensive explication to what protections are not afforded prospective</p> | <p>The Commission disagrees with the commenter's suggestion that an provision be added to paragraph (d)(2) requiring notice of the potential for a non-consensual screen. Paragraph (d)(2)'s requirement that the lawyer "take reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client" will provide sufficient protection for the client. If the lawyer could not show that he or she has taken such measures, such as advising the client to disclose only such information as to enable the lawyer to conduct a conflicts check, then screening would not be available.<sup>2</sup></p> <p>Because the Commission disagrees with the proposed addition, there is no need for a corresponding comment.</p> <p><b>The Commission agrees that the sentence is misleading and has revised it.</b></p> |

<sup>2</sup> Bob Kehr would like to discuss LACBA's recommendation for an addition to paragraph (d)(2).

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| No. | Commenter                                  | Position <sup>1</sup> | Comment on Behalf of Group? | Rule Paragraph                           | Comment  | RRC Response  |
|-----|--|-----------------------|-----------------------------|--|--|---|
|     |  |                       |                             |  | <p>clients, the sentence inadequately summarizes existing California law. See, California State Bar Formal Opinion No. 2003-161.</p> <p>Because the comment concerning “some but not all of the protection afforded clients” is both gratuitous and inadequate as a summary of existing law, we recommend that this single sentence be deleted.</p>  |   |
| 6   | Office of the Chief Trial Counsel (“OCTC”) | M                     |                             | <p>1.18(c), (d)</p> <p>Cmts. [6]-[8]</p> | <p>The drafters state that this is a new rule to California, although OCTC believes it is already part of existing ethical standards in our state.</p> <p>OCTC is concerned that paragraphs (c) and (d) are essentially repetitions of the conflicts rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflicts rules should be in a separate rule which clearly deals with all related issues.</p> <p>Like the Rule itself, Comments [6] – [8] are discussions of conflict situations and could create confusion with the conflict rules. It would be better to simply refer the lawyers to the conflict rules, as is done in Comment [9]</p> | <p>The Commission is not aware of any Rule of Professional Conduct that addresses duties owed to prospective clients. Thus, this is a “new rule” for California, although some of its concepts can be found in the Evidence Code and ethics opinions.</p> <p>The Commission disagrees with the commenter. As noted in the response to BASF, above, a conflict that might arise from a consultation with a prospective client is distinguishable from a former client conflict, requiring that it be treated separately from other conflicts situations. Moreover, non-waivable conflicts typically arise in concurrent representation situations and thus are more appropriately treated under Rule 1.7.</p> <p>See Response concerning paragraphs (c) and (d).</p> |



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|-----|-----------|-----------------------|-----------------------------|----------------|---|---|
|     |           |                       |                             | Comment [2]    | <p>We recommend that examples of reasonable measures be added after the first sentence in Comment [4].</p> <p>3. Subpart (i) of paragraph (d)(2) refers to the lawyer being “timely and effectively screened.” The Commission added the words “and effectively” to the ABA Model Rule language here and in Comment [7]. However, this language is not consistent with the definition of “screened” in proposed Rule 1.0.1, which refers to “adequate” procedures. We recommend that the wording used to describe the screening procedures in paragraph (d)(2) and Comment [7] of proposed Rule 1.18 be consistent with the definition ultimately used in proposed Rule 1.0.1, as well as in proposed Rule 1.10 if a screening provision is added to that Rule, which we support.</p> <p>4. We agree with the inclusion of the limitations contained in Comment [2] regarding who may constitute a “prospective client,” but we do not believe that the Comment addresses the situation in which a</p> | <p>3. The Commission agrees that “effectively” is not defined in the Rules. The Commission accordingly has deleted the phrase, “and effectively” from the Rule.<sup>4</sup></p> <p>4. The Commission agrees that the “beauty contest” scenario the Commenter identifies should be addressed by the Rule but believes that it is</p> |

<sup>4</sup> **KEM:** Use of the term “timely and effectively” was originally taken proposed NY Rule 1.11(c) and adopted for inclusion in all of the proposed Rules that had a screening provision (1.10, 1.11, 1.12 and 1.18). The only place it is used in the NY Rules is NY Rule 1.11(c). OCBA has a point; the definition of screening does not use “effective” but rather “adequate.” Either we should change “effectively” to “adequately” or delete the word. I favor the latter. As Bob Kehr noted a while back, if “effective” means “adequate,” then use of “effective” is redundant because the definition of screening specifies that the screen must be “adequate.” See footnote 2 of accompanying Rule draft.

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|-----|-----------|-----------------------|-----------------------------|----------------|--|--|
|     |           |                       |                             | Comment [5]    | <p>person contacts a lawyer for the purpose of confliction him or her out of the representation of an adversary (without a good faith intention to retain the lawyer in the matter at hand). In this regard, we suggest that the Commission incorporate language in the Comment similar to that adopted by Nevada, such as: "A person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the consultation is not a 'prospective client' within the meaning of the Rule."</p> <p>5. We suggest that the reference to "disqualifying information" in Comment [4] be changed to "information that prohibits representation as defined in paragraph (c)," which is consistent with the Commission's modification to the language in paragraph (d).</p> <p>6. Comment [5] states that "a lawyer may condition conversations with a prospective client on the person's <i>informed consent</i> that the information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter." (Emphasis added.) We recommend that this be changed to "informed written consent" to be consistent with the language and</p> | <p>adequately addressed by paragraph (a) of the proposed Rule and thus has not made the requested change. Unlike Model Rule 1.18(a), which provides "(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client," proposed paragraph (a) provides that a prospective client under this Rule is a person who "consults a lawyer <i>for the purpose of retaining the lawyer</i> or securing legal service or advice from the lawyer." (Emphasis added). The italicized language precludes a prospective client who engages in a beauty contest from claiming protection under this Rule.</p> <p>5. The Commission has made the suggested change.</p> <p>6. The Commission has not made the suggested change. The language in Comment [5] is identical to the Model Rule language. The Commission determined that an "informed consent" standard provides adequate protection to the prospective client. The lawyer is not prevented from obtaining informed written consent if the lawyer wants a record that will support the application of paragraph (d)(2).</p> |

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|-----|---|-----------------------|-----------------------------|----------------|--|---|
|     |   |                       |                             | Comment [6]    | requirement of paragraph (d)(2) and to ensure that any such agreement be documented for avoidance of doubt.<br><br>7. We recommend that the word “materially” be added between “interests” and “adverse” in the first sentence of Comment [6] to accurately reflect the language of paragraph (c).   | 7. The Commission has made the suggested change.  |
| 2   | San Diego County Bar Association Legal Ethics Committee | M                     |                             |                | Delete paragraph (d)(2). We agree with the opposition’s concerns about the unilateral nature of paragraph (d)(2) and that it could enable law firms to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very mater in which representation was sought without their consent. It seems requiring informed written consent of both the affected client and the prospective client pursuant to paragraph (d)(1) is the better approach. | The Commission disagrees. See Responses to BASF and LACBA, above.   |
| 3   | Santa Clara County Bar Association                      | M                     |                             |                | We recommend that subsection (d)(2)(ii) be deleted. This subsection requires that the attorney give written notice to the prospective client, which in many instances creates too onerous an obligation for an attorney or law firm, in particular, for government attorneys.  | The Commission is unclear on how the notice provision would apply to a government lawyer; the Commission is not aware of situations in which government lawyers engage in consultations with prospective clients. Regardless, the fact that providing notice to a prospective client might create “too onerous an obligation for an attorney or law firm” is not a sufficient reason to remove this |

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|-----|-----------|-----------------------|-----------------------------|----------------|---------|--|
|     |           |                       |                             |                |         | protection for a prospective client. If the lawyer or law firm cannot provide the notice, then the option of a screen will not be available. |



**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 confidential information 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<sup>1</sup> a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client 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 defined 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 that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and
    - (i) the prohibited lawyer is timely ~~and effectively~~<sup>2</sup> screened from any participation in the matter and is apportioned no part of the fee therefrom; and

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<sup>1</sup> **Drafters' Note:** The use of the word "represent" has caused some confusion as to whether "client" refers to a "current" client or a "future" client (e.g., H comes in re divorce, firm turns him down; W, whom the firm has never represented, comes in the next day and the firm accepts her representation).

RLK has suggested substituting "accept or continue representation of a client" for "represent a client."

KEM does not object to that substitution but notes that early on we made the change to "represent" from "accept or continue the representation" throughout the conflicts rules to conform to the Model Rules, and also that the phrase "represent" is clarified in the first sentence of Comment [6].

Note also that all the drafters have not had an opportunity to weigh in on this subject, so it should be discussed at the meeting.

<sup>2</sup> **KEM:** Use of the term "timely and effectively" was originally taken from proposed NY Rule 1.11(c) and adopted for inclusion in all of the proposed Rules that had a screening provision (1.10, 1.11, 1.12 and 1.18). OCBA has a point; the definition of screening does not use "effective" but rather "adequate."

RRC – Rule 1.18 [3-100]  
Rule – Draft 5.2 (3/17/10) – COMPARED TO DFT4.1 (12/15/09)  
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- (ii) written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.

## COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Hence, ~~prospective clients are entitled to some but not all of the protection afforded clients~~ although the range of a prospective client's information that is protected is the same as that of a client, see Comment [3], a law firm is permitted, in the limited circumstances provided under paragraph (d), to accept or continue representation of a client with interests adverse to the prospective client in the subject

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Either we should change "effectively" to "adequately" or delete the word. I favor the latter. As Bob Kehr noted a while back, if "effective" means "adequate," then use of "effective" is redundant because the definition of screening specifies that the screen must be "adequate."

### New York's Use of "Effectively"

The use of "effectively" was an appropriate addition to the Model Rule BEFORE our definition of screening was revised before Rule 1.0.1 was sent out for public comment (you quote from the Model Rule definition, MR 1.0(k). Here is what our proposed Rule 1.0.1(k) now provides:

"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 these 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.

(1) We use "adequate," which is not different from "effective". There is no "reasonably" modifier.

(2) Moreover, NY Rule 1.18(d)(2)(ii) provides:

"(ii) the firm implements **effective** screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;"

(3) Putting aside NY's use of the active voice (they can use the active voice and put the onus on the firm because they have law firm discipline), NY's view of effective is the prevention of the flow of information. That does not differ from part (ii) of our definition of "screened," which in effect requires procedures that are "adequate" (read: "effective") "to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer" (read "prevent the flow of information" between the prohibited lawyer and other law firm lawyers and non-lawyer personnel"). That's why using "effectively" is redundant.

MLT concedes the foregoing. However, he would still like to see "effectively" included in Rule 1.18 for the reason that the firm will be allowed to be directly adverse to the prospective client in the same matter in which the person consulted the lawyer (e.g., People ex rel Dept of Corp v. Speedee Oil Exchange Systems). Nevertheless, he does not insist on it.

RRC – Rule 1.18 [3-100]  
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[matter of the consultation](#).<sup>3</sup> [See Comment \[4\]](#). As used in this Rule, prospective client includes an authorized representative of the client.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].<sup>4</sup>

[2A] Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most

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<sup>3</sup> [KEM: COPRAC and LACBA have recommended deleting this sentence. I've suggested an alternative. In the context of the proposed Rule, the Model Rule sentence is not only misleading, but is also not accurate as we have deleted the Model Rule's \(and Restatement's\) "significantly harmful" standard for disqualification, substituting instead the "material" standard that applies to former clients. My proposed sentence is intended to clarify that we are not saying that the scope or range of a prospective client's material information is any less broad; rather, in the limited situation where a lawyer has taken pains not to be exposed to material information from a prospective client but the client has nevertheless divulged such information through no fault of the lawyer, the lawyer can be screened.](#)

[Please note that the other drafters have not had an opportunity to review this revision.](#)

[Note also that RLK believes that if the Model Rule sentence is deleted and no substitution made, then the entire Comment should be deleted. KEM disagrees.](#)

<sup>4</sup> [Draters' Request for Consideration: OCBA has suggested adding the following sentence to address the "beauty contest" scenario where a client interviews numerous lawyers to preclude them from representing the client's opponent:](#)

[In addition, a person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the communication is not a prospective client within the meaning of this Rule.](#)

[The language is taken from Nevada Rule 1.18. MLT and KEM do not believe the sentence is necessary in light of the RRC's revision of paragraph \(a\) of MR 1.18\(a\). MR 1.18\(a\) provides: "\(a\) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." It lacks the more specific language of proposed paragraph \(a\), "consults a lawyer \*\*for the purpose of retaining\*\* the lawyer or securing legal service or advice from the lawyer," which would not cover the "beauty contest" scenario.](#)

[The drafters request input from RRC members on whether they believe the proposed sentence is necessary.](#)

**RRC – Rule 1.18 [3-100]**  
**Rule – Draft 5.2 (3/17/10) – COMPARED TO DFT4.1 (12/15/09)**  
**March 26-27, 2010 Meeting; Agenda Item III.E.**

important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring ~~disqualifying~~ information from a prospective client that would prohibit representation as provided in paragraph (c),<sup>5</sup> a lawyer considering whether or not to undertake a new matter ~~should~~must<sup>6</sup> limit the initial interview to only such information as reasonably appears necessary for that purpose. For example, a lawyer may advise the prospective client that he or she should disclose only such information as reasonably appears necessary for the lawyer to conduct a check for conflicts of interest that might prohibit the lawyer from accepting the representation, and explain what kind of information the lawyer is seeking.<sup>7</sup> Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. However, the lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client.

---

<sup>5</sup> **Drafters' Note:** Change made in conformance with RRC style.

<sup>6</sup> **Drafters' Recommendation:** Change "should" to "must" to reflect the mandatory nature of paragraph (d)(2).

<sup>7</sup> **KEM:** I added this sentence in response to OCBA, which requested examples of "reasonable measures." It's a bit duplicative of the preceding sentence and I'm not sure it is necessary, but it does add a specific example.

**Discussion Topic:** Bob Kehr would like to discuss this addition.

**RRC – Rule 1.18 [3-100]**  
**Rule – Draft 5.2 (3/17/10) – COMPARED TO DFT4.1 (12/15/09)**  
**March 26-27, 2010 Meeting; Agenda Item III.E.**

[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either ~~continuing or accepting~~ or continuing the representation of a client with interests materially<sup>8</sup> adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that is material to the matter. For a discussion of the meaning of “materially adverse” as used in paragraph (c), see Rule 1.9, comment [7]. For a discussion of the meaning of “substantially related” as used in paragraph (c), see Rule 1.9, comments [4] – [6].

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all prohibited lawyers are timely ~~and effectively~~<sup>9</sup> screened and written notice is promptly given to the prospective client. See Rule 1.0.1(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given to the prospective client as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer’s duties when a prospective client entrusts valuables or papers to the lawyer’s care, see Rule 1.15.

---

<sup>8</sup> [KEM: I’ve added “materially” as requested by OCBA to parallel the language in paragraph \(c\).](#)

<sup>9</sup> [See footnote 2.](#)





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February 12, 2010

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Office of Professional Competence,  
Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

**Re: Comments to Proposed Amendments to the Rules of Professional Conduct of  
The State Bar of California (Batch 6)**

**Dear Ms. Hollins:**

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

**Patrick L. Hosey, President**  
**San Diego County Bar Association**

**Enclosures**

**cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee**  
**Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee**

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

| <u>Rule</u> | <u>Title [and current rule number]</u>      | <u>Rec.</u> | <u>Author</u> |
|-------------|---|-------------|---------------|
| Rule 1.0.1  | Terminology [1-100]                         | App         | McGowan       |
| Rule 1.4.1  | Insurance Disclosure [3-410]                | App.        | Simmons       |
| Rule 1.11   | Special Conflicts for Gov't Employees [N/A] | Mod.App.    | Hendlin       |
| Rule 1.17   | Sale of a Law Practice [2-300]              | App.        | Fulton        |
| Rule 1.18   | Duties to Prospective Client [N/A]          | Mod. App.   | Tobin         |
| Rule 3.9    | Non-adjudicative Proceedings [N/A]          | App.        | Leer          |
| Rule 4.1    | Truthfulness in Statements to Others [N/A]  | App.        | Hendlin       |
| Rule 4.4    | Respect for Rights of 3rd Persons [N/A]     | No Rec.     | Carr          |
| Rule 6.1    | Voluntary Pro Bono Service [N/A]            | App.        | Gerber        |
| Rule 6.2    | Accepting Appointments [N/A]                | App.        | Gibson        |
| Rule 6.5    | Limited Legal Services Programs [1-650]     | App.        | Simmons       |
| Rule 8.2    | Judicial and Legal Officials [1-700]        | App.        | McGowan       |

**Format for Analyses:**

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.

Yes [ ] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [ ] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [ ] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [ ] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

**Format for Recommendations:**

[ ] We approve the new rule in its entirety.

[ ] We approve the new rule with modifications.\*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.\*

[ ] We abstain from voting on the new rule but submit comments for your consideration.\*

**Summaries Follow:**

~~will not be permitted to “cherry pick” lucrative matters and leave clients with less lucrative matters to fend for themselves;~~

- ~~2. The selling lawyer must cease practice if the entire practice is sold, or cease practice in the particular substantive field or geographic area of practice if only a substantive field or geographic area of practice is sold;~~
- ~~3. Although brokers to facilitate the sale are allowed, the lawyer may only sell the practice to a lawyer, not to a broker or other intermediary — this is to ensure continuity of representation and protection of the seller’s clients;~~
- ~~4. Fees may not be increased solely by reason of the sale — clients are protected by requiring the purchaser to abide by pre-existing fee agreements; and~~
- ~~5. Appropriate protections for confidentiality of the clients have been made part of the rule.~~

~~The Commission deemed Proposed Rule 1.17 “Moderately Controversial” because a minority of the Commission believed that the proposed Rule that permits lawyers to sell a geographic area of the practice or a substantive field of practice will be viewed by some members of the profession as a lessening of client protection and further commercialization of the practice of law.~~

~~**CONCLUSION:** We approve the new rule in its entirety.~~

---

LEC Rule Volunteer Name(s): Frank L. Tobin

**Old Rule No./Title:** Not Applicable

**Proposed New Rule No./ Title:** Rule 1.18 Duties to Prospective Client

(5) Rule 1.18 clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek representation. There is no California rule counterpart, but the duty to protect confidential information of a proposed client, even if no attorney-client relationship results, is found in Evidence Code section 951 and is discussed at length in Cal. State Bar Formal Opn. 2003-161.

**Disagreement over the inclusion of a provision permitting the non-consensual screening of the consulted lawyer when confidential information is learned during the pre-retention period.**

The Commission voted 5-5 to strike from the proposed Rule 1.18 the concept of non-consensual screening and so the concept which is part of Model Rule 1.18, remains in the rule as paragraph (d)(2). Given the split of opinion on whether this paragraph should remain in the proposed rule, the LEC should take a position on whether to strike paragraph (d)(2) or not. A summary of this issue, which is fully set forth in the materials for those interested in the detail, is as follows:

Paragraph (d) of Rule 1.18 provides as follows:

(d) When the lawyer has received information that prohibits representation as defined 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 that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and
  - i. the prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no 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.

Those who oppose (d)(2) believe that the unilateral nature of this power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought.

Those who favored (d)(2) noted that it was only available in limited situations and that it appropriately balances the interests of the prospective client and the interests of the law firm's affected clients in retaining the lawyer of its choice. It follows that the lawyer who might have acquired the prospective client's information despite the lawyers "reasonable measures" is screened to protect the information.

After reviewing this proposed rule, I am in favor of modifying it to delete paragraph (d)(2). I agree with the opposition's concerns about the unilateral nature of paragraph (d)(2) and that it could enable law firms to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought without their consent. This would be a change from existing California law and seems to be contrary to the policy of open communication between lawyer and (potential) client.<sup>1</sup> Furthermore, after the prospective client is provided with written notice to enable the prospective client to ascertain compliance with the provisions of the proposed rule, a situation could develop where a firm is representing an adverse party while the potential client is investigating and objecting to whether there was compliance with the rule, and thus, whether representation of the adverse party is allowed. It seems requiring informed written consent of both the affected client and the prospective client pursuant to paragraph (d)(1) is the better approach.

I am in approval of the new rule after paragraph (d)(2) is deleted.

---

<sup>1</sup> A potential client might withhold information out of concern that the law firm might ultimately represent an adverse party.

CONCLUSION: We approve the new rule with modifications.\* - delete paragraph (d)(2)

---

~~LEC Rule Volunteer Name(s): Jack Leer~~

~~Old Rule No./Title: N/A~~

~~Proposed New Rule No./ Title: 3.9 "Non-adjudicative Proceedings"~~

~~(5) Rule 3.9, as proposed, would provide that attorneys appearing before legislative and other non-adjudicative bodies (1) disclose the attorney is acting in a representative capacity for the client and (2) comply with Rule 4.1 (i.e. refrain from making false statements or failing to disclose facts if necessary to avoid assisting in a fraud or crime). It differs from the ABA Rule by not including other duties set forth in Rules 3.3, 3.4 and 3.5, thus creating a less onerous burden on an attorney appearing before a non-adjudicative body than the ABA Rule would require, based on the Revision Committee's determination that the legislative/administrative bodies serve materially different interests than the courts. A minority suggests the Rule should be omitted entirely (as it is in several states) because it would take lawyers out of the protections of Civil Code section 47, which provides immunity for others appearing before the same type of non-adjudicative bodies. However, given the proposed Rule's minimal requirements and the policy of seeking to bring California's rules in line with the ABA Model Rules, I believe the Rule should be adopted as proposed.~~

~~CONCLUSION: We approve the new rule in its entirety.~~

---

~~LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)~~

~~Old Rule No./Title: N/A (Existing CA statute: Bus & Prof. Code section 60608(e))~~

~~Proposed New Rule No./ Title: 4.1 "Truthfulness In Statements to Others"~~

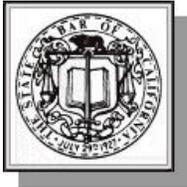
~~(5) Proposed Rule 4.1 largely tracks Model Rule 4.1 which apparently every jurisdiction has some version of except North Carolina and California. In my view, proposed Rule 4.1 should be adopted because it provides some helpful guidance in this complex area and brings California into conformity with the rest of the country on this subject. Although it is extremely difficult to enforce, it might beneficially influence lawyers' conduct and beliefs.~~

~~Proposed Rule 4.1 (a) states a lawyer's duty of honesty that is owed to third persons in the course of representing a client as follows:~~

~~"(a) In the course of representing a client a lawyer shall not knowingly:~~

~~(1) make a false statement of material fact or law to a third person; or~~

~~(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is~~



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## Your Information

Professional Affiliation  Commenting on behalf of an organization

Yes  
 No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

The Santa Clara County Bar Association recommends that subsection (d) (2) (ii) be deleted. This subsection requires that the attorney given written notice to the prospective client, which in many instances creates too onerous an obligation for an attorney or law firm, in particular, for government attorneys.

# OFFICE USE ONLY.

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03/01/2010 

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F-2010-382g SCCBA [1.18]

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March 1, 2010

Audrey Hollins  
Office of Professional Competence, Planning & Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Comments Regarding Proposed Rule of Professional Conduct 1.18 –  
Duties to Prospective Clients

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee ("PREC") has the following comments regarding Proposed Rule 1.18.

**Subparagraph (d)**

PREC proposes a middle ground to resolve the competing positions enunciated by members of the Commission with respect to non-consensual screening of a consulted lawyer when confidential information is learned during the pre-retention period.

The duty of loyalty is at the heart of the lawyer's role in our society. This duty is rightly owed even to prospective clients, who otherwise might be unable to knowledgeably obtain competent and appropriate counsel. Prospective clients ought not to be placed in a position where the confidential information that they have conveyed to prospective counsel is used against them. But this shield ought not become a sword for the disqualification of associated counsel where there is no retention. Subparagraph (d) rightly addresses these competing interests.

Those who oppose non-consensual screening note that "[t]his unilateral power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences . . . ." We believe that this is a legitimate concern, and that the credibility of the legal system requires that prospective clients be made aware, before they convey confidential information, of the possible consequences of doing so. Accordingly, PREC recommends that an additional provision be added, as a subsection to subparagraph (d)(2), requiring notice to the prospective client, prior to the receipt of confidential information, of the possibility of non-consensual screening.<sup>1</sup> PREC recommends that the Commission also provide a

<sup>1</sup> PREC agrees, as provided in Comment [2], that no screening whatever is necessary where the communication is unilateral and without any reasonable

Comment to the new, proposed subsection that, where practicable, the required notice to the prospective client of the possibility of non-consensual screening be confirmed in writing.

**Comment [1]**

Comment [1] states, among other matters, that “prospective clients are entitled to some but not all of the protection afforded clients.” This sentence appears to add nothing to the understanding of Rule 1.18. Moreover, in the absence of further extensive explication to what protections are not afforded prospective clients, the sentence inadequately summarizes existing California law. For example, California State Bar Formal Opinion No. 2003-161, provides that:

“In California State Bar Formal Opn. No. 1984-84, we concluded that a person who consults with an attorney to retain the attorney is a ‘client,’ not only for purposes of determining the applicability of the evidentiary attorney-client privilege under Evidence Code section 950 et seq., but also for purposes of determining the existence and scope of the attorney’s ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e), and under former rule 4-101 of the Rules of Professional Conduct of the State Bar of California, the precursor to rule 3-310(E) . . . . [¶] . . . [W]e reaffirm our conclusion in California State Bar Formal Opn. No. 1984-84 that, with regard to information imparted in confidence, attorneys can owe the broader duties of confidentiality under Business and Professions Code, section 6068, subdivision (e) and rule 3-310(E) to persons who never become their clients.”

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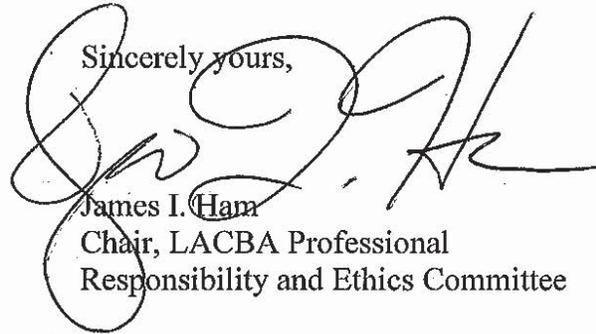
expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.

Office of Professional Competence, Planning & Development  
State Bar of California  
March 1, 2010  
Page 3

Because the comment concerning “some but not all of the protection afforded clients” is both gratuitous and inadequate as a summary of existing law, PREC suggests that this single sentence be deleted.

We appreciate the opportunity to comment on the proposed rules.

Sincerely yours,

A handwritten signature in black ink, appearing to read "J. I. Ham", written over the typed name and title.

James I. Ham  
Chair, LACBA Professional  
Responsibility and Ethics Committee



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March 9, 2010

Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

|            |  |
|------------|--|
| Rule 1.0.1 | Terminology [1-100]                              |
| Rule 1.4.1 | Insurance Disclosure [3-410]                     |
| Rule 1.11  | Special Conflicts for Government Employees [N/A] |
| Rule 1.17  | Sale of a Law Practice [2-300]                   |
| Rule 1.18  | Duties to Prospective Client [N/A]               |
| Rule 3.9   | Non-adjudicative Proceedings [N/A]               |
| Rule 4.1   | Truthfulness in Statements to Others [N/A]       |
| Rule 4.4   | Respect for Rights of 3rd Persons [N/A]          |
| Rule 6.1   | Voluntary Pro Bono Service [N/A]                 |
| Rule 6.2   | Accepting Appointments [N/A]                     |
| Rule 6.5   | Limited Legal Services Programs [1-650]          |
| Rule 8.2   | Judicial and Legal Officials [1-700]             |

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

## MEMORANDUM

Date: February 24, 2010

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.18 – Duties to Prospective Client**

Founded over 100 years ago, the Orange County Bar Association 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 law firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA generally supports the adoption of proposed Rule 1.18, but believes that several modifications should be made for purposes of clarity and consistency.

As an initial matter, it is unclear from the use of the word "client" in the first sentence of paragraph (c) whether this provision (along with paragraph (d)) is intended to deal solely with current clients, as opposed to future clients, that have interests materially adverse to those of a prospective client. The language of Comment [6] seems to suggest that it applies to both current and future clients (*i.e.*, "continuing or accepting the representation of a client"). The OCBA recommends that this be clarified in paragraphs (c) and (d).

The paragraph that follows, specifically, paragraph (d)(2), permits representation of an affected client despite receipt of information that would prohibit the representation under paragraph (c) if, *inter alia*, "the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client ...." However, neither the proposed Rule nor the Comments provide guidance as to what would constitute "reasonable measures to avoid exposure." The OCBA recommends that examples of reasonable measures be added after the first sentence in Comment [4].

In addition, subpart (i) of paragraph (d)(2) refers to the lawyer being "timely and effectively screened." The Commission added the words "and effectively" to the ABA Model Rule language here and in Comment [7]. However, this language is not consistent with the definition of "screened" in proposed Rule 1.0.1, which refers to "adequate" procedures. The OCBA recommends that the wording used to describe the screening procedures in paragraph (d)(2) and Comment [7] of proposed Rule 1.18 be consistent with the definition ultimately used in proposed Rule 1.0.1, as well as in proposed Rule 1.10 if a screening provision is added to that Rule, which the OCBA supports.

With respect to the Comments, the OCBA recommends several changes.

- First, the OCBA agrees with the inclusion of the limitations contained in Comment [2] regarding who may constitute a “prospective client,” but does not believe that the Comment addresses the situation in which a person contacts a lawyer for the purpose of conflicting him or her out of the representation of an adversary (without a good faith intention to retain the lawyer in the matter at hand). In this regard, the OCBA suggests that the Commission incorporate language in the Comment similar to that adopted by Nevada, such as: “A person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the consultation is not a ‘prospective client’ within the meaning of the Rule.”
- Second, the OCBA suggests that the reference to “disqualifying information” in Comment [4] be changed to “information that prohibits representation as defined in paragraph (c),” which is consistent with the Commission’s modification to the language in paragraph (d).
- Third, Comment [5] states that “[a] lawyer may condition conversations with a prospective client on the person’s *informed consent* that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter.” (Emphasis added.) The OCBA recommends that this be changed to “informed written consent” to be consistent with the language and requirement of paragraph (d)(2) and to ensure that any such agreement be documented for avoidance of doubt.
- Fourth, the OCBA recommends that the word “materially” be added between “interests” and “adverse” in the first sentence of Comment [6] to accurately reflect the language of paragraph (c).

**COOPER, WHITE & COOPER LLP**

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March 12, 2010

**Via Facsimile**  
**(415) 538-2171**

Audrey Hollins  
Office of Professional Competence,  
Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: **Public Comment on Proposed Rule of Professional Conduct 1.18**  
**(Duties to Prospective Client)**

Dear Ms. Hollins:

On behalf of the Bar Association of San Francisco's Legal Ethics Committee, and as Vice Chair of that Committee, I respectfully submit the following comments on Proposed Rule of Professional Conduct 1.18 (Duties to a Prospective Client). Our Committee opposes the provision of this rule permitting "non-consensual" screening.

As a preliminary matter, we note that the materials provided by the Commission indicate that the provision permitting non-consensual screening of a consulted lawyer when confidential information is learned during the pre-retention period remains in paragraph (d)(2) after a 5-5 vote by the Commission to strike the provision.

**The Proposed Rule Would Significantly Depart From Existing Law and Policy Concerns.**

Except in the limited context of government lawyers, California courts have not generally approved the concept of non-consensual screening, despite numerous opportunities to do so. See *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4<sup>th</sup> 410, 438, fn. 11. In considering the matter, California courts have emphasized, among other things, the detrimental effect that such screening could have on public confidence in the legal system. See, e.g., *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4<sup>th</sup> 1324

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("No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage .... No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent."). Allowing non-consensual screening outside the government lawyer context is therefore a significant departure from existing law and concerns about public confidence in the integrity of the legal process.

The policy considerations that led to an exception for screening in the government lawyer context do not have the same application in the private sector context. See, e.g., *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 899 (discussing the interest in not unduly inhibiting the government's ability to attract legal talent). Instead, non-consensual screening in the private sector appears to be driven largely by the interests of lawyers and law firms. Unlike the public interest in encouraging lawyers to work for governmental bodies that act for the benefit of the public as a whole there is no overriding "public interest" in a particular firm being able to represent a particular client in a particular private-sector matter.<sup>1</sup>

**No Principled Reason has Been Articulated For Affording Less Protection to Prospective Clients That Provide Confidential Information to Lawyers Than Former Clients.**

While some sophisticated clients may be accustomed to negotiating conflict issues and the use of screening mechanisms with their lawyers, many clients are not familiar with such concepts. More significantly, ethical screens in the private sector are generally the product of negotiation in the context of the engagement through, for instance, an advance conflict waiver in the engagement agreement, or through efforts by the lawyer to seek the informed consent of his or her client to proceed with an adverse representation despite having previously obtained material confidential information.

Here, the Commission proposes non-consensual screening where the prospective client may never have any further contact with the lawyer beyond his or her initial discussion(s) regarding possible retention of the lawyer, and may never have occasion to

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<sup>1</sup> There is, of course, an important interest in clients being able to retain counsel of their choice. However, case law recognizes that "[t]he important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citation.]" *People ex. rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4<sup>th</sup> 1135, 1145.

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discuss or negotiate such issues. Nor is the lawyer required to initiate such negotiations by seeking informed consent from the prospective client. Instead, the lawyer and his or her firm have the unilateral power to resolve the conflict issue without input from the prospective client. Why is a prospective client who consults with a lawyer for the purpose of retaining the lawyer, and provides material confidential information, but does not end up retaining the lawyer, entitled to less protection of his or her confidential information than the prospective client who ends up retaining the lawyer?

California case law acknowledges that, in addition to a client's or prospective client's interest in confidential information, other important policies are implicated when considering conflicts and appropriate methods for resolving them. Those policies include the need to maintain the public's trust and confidence in the legal system, to preserve a client's or prospective client's trust in the lawyer he or she consults with, and to preserve trust in their ability to communicate freely with the lawyer in confidence. See *SpeedDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1145; *Aerojet, supra*, 86 Cal.App.4<sup>th</sup> 1334-1335. We see no reason why these concerns are less important in the context of a "prospective client" who has provided confidential information to the lawyer, as opposed to a former client who has done so.

**The Requirement That the Lawyer Take "Reasonable Measures to Avoid Exposure to More Information That Prohibits Representation Than was Reasonably Necessary to Determine Whether to Represent the Prospective Client" Does Not Justify Non-Consensual Screening.**

While those in favor of a non-consensual screening provision note that it is available in only limited situations where the consulted lawyer "took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client," it is not clear that this provides meaningful protection to a prospective client who has given material confidential information to the lawyer.

The information a lawyer may "reasonably" require in a given matter in order to decide whether to represent a prospective client is not static, and can vary from case-to-case. The proposed standard appears to focus more on the quantity of information obtained by the lawyer, or his or her intention to abstain from obtaining more information than reasonably necessary, rather than the protection of the information that was in fact obtained. As the rule is written, unilateral screening comes into play when the lawyer has *in fact* obtained material confidential information. At that juncture, what relevance does the amount of information obtained or the lawyer's prior intention have as to the level of protection that should be afforded to the confidential information? See *SpeedDee Oil*,

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*supra*, 20 Cal.4<sup>th</sup> at 1148 ("The primary concern is whether and to what extent the attorney acquired confidential information. [Citation.]"). Why do these factors warrant imposition of a non-consensual screen when a law firm could not do so with respect to a former client in the same position?

California courts have rejected the notion that disqualification based on a lawyer's potential or actual receipt of confidential information must necessarily be denied because the lawyer's relationship or interaction with the moving party was brief. See *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4<sup>th</sup> 109, 113-114 ("Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences."). Similarly, our courts have refused to formulate protections for such information based on the good or bad intentions of the lawyer. Instead, the courts have noted that the legal protections afforded to confidential information are intended to be prophylactic and to prevent disclosure of confidential information by even a well-intentioned lawyer. See, e.g., *SpeeDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1147 (the conflict of interest rules are "...'designed not alone to prevent the dishonest practitioner from fraudulent conduct,' but also to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their clients' rights. (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].) The loyalty the attorney owes one client cannot be allowed to compromise the duty owed another.").

The notion that the provision appropriately balances the interests of the prospective clients and the interests of the firm's affected clients in retaining the lawyer of their choice is also problematic. Allowing a non-consensual screen in the prospective client context suggests that the confidentiality interests of prospective clients are given less deference than the confidentiality interests of those who follow through with the retention of the lawyer. This principle is at odds with existing authority. As the Commission notes in its materials, California has long recognized a duty to protect confidential information of a prospective client even where no attorney-client relationship exists. That concept is codified in Cal. Ev. C. § 951; see also *SpeeDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1147-1148, quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.* (7<sup>th</sup> Cir. 1978) 580 F.2d 1311, 1319, fn. omitted ("The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.").

**Allowing Non-Consensual Screening Could Impair the Flow of Information Between Attorney and Client.**

Under the rule as currently drafted, a law firm contacted by a prospective client that receives the prospective client's material confidential information is not required to

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provide any notice to the prospective client of the potential consequences of the consultation. The law firm may later appear against the prospective client in the same matter in which the prospective client sought the law firm's advice by unilaterally imposing a screen. Such a proposition risks chilling the free-flow of information between the lawyer and potential client. The process of determining whether to undertake representation of a client can often entail more than one discussion, and can proceed well beyond an initial conflicts check. Lawyers dealing with prospective clients should not be encouraged to limit the information they need to make an intelligent and informed decision about the potential representation. Such a proposition also risks a chilling effect on the prospective client's willingness to disclose important information to the lawyer. California, and other jurisdictions, have long recognized that full disclosure of facts, and open communication, between a lawyer and client are part of the bedrock of the attorney-client relationship and are fundamental to a lawyer's ability to effectively represent a client and to carry out his or her ethical obligations. See *SpeeDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1146; *City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235.

**The Written Notice Requirement Does Not Enable the Prospective Client to Verify That Its Confidences Are Being Appropriately Protected**

We appreciate the fact that the Commission has tried to enhance the protections afforded to a prospective client by adopting language not contained in ABA Model Rule 1.18, to the effect that written notice must be promptly given to the prospective client "to enable the prospective client to ascertain compliance with the provisions of the Rule." While at first blush this language might suggest a greater level of accountability by the law firm, it may be largely illusory. Screens can be in place over long periods of time (legal matters can go on for months or years). If a prospective client has an interest in ensuring that a firm has an effective screen in place at the beginning of the firm's adverse representation of another client, it presumably has no less of an interest four months or four years into that representation. Even where a law firm advises a client of screening procedures it has put in place, a client typically has no meaningful way to monitor continuing compliance with, or the effectiveness of, the screen. This is especially true for a "prospective client" who does not have a continuing relationship with the law firm.

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We appreciate the opportunity to have presented our views to the Commission, and hope that the Commission will give further consideration to these matters.

Very truly yours,



Andrew I. Dilworth  
Bar Association of San Francisco,  
Legal Ethics Committee, Vice Chair

AID:rc

cc: William Balin, Chair  
San Francisco Bar Association, Legal Ethics Committee



THE STATE BAR OF  
CALIFORNIA

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March 12, 2010

Randall Difuntorum, Director  
Office of Professional Competence & Planning  
State Bar of California  
180 Howard Street  
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed  
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

~~**Rule 1.0.1 Terminology/Definitions.**~~

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

### Rule 1.17 Purchase and Sale of Law Practice.

- ~~1. Although the rule states that if substitution is required by the rules of a tribunal all steps necessary to substitute a lawyer shall be taken, this appears incomplete. OCTC's believes that the rule should more clearly state that cessation of work by the current attorney requires compliance with the termination rules in all situations. Thus, there should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are some comments regarding this, but OCTC believes that it should be stated in the rule itself.)~~
- ~~2. Comment 2 says "see Rule 1.16," when it should state that the seller is permitted to withdraw only if in compliance with rule 1.16. Comment 1A defines "selling lawyer;" this definition should be in the rule, not a comment. Comment 4 is completely repetitive of the rule itself and thus unnecessary. Comments 5-6 and 13 also serve no purpose. Comment 12, which provides information regarding the withdrawal requirement, should be in the rule, not a comment. Comments 15A (that lawyers must comply with rules 1.5.1 and 1.5.4) and 15B (requiring compliance with Bus & Prof. Code section 6180) also belong in the rule, not a comment.~~

### Rule 1.18 Duties to Prospective Clients.

1. The drafters state that this is a new rule to California, although OCTC believes it is already part of existing ethical standards in our state.
2. OCTC is concerned that paragraphs (c) and (d) are essentially repetitions of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule which clearly deals with all related issues.
3. Like the rule itself, comments 6 - 8 are discussions of conflict situations and could create confusion with the conflict rules. It would be better to simply refer the lawyers to the conflict rules, as is done in comment 9 to the competence rules and the client's property rules.

### Rule 3.9 Non-adjudicative Proceedings.

- ~~1. OCTC is concerned with the Commission's departure from the language in ABA rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should make no difference whether it is in litigation or a non-adjudicative proceeding. There is no reason to depart from the ABA's rule.~~
- ~~2. Comments 1-2 are too general. OCTC also requests a comment that other rules may apply depending on the facts and circumstances.~~



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

Harry B. Sondheim, Chair  
Commission for the Revision of the  
Rules of Professional Conduct  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Proposed Rule 1.18

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.18, Duties to Prospective Client.

We generally support adoption of this proposed rule. In particular, we support the inclusion of non-consensual screening in paragraph (d)(2)(i), a concept that apparently split your committee 5-5.

Notwithstanding our general support for proposed Rule 1.18, we recommend the following changes.

First, we find the language of subparagraph (d) confusing in that it does not specify who can represent the affected client. We recommend changing (d) to read:

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client by another lawyer at such lawyer's firm is permissible if: (added language underscored)

Second, we find awkward the use of the phrase "prohibited lawyer" in subparagraph (d)(2)(i). We recommend the phrase be changed to "the lawyer who received the information."

Third, in Comment [1], we recommend the deletion of the sentence "Hence, prospective clients are entitled to some but not all of the protection afforded clients." We believe that this sentence may suggest inappropriately that a lawyer owes a duty of confidentiality to

prospective clients that is different than the duty of confidentiality owed to current or past clients. We see no difference under existing California law.

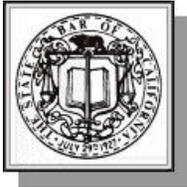
Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive, flowing style.

Carole J. Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

\* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

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Online

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\* Required



# Proposed Rule 1.18 [N/A] “Duties to Prospective Client”

(Draft # 4.1, 12/15/09)

**Summary:** Proposed Rule 1.18 closely tracks Model Rule 1.18 and clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek representation. There is no California Rule counterpart, but the duty to protect confidential information of a prospective client, even if no attorney-client relationship results, is found in Evid. Code § 951 and is discussed at length in Cal. State Bar Formal Opn. 2003-161.

## Comparison with ABA Counterpart

| Rule  | Comment   |
|---|---|
| <input checked="" type="checkbox"/> ABA Model Rule substantially adopted      | <input checked="" type="checkbox"/> ABA Model Rule substantially adopted      |
| <input type="checkbox"/> ABA Model Rule substantially rejected                | <input type="checkbox"/> ABA Model Rule substantially rejected                |
| <input checked="" type="checkbox"/> Some material additions to ABA Model Rule | <input checked="" type="checkbox"/> Some material additions to ABA Model Rule |
| <input type="checkbox"/> Some material deletions from ABA Model Rule          | <input type="checkbox"/> Some material deletions from ABA Model Rule          |
| <input type="checkbox"/> No ABA Model Rule counterpart                        | <input type="checkbox"/> No ABA Model Rule counterpart                        |

## Primary Factors Considered

- Existing California Law

Rule

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by Consensus

---

## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included. (See Introduction):  Yes  No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

A number of lawyers in California reject the concept of non-consensual screening, which is provided for in paragraph (d)(2), in the private law firm context. See Introduction.

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.18\* Duties to Prospective Client\*

December 2009

(Draft rule to be considered for public comment.)

### *INTRODUCTION:*

Proposed Rule 1.18 is based on Model Rule 1.18 and clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek legal services or advice. Model Rule 1.18 is a new Rule that the ABA approved in 2002 to address the “concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. For the most part, the current Model Rules do not address that pre-retention period.” See Model Rule 1.18, Reporter’s Explanation of Changes, ¶. 1, available at <http://www.abanet.org/cpr/e2k/e2k-rule118rem.html> (last visited 11/18/09).<sup>1</sup> Adopting Rule 1.18 will put the important duties that might arise during the pre-retention period front and center for the profession.

There is no California Rule counterpart, but the duty to protect confidential information of a prospective client, even if no attorney-client relationship results, is found in Cal. Evid. Code § 951, which does not require the formation of a lawyer-client relationship but instead defines “client” as a person who “consults” with a lawyer in the lawyer’s capacity as a lawyer “for the purpose of securing legal service or advice.” Section 951 is discussed at length in Cal. State Bar Formal Opn. 2003-161, available at [http://www.calbar.ca.gov/calbar/pdfs/ethics/OPN\\_2003\\_161.pdf](http://www.calbar.ca.gov/calbar/pdfs/ethics/OPN_2003_161.pdf) [last visited 11/18/09].

The proposed Rule closely tracks Model Rule 1.18, with a number of changes that are intended to: (i) conform the Rule to the language of the Evidence Code [see Explanation of Changes to paragraph (a)]; (ii) limit the scope of a prospective client’s protected information by requiring it that be “confidential,” while at the same time broadening the scope to include confidential information learned not only “in” the initial consultation but also learned “as a result of” that consultation [see Explanation of Changes to paragraph (b)]; (iii) substituting the

\* Proposed Rule 1.18, Draft 4.1 (12/15/09).

<sup>1</sup> The Reporter’s Explanation of Changes for each of the Model Rules, as recommended by the Ethics 2000 Commission, is available at [http://www.abanet.org/cpr/e2k/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k/e2k-report_home.html) [last visited 11/18/09].

well-settled “material to the matter” standard developed over many years in California case law for the ambiguous “significantly harmful to that in the matter” standard that is used in Model Rule 1.18 [see Explanation of Changes for paragraph (c)]; (iv) adding clarifying language and requiring a more rigorous ethical screen than is required by the Model Rule to protect the prospective client’s confidential information [see Explanation of Changes for paragraph (d)].

The Comment to proposed Rule 1.18 largely tracks the comment to Model Rule 1.18. The changes made are intended primarily to conform the comment to the revisions to the black letter of the Rule.

*Disagreement Over the inclusion of a provision permitting non-consensual screening of the consulted lawyer when confidential information is learned during the pre-retention period.* The Commission voted 5-5 to strike from proposed Rule 1.18 the concept of non-consensual screening and so the concept, which is part of Model Rule 1.18, remains in the rule as paragraph (d)(2).

Those who favor a non-consensual screening provision note that it is available to a law firm only in limited situations – where the consulted lawyer “took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client.” Proponents of this view take the position that the proposed Rule appropriately balances the interests of the prospective client and the interests of the firm’s affected client in retaining the lawyer of its choice. The lawyer who might have acquired the prospective client’s information despite the lawyer’s “reasonable measures” is screened to protect the information.

Those who oppose the inclusion of non-consensual screening in this Rule take the position that “[t]his unilateral power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought.” A detailed statement of this position, with citation to authority, is provided in these materials after the Rule & Comment Comparison Chart, below. See Statement Opposing Non-Consensual Screening.

*Variations in Other Jurisdictions.* Every jurisdiction that has completed its Ethics 2000 review of its Rules of Professional Conduct has adopted some version of Model Rule 1.18. One of those jurisdictions (D.C.) does not permit non-consensual screening. Several jurisdictions do not require that the consulted lawyer take “reasonable measures” to avoid exposure to information not necessary to decide whether to accept the representation. (E.g., North Carolina, Oregon). Nevada moves into the black letter of the Rule Comments [2] and [5] of the Model Rule.

| <p align="center"><u>ABA Model Rule</u><br/>Rule 1.18 Duties to Prospective Client</p>   | <p align="center"><u>Commission's Proposed Rule*</u><br/>Rule 1.18 Duties to Prospective Client</p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
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| <p>(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.</p>  | <p>(a) A person who <del>discusses with, directly or through an authorized representative, consults</del> a lawyer <del>for the possibility</del><u>purpose of forming a client-retaining the lawyer relationship with respect to a matter or securing legal service or advice from the lawyer in the lawyer's professional capacity,</u> is a prospective client.</p>     | <p>Paragraph (a) is based on Model Rule 1.18(a) but has been revised to track the language from the California Evidence Code concerning the lawyer-client privilege. The concept of "authorized representative" through whom a client may act is derived from Evid. Code §§ 951 ("Client") and 954 ("Holder of the Privilege"). The clause, "securing legal service or advice from the lawyer in the lawyer's professional capacity" is also taken from section 951.</p> <p>Utilizing the Evidence Code language conforms the Rule to the statutory language for the privilege, which applies even if the lawyer is not retained as counsel. See Evid. Code § 951 ("client" means a person who ... <i>consults</i> a lawyer ..."). See also Cal. State Bar Formal Opn. 2003-161.</p> |
| <p>(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.</p> | <p>(b) Even when no <del>client-lawyer-client</del> relationship ensues, a lawyer who has <del>had discussions</del><u>communicated</u> with a prospective client shall not use or reveal <u>confidential</u> information learned <del>in</del><u>as a result of</u> the consultation, except as Rule 1.9 would permit with respect to information of a former client.</p> | <p>Paragraph (b) largely tracks Model Rule 1.18(b). The term "lawyer-client" has been substituted for the Model Rule's "client-lawyer" to conform to the style of California rules and statutes.</p> <p>The phrase "has communicated with" has been substituted for "has had discussions with" because "discuss" is a subset of "communicate," and the Commission determined that given the wide range of communication modes available to prospective clients, the broader term is more inclusive, and so more protective, of the prospective client's communication.</p>   |

\* Proposed Rule 1.18, Draft 4.1 (12/16/09). Redline/strikeout showing changes to the ABA Model Rule

| <p align="center"><u>ABA Model Rule</u><br/>Rule 1.18 Duties to Prospective Client</p>  | <p align="center"><u>Commission’s Proposed Rule*</u><br/>Rule 1.18 Duties to Prospective Client</p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
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|   |  | <p>The phrase “as a result of” has been substituted for “in” because a lawyer often will have to investigate further to determine whether the lawyer is willing or able to accept the representation. That information should also be protected. See Comment [3].</p> <p>However, the word “confidential” has been added to narrow the scope of protection afforded a prospective client. Although a current or former client should be entitled to protection by the lawyer of all information the lawyer learned as a result of a representation, only information which is learned “as a result” of the consultation <i>and</i> which is confidential should be protected in the prospective client situation.</p>  |
| <p>(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 information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified 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).</p> | <p>(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 <u>confidential</u> information from the prospective client that <del>could be significantly harmful</del> <u>is material</u> to that person in the matter, except as provided in paragraph (d). If a lawyer is <del>disqualified</del> <u>prohibited</u> 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).</p> | <p>Paragraph (c) is based on Model Rule 1.18(c). with several changes.</p> <p>As to the addition of “confidential” to modify “information,” see Explanation of Changes for paragraph (b).</p> <p>The phrase “is material to the matter” has been substituted for “could be significantly harmful to that person in the matter” to track California case law on successive representation conflicts of interest, which focuses on the materiality of the information learned in the prior representation or consultation. See, e.g., <i>Jessen v. Hartford General Casualty Co.</i>, 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877, 884-885 (2003). See also <i>Knight v. Ferguson</i>, 149 Cal.App.4th 1207, 57 Cal.Rptr.3d 823 (2007); <i>Ochoa v. Fordel</i>, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007); <i>Faughn v. Perez</i>, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006); <i>Farris v. Fireman’s Fund Ins. Co.</i>, 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (2004).</p> |

| <p align="center"><u>ABA Model Rule</u><br/>Rule 1.18 Duties to Prospective Client</p>  | <p align="center"><u>Commission’s Proposed Rule*</u><br/>Rule 1.18 Duties to Prospective Client</p>   | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
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|   |   | <p>The word “prohibited” has been substituted for “disqualification” because the rule is intended as a disciplinary rule, not a civil disqualification standard.</p>   |
| <p>(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:</p>  | <p>(d) When the lawyer has received <del>disqualifying</del> information <u>that prohibits representation</u> as defined in paragraph (c), representation <u>of the affected client</u> is permissible if:</p>  | <p>The introductory clause to paragraph (d) is based on the corresponding clause in Model Rule 1.18(d), with several changes. The phrase, “that prohibits representation” is substituted for “disqualified” because the rule is intended as a disciplinary rule, not a civil disqualification standard.</p> <p>The phrase “of the affected client” has been added to clarify that the issue is whether the lawyer or the lawyer’s firm can represent a current client who might be affected by the consultation with the prospective client because the current client might be prohibited from retaining his or her preferred lawyer.</p> |
| <p>(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:</p>   | <p>(1) both the affected client and the prospective client have given informed <u>written</u> consent, <del>confirmed in writing, or:</del></p>   | <p>Subparagraph (d)(1) is based on Model Rule 1.18(d)(1), except that California’s stricter “informed written consent” standard has been substituted for the Model Rule’s “consent, confirmed in writing” standard.</p>  |
| <p>(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and</p> | <p>(2) the lawyer who received the information took reasonable measures to avoid exposure to more <del>disqualifying</del> information <u>that prohibits representation</u> than was reasonably necessary to determine whether to represent the prospective client; and</p> | <p>Subparagraph (d)(1) is based on Model Rule 1.18(d)(2), except that the phrase, “that prohibits representation” is substituted for “disqualified” because the rule is intended as a disciplinary rule, not a civil disqualification standard.</p>  |

| <p style="text-align: center;"><u>ABA Model Rule</u><br/>Rule 1.18 Duties to Prospective Client</p>   | <p style="text-align: center;"><u>Commission’s Proposed Rule*</u><br/>Rule 1.18 Duties to Prospective Client</p>   | <p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>   |
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| <p>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p> | <p>(i) the <del>disqualified</del><u>prohibited</u> lawyer is timely <u>and effectively</u> screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p> | <p>Subparagraph (d)(2)(i) is based on Model Rule 1.18(d)(2)(i), except that the word “prohibited” has been substituted for “disqualified” because the rule is intended as a disciplinary rule, not a civil standard.</p> <p>The phrase “and effectively” has been added to the paragraph to provide an added layer of protection to the client by requiring that an ethical screen not only be timely, but also effective. This language is taken from New York Rule 1.11.</p> |
| <p>(ii) written notice is promptly given to the prospective client.</p>   | <p>(ii) written notice is promptly given to the prospective client <u>to enable the prospective client to ascertain compliance with the provisions of this Rule.</u></p>                           | <p>Subparagraph (d)(2)(ii) is based on Model Rule 1.18(d)(2)(ii), except for the addition of the clause, “to enable the prospective client to ascertain compliance with the provisions of this Rule.” The addition of this clause, taken from New York Rule 1.11, apprises lawyers of what the notice is intended to accomplish.</p>   |

| <p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.18 Duties to Prospective Client</b></p> <p align="center"><b>Comment</b></p>   | <p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.18 Duties to Prospective Client</b></p> <p align="center"><b>Comment</b></p>   | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
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| <p>[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.</p> | <p>[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free <del>to</del> and sometimes required <del>to</del> to proceed no further. Hence, prospective clients <del>should receive</del> <u>are entitled to</u> some but not all of the protection afforded clients. <u>As used in this Rule, prospective client includes an authorized representative of the client.</u></p>  | <p>Comment [1] is based on Model Rule 1.18, cmt. [1]. The phrase "are entitled to" has been substituted for "should receive" in recognition that prospective clients are entitled to certain protections; it is not merely a hortatory standard. See, e.g., Evid. Code § 951, which defines client for purposes of the lawyer-client privilege as persons who "consult" with a lawyer, not just those who retain the lawyer.</p> <p>The last sentence has been added to clarify that whether prospective client consults directly with the lawyer or through an authorized representative, the effect is the same. See also Explanation of Changes for paragraph (a).</p>  |
| <p>[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).</p>  | <p>[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who <u>by any means</u> communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship <u>or to discuss the prospective client's matter in the lawyer's professional capacity</u>, is not a "prospective client" within the meaning of paragraph (a). <u>Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See <i>People v. Gionis</i> (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].</u></p> | <p>Comment [2] is based on Model Rule 1.18, cmt. [2]. The phrase "by any means" has been added to emphasize that there are a plethora of modes by which prospective clients can communicate their interest in retaining a lawyer. See also Explanation of Changes to paragraph (b) (substitution of "communicate" for "discussion").</p> <p>The addition of the clause, "or to discuss the prospective client's matter in the lawyer's professional capacity," has been added to track the language in paragraph (a), which in turn is derived from Evid. Code § 951.</p> <p>The last sentence is taken nearly verbatim from a seminal California Supreme Court case. It provides important guidance to clients and lawyers alike that a lawyer can expressly disclaim that a lawyer-client communication will take place.</p> |

| <p align="center"><u>ABA Model Rule</u><br/>Rule 1.18 Duties to Prospective Client<br/>Comment</p>   | <p align="center"><u>Commission's Proposed Rule</u><br/>Rule 1.18 Duties to Prospective Client<br/>Comment</p>   | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
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|  | <p><u>[2A]Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.</u></p> | <p>Comment [2A] has no counterpart in Model Rule 1.18. It has been added to provide helpful guidance to lawyers concerning the relevant factors to analyze to determine whether a lawyer has indicated by words or conduct an interest in consulting with a prospective client in the lawyer's professional capacity. See Cal. State Bar Ethics Opn. 2003-161.</p>   |
| <p>[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.</p> | <p>[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. <del>Paragraph</del> <u>Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial</u></p>  | <p>Comment [3] is based on Model Rule 1.18, cmt. [3]. The new third sentence ("Sometimes the ...") and the language added to the third Model Rule sentence "Regardless of ...") have been added in recognition that information needed to determine whether a lawyer is willing or able to accept a representation might occur outside the initial client consultation, but nevertheless will be protected. See also Explanation of Changes for paragraph (b).</p> |

| <p align="center"><u>ABA Model Rule</u><br/>Rule 1.18 Duties to Prospective Client<br/>Comment</p>  | <p align="center"><u>Commission's Proposed Rule</u><br/>Rule 1.18 Duties to Prospective Client<br/>Comment</p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
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|   | <p><a href="#">consultation or during the subsequent investigation, paragraph</a> (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.</p>   |  |
| <p>[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.</p> | <p>[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under <del>Rule</del><a href="#">Rules 1.7 and 1.9</a>, then consent from all affected present or former clients must be obtained before accepting the representation.</p> | <p>Comment [4] is nearly identical to Model Rule 1.18, cmt. [4]. A reference to Rule 1.9 (“Duties to Former Clients”) has been added to conform to the Model Rule comment’s reference to “former clients”.</p>   |
| <p>[5] A lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received</p>  | <p>[5] A lawyer may condition conversations with a prospective client on the person’s informed consent that <del>no</del> information disclosed during the consultation will <u>not</u> prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. <del>If However, the agreement expressly so provides, lawyer must take</del> <a href="#">reasonable measures to avoid exposure to more</a></p>  | <p>Comment [5] is based on Model Rule 1.18, cmt. [5]. The change to the first sentence is for clarity. No change in meaning is intended.</p> <p>The last sentence has been extensively modified to change the Model Rule’s emphasis from a lawyer’s <i>ability</i> to obtain a prospective client’s consent to use of the information to the lawyer’s <i>obligation</i> to limit his or her exposure to information that</p> |

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| <p>from the prospective client.</p>  | <p><u>information that prohibits representation than is reasonably necessary to determine whether to represent</u> the prospective client <del>may also consent to the lawyer's subsequent use of information received from the prospective client.</del></p>  | <p>would serve to prohibit the lawyer's representation of a current client. The latter approach is more in keeping with California's strong policy obligating lawyers to protect confidential information.</p>  |
| <p>[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.</p>   | <p>[6] Even in the absence of an agreement <u>with the prospective client</u>, under paragraph (c), the lawyer is not prohibited from <del>representing</del> <u>either continuing or accepting the representation of</u> a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that <del>could be significantly harmful if used in</del> <u>is material to</u> the matter. <u>For a discussion of the meaning of "materially adverse" as used in paragraph (c), see Rule 1.9, comment [7]. For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, comments [4] – [6].</u></p> | <p>Comment [6] is based on Model Rule 1.18, cmt. [6], with some revisions to clarify the intent of the Rule or to conform the Comment to revisions made to paragraph (c). First, the phrase "with the prospective client" has been added as a transition from the previous Comment. Second, the clause, "either continuing or accepting the representation" has been added to clarify that the concept of "representing" includes both ongoing representations and new matters. Third, as in paragraph (c), the phrase "is material to" has been substituted for "could be significantly harmful if used in" for the reasons stated in the Explanation of Changes for paragraph (c). Finally, the last two sentences have been added to provide a cross-reference to several comments to Rule 1.9, which provide guidance to lawyers on the application of the "substantially related" and "material" standards in paragraph (c).</p> |
| <p>[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and</p> | <p>[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed <u>written</u> consent, <del>confirmed in writing</del>, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all <del>disqualified prohibited</del> lawyers are</p>   | <p>Comment [7] is nearly identical to Model Rule 1.18, cmt. [7]. For an explanation of the changes to the comment, see Explanation of Changes for subparagraphs (d)(1) and (d)(2)(i).</p>   |

| <p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.18 Duties to Prospective Client</b></p> <p align="center"><b>Comment</b></p>  | <p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.18 Duties to Prospective Client</b></p> <p align="center"><b>Comment</b></p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>  |
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| <p>written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p> | <p>timely <u>and effectively</u> screened and written notice is promptly given to the prospective client. See Rule <del>4-9</del><u>1.0.1</u>(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p> |  |
| <p>[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.</p>  | <p>[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given <u>to the prospective client</u> as soon as practicable after the need for screening becomes apparent.</p>   | <p>Comment [8] is based on Model Rule 1.18, cmt. [8]. The phrase "to the prospective client" has been added to clarify that the notice must be given so that the prospective client may monitor the effectiveness of the screen.</p> |
| <p>[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.</p>   | <p>[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.</p>   | <p>Comment [9] is identical to Model Rule 1.9, cmt. [9].</p>   |



## **Proposed Rule 1.18 Duties to Prospective Client Dissent from Paragraph (d)(2) – Non-consented Screening**

A motion to delete Rule 1.18(d)(2) failed on a tie vote. The members of the Commission who voted for the motion dissent from proposed Rule 1.18(d)(2) because it would permit a law firm that has received a potential client's confidential information to adopt an ethical screen unilaterally and without the potential client's consent. This unilateral power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought. This would cause a major change in California law – a change that would be of great financial benefit to lawyers but would cause material harm to clients, causing injury to public respect for lawyers and for the legal system.

The duty of confidentiality expressed in Business & Professions Code section 6068(e)(1) and Rule 3-100 prohibits a lawyer from using or disclosing any information that a client wants the lawyer to hold inviolate or the disclosure of likely would be embarrassing or detrimental to the client. This duty exists to assure that anyone can discuss with a lawyer how the law applies to his or her most intimate problem without fear of consequence. This duty also exists because effective representation depends on open communication between lawyer and client. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 (1951) ["Adequate legal representation in the ascertainment and enforcement of

rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading."].)

California law presumes that confidential information possessed by one lawyer in a law firm is shared by all other lawyers in the firm. This presumption exists because the client has no means to assure that information in the possession of a firm representing the client's adversary will not be shared and used or disclosed against the client's interests. As the Court of Appeal stated in *Adams v. Aerojet General* (2001) 86 Cal.App.4th 1324 in adopting Cal. State Bar Formal Opn. 1998-152:

The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to the current controversy would otherwise be permitted to represent the former client's adversary. ***"No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. . . .***

***No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent.*** (*Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, *supra*, at p. IIA-418.) (Emphasis added.)

Screening without client consent does not protect clients because it cannot be verified by a client. A client who has not expressed confidence in a law firm by consenting to the use of an ethical screen should not be forced to accept screening by law firm fiat. A client who has

shared confidential information with a lawyer, justifiably would feel a sense of betrayal to learn after the representation has ended that information the client expected would be held in confidence is in the possession of the law firm that now represents the client's adversary in a situation where that information could benefit that adversary.

These considerations apply with equal force to a prospective client, who shares confidential information with a lawyer in order to obtain representation. The legislature recognized as much when it defined "client" for purposes of the lawyer-client privilege as including "... a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer ...." The Bar cannot fulfill the purpose of the duty of confidentiality, and it cannot expect clients to trust that they can communicate with lawyers in confidence, when a law firm can harbor that confidential information behind an unconsented and unverifiable screen while the firm represents the client's adversary.

**Rule 1.18: Duties to Prospective Client**  
**(Commission's Proposed Rule - Clean Version)**

- (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 confidential information 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 confidential information from the prospective client 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 defined 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 that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and
    - (i) the prohibited lawyer is timely and effectively 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.

**COMMENT**

- [1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Hence, prospective clients are entitled to some but not all of the protection afforded clients. As used in this Rule, prospective client includes an authorized representative of the client.
- [2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not

a “prospective client” within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer’s professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].

- [2A] Whether a lawyer’s representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.
- [3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that

information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

- [4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.
- [5] A lawyer may condition conversations with a prospective client on the person’s informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. However, the lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client.
- [6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either continuing or accepting the representation of a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that is material to the matter. For a discussion of the meaning of “materially adverse” as used in paragraph (c), see Rule 1.9, comment

[7]. For a discussion of the meaning of “substantially related” as used in paragraph (c), see Rule 1.9, comments [4] – [6].

- [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all prohibited lawyers are timely and effectively screened and written notice is promptly given to the prospective client. See Rule 1.0.1(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.
- [8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given to the prospective client as soon as practicable after the need for screening becomes apparent.
- [9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer’s duties when a prospective client entrusts valuables or papers to the lawyer’s care, see Rule 1.15.



## Rule 1.18: Duties to Prospective Client

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)  
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**Connecticut:** Rule 1.18(a) defines a “prospective client” as a person who discusses “or communicates” with a lawyer concerning the possibility of forming a client-lawyer relationship with respect to a matter.

**District of Columbia** adopts the essence of Rule 1.18 except that it omits Model Rule 1.18(d)(2) and (2)(ii) while retaining the language in (2)(i).

**Florida** omits the words “significantly harmful” from paragraph (c), so a lawyer is personally disqualified if he or she received information “that could be used to the disadvantage” of the prospective client.

**Maryland** deletes the introductory language in ABA Model Rule 1.18(d)(2) and all of Rule 1.18(d)(2)(ii). Thus, Maryland Rule 1.18(d) is a single sentence permitting representation if either “both the affected client and the prospective client have given informed consent, confirmed in writing, or the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.”

**Missouri:** Rule 1.18(d)(2) deletes the ABA Model Rule requirements that the lawyer who received the disqualifying information be apportioned no part of the fee and that written notice be promptly given to the prospective client.

**Nevada:** Nevada adds the following new paragraphs to Rule 1.18:

(e) A person who communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, or for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation, is not a “prospective client” within the meaning of this Rule.

(f) A lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.

(g) Whenever a prospective client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm:

(1) The lawyer or law firm shall promptly furnish (by mail if requested) the written information described in Rule 1.4(c).

(2) The lawyer or law firm may furnish such additional factual information regarding the lawyer or law firm deemed valuable to assist the client.

(3) If the information furnished to the client includes a fee contract, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

**New York** has no counterpart to ABA Model Rule 1.18, but the first sentence of EC 4-1 provides: "Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer."

**North Carolina** omits the language in Rule 1.18(d)(2) requiring "reasonable measures to avoid exposure" to unnecessary confidential information. North Carolina does not require that a disqualified lawyer be denied part of the fee.

**Oregon** omits the language in Rule 1.18(d)(2) requiring "reasonable measures to avoid exposure" to unnecessary confidential information.

**South Carolina:** Rule 1.18(a) provides that a person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client "only when there is a reasonable expectation that the lawyer is likely to form the relationship."

**RRC – Rule 1.18 [MR 1.18]  
E-mails, etc. – Revised (3/24/2010)**

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**March 10, 2010 McCurdy E-mail to Drafters (KEM, Julien, Kehr, Tuft), cc Chair, Vice-Chairs & Staff:**

Rule 1.18 Drafting Team (MOHR, Julien, Kehr, Tuft):

This message provides the assignment background materials for Rule 1.18 on the March agenda. **The assignment deadline is Thursday, March 18, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received to date – public comment period ends March 12th)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (public comment version)
4. introduction (public comment version – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (public comment version)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

**Attached:**

- RRC - 3-100 [1-18] - Dashboard - ADOPT - DFT4 (03-10-10).doc
- RRC - 3-100 [1-18] - Compare - Introduction - DFT2 (12-16-09)KEM-LM.doc
- RRC - 3-100 [1-18] - Compare - Rule & Comment Explanation - DFT3 (12-16-09)KEM-LM.doc
- RRC - 3-100 [1-18] - Rule - DFT4.1 (12-15-09) - CLEAN-LAND.doc
- RRC - [1-18] -Dissent re Paragraph (d)(2) (12-16-09)-2 COL-LM.doc
- RRC - 3-100 [1-18] - Public Comment Complete - REV (03-10-10).pdf
- RRC - 3-100 [1-18] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc
- RRC - 3-100 [1-18] - State Variations (2009).pdf

**March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

To assist you in preparing the materials for the 3/26-27/10 meeting, I've attached the following for this Rule:

1. My cumulative meeting notes, revised 11/27/09.
2. Full E-mail compilation, revised 1/5/10.

Please let me know if you have any questions.

**March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

This message provides an updated public comment compilation adding comments received since the materials I transmitted with the message below. In addition, I've attached an updated commenter chart. Please note that not all of the comments received over the past several days have been synopsisized and added to this chart. Please go ahead and add any missing comment synopses and responses yourself in the extra row at the bottom of the table. If you run out of rows, simply press the TAB key in the last cell of the last row and a new row will appear.

Since the last transmission, comments from the following commenters were received:

BASF  
OCTC  
COPRAC

Any additional comments received will be sent to you as soon as they are received.

***Attached:***

RRC - 3-100 [1-18] - Public Comment Complete - REV (03-15-10).pdf  
RRC - 3-100 [1-18] - Public Comment Chart - By Commenter - DFT1 (03-15-10)AT.doc

**March 16, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

I've attached the following, both in Word:

1. Public Comment Chart, Draft 2.1 (3/16/10), with suggested responses to public comment received.
2. Rule, Draft 5 (3/15/10), redline, compared to Draft 4.1 (12/15/09) [the public comment draft].

Please let me know if you have any questions or comments. I haven't made changes to the other documents that were circulated pending the Commission's decisions at the March meeting.

March 16, 2010 Kehr E-mail to KEM, cc Drafters, Chair, Vice-Chairs & Staff:

Here are my thoughts on your draft ---

1. I would not cite the **County of Los Angeles opinion**. It is a Rule 1.12 situation, not Rule 1.18; it relies on the Model Rules as persuasive authority and therefore is only a limited reply to the commenter's point; and its analysis of California law seems to me to be highly speculative (it didn't convince me when issued, and now ten years have passed with no California court acting as Kozinski predicted). Moreover, that sentence seems to me to be unneeded b/c of the point you make in the final sentence. I would rely on the final sentence assuming the Commission decides to keep unilateral screening in this Rule.
2. The balance of your defense of unilateral screening under this Rule seems fine to me. If the Commission decides to retain unilateral screening, I wouldn't change anything in your explanation. However, I remain unconvinced by it. My reason is the sentence "A lawyer cannot mine a prospective client's information and then use it to that person's disadvantage." That seems to me to obscure the key fact. To refer to mining suggests willfulness, as if there would be a nefarious plan on the part of the lawyer to obtain information for an improper purpose. Any information that the lawyer obtains in order to decide whether to take the case could include the prospective client's innermost secret even if the conversation is brief.
3. I'm fine with all of your responses to the COPRAC comments and to your suggested removal of the third sentence of Comment [1]. **But with that sentence gone, I don't see any need for the first two sentences of the Comment.**
4. If the Commission decides to retain unilateral screening in this Rule, I would agree with the first two LACBA comments **and ask that they be discussed**. The obligation to "take reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client" seems to me to be unrelated to the question of whether a lawyer who intends to utilize this Rule should be obligated to inform the prospective client before receiving confidential information.
5. In the fourth line of your response to the first OCTC comment, where you say that "its concepts can be found", I would say: "... **some of its concepts** ...."
6. The second and third OCTC comments are interesting. I think they are right that this can be viewed as a conflict rule under the traditional definition of a conflict, but I agree with your response.
7. On the first O.C. comment, it sometimes is difficult to see what confuses others after spending as many hours as we have immersed in the drafting of a rule. Would you have any objection to using **accept or continue the representation of a client** in paragraph (c) rather than relegating that to Comment [6]? And by the way, I notice that for some reason Comment [6] reverses the order to say continue or accept, which seems backwards to me and reverses the order we have in our current rules.
8. I support your first Comment [4] change in principle but would say: "... **that would prohibit** ...."

9. Later in the same sentence “should” seems to me to be inconsistent with the mandatory nature of paragraph (d). I would use “**must**”.
10. I ask that the Commission discuss the **fn. 5 addition**. To save time, I won't try to explain my concerns here.
11. I support the balance of your draft responses and your recommendations.

**March 17, 2010 Tuft E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

1. I have made **two edits** to the footnotes to draft 5 which appear in bold type.
2. I continue to believe that New York has it right in requiring that the screen under Rule 1.18 be both timely and effective and I oppose the recommendation that we delete "effective" from paragraph (d)(2)(i) and from Comment [7]. Requiring that the screen be effective in protecting a prospective client's information when the subsequent representation is directly adverse to that person is not redundant with the definition of "screened" in rule 1.0(k). "Screened" is defined generally as isolation of the affected lawyer through the timely imposition of procedures that are "reasonably adequate under the circumstances" to protect the prospective client's information. Rule 1.0(k). This definition applies whenever screening is allowed. Rule 1.18(d)(2) requires that representation of a client whose interests are materially adverse to those of the prospective client in the same or a substantially related matter is allowed only if the screen is timely and effective. Adding the requirement that the screen be effective provides additional protection for the prospective client in situations where the representation involves direct adversity and screening would not otherwise be allowed. Requiring that the screen be effective in this situation is not necessarily the same as having procedures that are "reasonably adequate". Effective means the ethical wall will in fact produce the intended result of actually protecting the prospective client's information. Requiring that the screen be effective is not redundant with the definition of "screened" any more than requiring that the screen be timely. Since there have been many concerns raised about allowing screening in this rule among Commission members and commenters, the added protection is worth keeping.
3. There may be some misunderstanding regarding the **third sentence in Comment [1]**. I have read that sentence to mean that the prospective client does not have the same protections as a former client under Rule 1.9(a), but that the prospective client's information is not any less confidential. Perhaps the sentence could be clarified rather than deleted.
4. I disagree with the new **last sentence in Comment [2]**. We have already modified paragraph (a) to address this problem. Adding a subjective "good faith" requirement in the comment will only be a source for mischief and needless litigation. We do not need the additional sentence in view of our version of paragraph (a).

**Attached:**

**March 17, 2010 KEM E-mail to Tuft, cc Drafters, Chair, Vice-Chairs & Staff:**

A few responses to your comments:

1. Would you please send the draft of the Rule that you revised? There was no attachments to the e-mail.

2. I agreed that "effective" was an appropriate addition to the Model Rule BEFORE our definition of screening was revised before Rule 1.0.1 was sent out for public comment (you quote from the Model Rule definition, MR 1.0(k). Here is what our proposed Rule 1.0.1(k) now provides:

“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 these 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.

a. We use adequate, which I don't see as different from "effective". There is no "reasonably" modifier.

b. Moreover, NY Rule 1.18(d)(2)(ii) provides:

"(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;"

c. Putting aside NY's use of the active voice (they can use the active voice and put the onus on the firm because they have law firm discipline), NY's view of effective is the prevention of the flow of information. I don't see how that differs from part (ii) of our definition of "screened," which in effect requires procedures that are "adequate" (read: "effective") "to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer" (read "prevent the flow of information" between the prohibited lawyer and other law firm lawyers and non-lawyer personnel"). That's why I've concluded that using "effective" is redundant.

3. If I understand your comment, I agree with you. I'll try to come up with something.

4. After re-reading our revision of MR 1.18(a), I agree with your conclusion that the last sentence of Comment [1] is not necessary.

I'll incorporate yours and Bob comments in the drafts I circulated the other day.

**March 17, 2010 Tuft E-mail to KEM, cc Drafters, Chair, Vice-Chairs & Staff:**

I see your point under our current definition of "screened" and agree that it makes "effective" somewhat redundant. I would still like to see it included in Rule 1.18 for the reason that the firm will be allowed to be directly adverse to the prospective client in the same matter in which the person consulted the lawyer (e.g., *People ex rel Dept of Corp v. Speedee Oil Exchange Systems*), but I will not insist upon it.

**March 18, 2010 KEM E-mail to McCurdy, cc Drafters, Chair & Staff:**

I've attached the following, in Word:

1. Public Comment Chart, Draft 2.2 (3/18/10). Revisions I've made to the chart from the previous draft I circulated to the drafters are highlighted in yellow.
2. Rule 1.18, Draft 5.2 (3/17/10), redline, compared to Draft 4.1 (12/15/09) [the public comment draft].

I have not made revisions to the other submission documents (Dash, Intro, etc.) pending the RRC's decisions concerning suggested revisions to the attached Rule draft.

Notes & comments:

1. I've incorporated the comments of Bob and Mark in the attached documents.
2. In some instances, based on Bob's and Mark's input, I've made suggested changes to the draft Rule that the other drafters have not had an opportunity to review. I've flagged those changes in the footnotes.

Please let me know if you have any questions.

**March 20, 2010 KEM E-mail to RRC:**

The first sentence in Comment [7] to Draft 5.2 of the proposed rule [page 257 of Agenda Materials] should be revised as follows:

Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients.

My apologies for not catching this earlier. If the BOG revisits 1.10 and adopts the imputation aspects of it, the deleted language will be restored but for now, we must proceed with the assumption that there is no Rule 1.10.

**March 23, 2010 Sapiro E-mail to RRC List:**

1. I am troubled by the screening aspects of this rule. I am also troubled by the burden of proof the potential client will have in order to overcome the shelter from disqualification provided under paragraph (d)(2). In order to disqualify the lawyer's firm, the potential client will have to prove – and thereby disclose - the confidential information that was disclosed to the lawyer and prove that the quantum of information was more than reasonably necessary for the tainted lawyer to decide whether to represent the prospective client. This will require the prospective client in a disqualification motion to waive the confidentiality of the very information that is disqualifying. That is a serious departure from the presumption in other conflict cases that confidential information relevant to the case was disclosed.

2. I would not accept in this case an argument that this rule only deals with discipline and not with disqualification. This rule will be used by courts in ruling on disqualification motions.

The rule does not say it does not apply in disqualification motions or that it is limited to disciplinary consequences.

3. I think that a general rule on this subject is premature and that case law dealing with the potential client problem should, instead, be allowed to continue to evolve.

**March 23, 2010 Sondheim E-mail to RRC:**

1. It would be a great mistake to include the screening provision of this rule. A justification for the screening is set forth at p. 241 as part of the RRC Response as follows: "Although no California court has expressly held screening should be available in those situations [private lawyer context], the Supreme Court is free to approve a Rule of Professional Conduct without there being a predicate for the rule in case law." Yet this was one of the bases for RAC rejecting 1.10. Of the RAC members who spoke at the RAC meeting, some indicated they did not want to recommend screening to the Supreme Court in the absence of court decisions expressly approving screening in the private sector. I am aware that there are some who believe the Court has implicitly indicated it would be willing to approve some screening, but members of RAC wanted the courts to expressly develop the law in this area. If we propose the screening in this rule, we will be undermining any possibility of getting approval of 1.10 without screening and may end up having this rule returned to us as was done with 1.10. This would throw us off track in our efforts to timely complete this project.

By the way, I consider the views of Stan and Kevin regarding screening in 1.11 as involving screening issues different from those in 1.18. However, in spite of his differences with Stan regarding 1.11, Kevin noted "the reason RAC wanted to see private-private firm screening 'played out in the courts' is that the game is still being played and it's anyone's guess who will 'win.'" (E-mail of 3/19/10)

2. Page 244: Compare RRC response 3 regarding "prohibited lawyer" with my comment regarding p. 8.

3. Page 245: Nit--in the second line of the RRC Response "an" should be "a."

**March 24, 2010 Lamport E-mail to RRC:**

The following are my comments:

1. I have pretty much said all I can say about screening in this Rule. I do not agree with the rationale given in responses given to the comments opposed to screening. I think (d)(2) should be deleted along with everything after the first sentence in Comment [7] and all of Comment [8].

2. Footnote 1: I prefer "accept or continue" to "represent." In the countless votes we've taken, I do not recall that we committed to "represent" uber alles. (I am not saying it did not happen.) I understand they mean the same thing (whether you are accepting or continuing, you are always representing). But some of the comments lead me to think that there will be a lot of lawyers who are not clear on the concept and who seem to need "accept or continue" to clear it up for them. If it will help people understand the Rule, we should use "accept or continue." I know "accept or continue" is in the Comments, but we also have received comments calling for greater consistency between the Comments and the Rule. With those comments in mind, I think we should try to achieve consistency of terminology between the Rule and the Comment

whenever we can. I think this is a situation where we can achieve consistency by putting "accept and continue" in the Rule.

3. Footnote 2: I agree with Kevin's analysis.

4. Footnote 3: I have been reading "Hence, prospective clients are entitled to some but not all of the protection afforded clients" in the context of the Comment as meaning that the duty of loyalty, the duty to inform and the duty to competently represent a prospective client are more limited than full blown lawyer-client relationships. That is the result of the fact that discussions are usually limited in time and depth and may proceed no further or may be required to proceed no further, which is what the preceding sentence in the Comment says. One could cite Flatt for that proposition COPRAC and LACBA are reading the sentence as suggesting a limited duty of confidentiality, which, of course, we do not mean to say. What we should say in the Comment to avoid that reading is that while the prospective client may not be entitled to all of the protection afforded clients, the protection is the same when it comes to the duty of confidentiality. I am not trying to write it here, but I would consider something along these lines in place of the language Kevin added.

4. Footnote 4: I agree with Kevin & Mark's position.

5. Footnote 7: I don't think we need the sentence. If we are going to give an example, it should be more specific. We are talking about finding out only as much as is necessary to run a conflict search and to find out whether it involves legal work the lawyer is capable of handling. That usually is limited to the names of the participants, the general nature of the issue, and the nature of the legal work requested.

6. Comment [7]: I am having trouble with the phrase "imputation may be avoided" with consent. Consent is not about avoiding imputation. It is about addressing the conflict situation. The prohibition is imputed to other lawyers who also cannot accept or continue a prohibited representation without the informed written consent of client and prospective client. The lawyer to whom the conflict is imputed has to address the same things in the disclosure to the client and prospective client that the lawyer with the conflict would have to address. I would like to see the first sentence of this Comment rewritten to remove the "imputation may be avoided" with consent concept.

7. Response to OCTC Comment: We should cite State Bar Formal Opinion 1998-152 as authority for our response.

**March 24, 2010 KEM E-mail to RRC:**

Harry notes the point I made concerning screening under 1.10 (private-private firm screening): that the Board wanted to see screening play out in the courts because if the game was not ended there. I still adhere to that view of the Board's decision. However, I view the concept of screening as addressed in 1.10 and as addressed in 1.18 as qualitatively different. A screening provision in 1.10 would apply even when an attorney-client relationship, with all the duties attendant thereto, had been formed. The screen in 1.18 would apply only to situations involving a prospective client, and only when the lawyer had taken reasonable measures to avoid exposure to more of the prospective client's confidential information than is necessary to determine whether the lawyer can (e.g., conflict w/ a client) or should accept the representation. As noted in the response to BASF's comment at pages 1 and 2 of the Public Comment Chart, the rule, with its screening provision, reflects a carefully balanced consideration of the benefits

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of confidentiality to the legal system (encouraging candor) and the ability of a lawyer to explore potential representations while at the same time preserving right of other clients of the lawyer to the counsel of their choice:

The commenter's second point is that there is no principled reason to distinguish between prospective clients and former clients in terms of protecting confidential information. However, the Commission agrees with the position of the Restatement of the Law Governing Lawyers, § 15, Comment b, which observes:

Prospective clients are like clients in that they often disclose confidential information to a lawyer, place documents or other property in the lawyer's custody, and rely on the lawyer's advice. But a lawyer's discussions with a prospective client often are limited in time and depth of exploration, do not reflect full consideration of the prospective client's problems, and leave both prospective client and lawyer free (and sometimes required) to proceed no further.

Comment [1] states the same rationale in a somewhat abbreviated fashion.

Moreover, by recommending the adoption of this Rule, which is based on Model Rule 1.18, the Commission does not suggest that a lawyer should be able to plumb the depths of a prospective client's confidential information and then, with impunity, be able to accept an adverse representation in the same matter or be screened to enable other lawyers in the lawyer's law firm to accept the adverse representation. Rather, a lawyer governed by this Rule and the lawyer's law firm are afforded an opportunity to rebut the presumption of shared confidences with an ethical screen only in situations where the lawyer has not taken "more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client." Rule 1.18(d)(2). A lawyer cannot mine a prospective client's information and then use it to that person's disadvantage.

The Commission understands the important role that confidentiality plays in encouraging client candor, typically a prerequisite to a lawyer's effective representation of a client. This Rule recognizes that role and balances the need for prospective clients to be secure in their secrets and the need for lawyers to obtain sufficient information to determine whether they should – or even can – accept the representation. Thus, the limited availability of screening under this Rule should not, as the commenter suggests, impair the flow of information between lawyer and client.

I realize my e-mail won't convince the anti-screening contingent on the Commission. I recognize that the Board Committee is opposed to screening in the private-private context as it would apply to clients with whom the infected lawyer had formed a lawyer-client relationship. I am not sure they would be similarly unreceptive to a screening provision in the limited situation provided for in Rule 1.18. We should at least give them an opportunity to make that decision.

I'm off to have a tooth crowned. I'll get you the e-mail compilations later this morning or early afternoon.

**March 24, 2010 Lamport E-mail to RRC:**

Either a lawyer obtains confidential information from the prospective client or the lawyer doesn't. If the lawyer has not obtained material confidential information, you don't need a screen

because there is nothing to screen. If the lawyer did obtain material confidential information then you have the same problem with screening that exists in Rule 1.10 (that I will not recount here). It will be no solace to the prospective client that lawyer took measures to avoid exposure to any more information than was necessary to determine whether the lawyer would accept the engagement. It does not change the fact that the lawyer obtained a prospective client secret in the limited exchange, which is what the prospective client is concerned about.

This standard puts a terrible burden on a prospective client. Many prospective clients have no sense what is relevant. They don't know how much information they need to impart. Most don't know how much is only as much as necessary to determine whether the lawyer can take the case. In my experience, inexperienced prospective clients tend to be over inclusive in their communications with a lawyer because they don't know what the lawyer needs to know. Even if the communication is limited, confidential information may still be elicited. For example, the prospective client says, "I embezzled money from my company. I did it in a way that will be hard to detect. I need to know what my rights are in the event my company suspects me." Pretty limited, but pretty significant information. Do you not think that prospective client might feel inhibited in his or her communication with a lawyer if the client knew the law firm could represent the company regarding the embezzlement with an unconsented screen? Do you think that prospective client is going to feel any better about the screen because the lawyer limited the conversation to only as much information as was necessary to determine whether he would take the case? Do you think the prospective client will feel any better about it because we were trying to strike a balance between the prospective client's interest in confidentiality and the law firm's business interests? Why would we even consider that a law firm's business interests could be balanced against a client's interest in confidentiality?

Then there is the issue of proof. Prospective client communications are often oral. The lawyer is going to say, "I limited the communication to only the information necessary to determine if I could take the matter." The prospective client says, "No you didn't." Now it is a battle of dueling declarations and some court has to make Solomon's choice. And the prospective client has to pay to litigate the issue, which would not exist if the screening standard in this Rule did not exist.

I commend the effort to try to fashion a screening standard that attempts to limit its application, but I condemn the result. It doesn't work.

I don't think screening is going to be any more acceptable to RAC in this Rule than it was in 1.10. Giving RAC an opportunity to decide whether they would reject screening in this Rule invites the same result we got on 1.10, which is no Rule at all. I don't think it is worth risking the same result here by sending another screening rule to an unreceptive audience.

**March 24, 2010 Peck E-mail to RRC:**

I do not understand how we can go against years of California common law allowing screening in the governmental setting by deleting screening from 1.18. If we had a tabula rasa, Stan's points would be factors to take into account. However, the Courts have repeatedly considered these aspects, and other policies which are not discussed in our e-mails and ruled that, with exceptions, screening is permissible. I must be missing something, but I cannot vote to delete the inclusion of screening provisions which have been set forth in case law for thirty years.