

# Proposed Rule 1.18 [N/A]

## “Duties to Prospective Client”

(ALTB, Draft # 2.1, 05/16/10)

**Summary:** 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 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. Unlike Model Rule 1.18, proposed Rule 1.18 does not include a provision permitting a law firm to erect an ethical or screen to rebut imputation of shared confidential information.

### Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input 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 checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" 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.)

Nevada Rule 1.18.

- 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   4    
Opposed Rule as Recommended for Adoption   5    
Abstain   0  

\*NOTE: The above vote records the position of the Commission submitted to the Board of Governors for consideration at its May 13–15, 2010 meeting. By a close vote, the Commission did not recommend adoption of a California version of Model Rule 1.18. There were two dissenting positions submitted to the Board. Both dissenting positions recommended adoption of a rule, but one dissenting group deleted the Model Rule provisions for unconsented ethical walls/screening. At the Board's May meetings, the Board agreed with the view of one of the dissenting groups and conditionally adopted a version of proposed Rule 1.18 that does not include a provision for screening.

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

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Dissenting Position Included. (See Introduction):  Yes  No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

A number of Commission members and other lawyers in California favor including the concept of unconsented screening in this Rule. Unlike the Model Rule, that concept is not provided for in paragraph (d). See Introduction.

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

May 2010

(Draft rule following consideration of 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].

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\* Proposed Rule 1.18, ALTB, Draft 2.1 (5/16/10).

<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 4/9/10].

The proposed Rule tracks Model Rule 1.18 but diverges from the Model Rule in several respects: (i) the Rule language has been conformed to the language of the Evidence Code [see Explanation of Changes to paragraph (a)]; (ii) the scope of a prospective client's protected information is limited 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) the well-settled "material to the matter" standard developed over many years in California case law has been substituted 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) The Model Rule provision, 1.18(d)(2), which provides for ethical screens in limited circumstances, has been deleted. [See Explanation of Changes for paragraph (d)]. This latter change is a departure from the public comment draft of the Rule, which included a provision for screening that was substantially similar to Model Rule 1.18(d)(2). The change reflects the State Bar Board of Governor's determination that that whether the timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter to be determined by the case law.

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. However, a new comment with no counterpart in the Model Rule has been added to clarify that whether the timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter to be determined by the case law. See Explanation of Changes for Comment [8].

*Dissenting Positions.* There are two separate dissenting positions from the Board's decision to conditionally adopt a version of Model Rule 1.18 that does not include a provision permitting an ethical screen to rebut the presumption of shared confidences.

*Dissent A.* Members of the Commission who support this position believe a rule substantially similar to the Model Rule, including the Model Rule's provision for an ethical screen in limited circumstances, should be adopted. See Dissent A, following the Rule & Comment Comparison Chart, below.

*Dissent C.* Members of the Commission who support this position believe that no counterpart to Model Rule 1.18 should be adopted. See Dissent C, following the Rule & Comment Comparison Chart, below.

*Public Comment.* Although there was some disagreement among the commenters on whether non-consented screening should be included in the proposed Rule that was circulated for public comment, none of the public comment received objected to the adoption of a rule patterned on Model Rule 1.18. See Public Comment Chart, below.

*Variations in Other Jurisdictions.* Only one of the 42 jurisdictions that have completed their Ethics 2000 review of their Rules of Professional Conduct (Virginia) has not adopted some version of Model Rule 1.18. Two jurisdictions (D.C., Idaho) do 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. Of the remaining nine jurisdictions that have not yet adopted post-Ethics 2000 Rules of Professional Conduct, six (Alabama, Georgia, Hawaii, Massachusetts, Mississippi and Texas) have not not yet made recommendations concerning a Model Rule 1.18 counterpart, and two (Michigan and Tennessee) have recommended adoption of a Model Rule 1.18 counterpart with the screening provision intact.

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 1.18 Duties to Prospective Client</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<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 <u>for the possibility 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> <p>The phrase "as a result of" has been substituted for "in" because a lawyer often will have to investigate further to determine whether</p>

\* Proposed Rule 1.18, ALTB, Draft 2.1 (5/16/10). Redline/strikeout showing changes to the ABA Model Rule

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		<p>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 <del>that person in</del> 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>The word “prohibited” has been substituted for “disqualification” because the rule is intended as a disciplinary rule, not a civil disqualification standard.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.18 Duties to Prospective Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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: <u>both the affected client and the prospective client have given informed written consent.</u></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>Because the Commission recommends the deletion of subparagraph (d)(2), see Introduction and Explanation for subparagraph (d)(2), the language of Model Rule 1.18(d)(1), which permits representation provided client consent is obtained, has been moved into the introductory paragraph. The language is identical to that of Model Rule 1.18(d)(1), except that California's heightened "informed written consent" standard has been substituted for the Model Rule's "consent, confirmed in writing" standard.</p>
<p>(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:</p>	<p><del>(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:</del></p>	<p>As noted above, the language in Model Rule 1.18(d)(1) has been moved into paragraph (d).</p>
<p>(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying</p>	<p><del>(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information</del></p>	<p>See Introduction. The Commission recommends that Rule 1.18 be adopted without the provisions in Model Rule 1.18(d)(2) that permit a law firm that has received a prospective client's</p>

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<p>information than was reasonably necessary to determine whether to represent the prospective client; and</p>	<p><del>than was reasonably necessary to determine whether to represent the prospective client; and</del></p>	<p>confidential information to implement an ethical screen unilaterally and without the prospective client's consent. In part, the Commission believes that allowing screening without a prospective client's consent undermines the extremely important role of confidentiality and trust in a prospective lawyer-client relationship.</p>
<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><del>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</del></p>	<p>See Explanation of Changes for subparagraph (d)(2).</p>
<p>(ii) written notice is promptly given to the prospective client.</p>	<p><del>(ii) written notice is promptly given to the prospective client.</del></p>	<p>See Explanation of Changes for subparagraph (d)(2).</p>

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 1.18 Duties to Prospective Client</b> <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 1.18 Duties to Prospective Client</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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 (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) to proceed no further. Hence, <u>although the range of a prospective clients should receive some but not all client's information that is protected is the same as that of a client, 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 matter of the protection afforded clients</u>consultation. See Comments [3] and [4]. As used in this Rule, prospective client includes an authorized representative of the client.</p>	<p>Comment [1] is based on Model Rule 1.18, cmt. [1]. The Model Rule language, in the third sentence, stating that "prospective clients should receive some but not all of the protection afforded clients" has been replaced with: a statement that a prospective client's information is protected "to the same extent as that of a client;" and a reference to the provision in paragraph (d) for seeking client consent to accept or continue a representation of a client who is adverse to a prospective client. This deviation from the Model Rule language, in part, reflects the Commission's view that a lawyer's duties to a prospective client should encourage trust and confidence in the context of a consultation.</p> <p>In addition, new language has been included that provides cross to Comments [3] and [4] for guidance and a new last sentence has been added to clarify that whether a 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</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</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">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]. 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.</a></p>	<p>Evid. Code § 951.</p> <p>The third sentence provides a citation to and brief summary of a seminal California Supreme Court case, <i>Gionis</i>, which provides important guidance to clients and lawyers alike that a lawyer can expressly disclaim that a lawyer-client communication will take place. The fourth sentence, which is taken nearly verbatim from a corresponding comment to Nevada Rule 1.18, was added pursuant to the recommendation in a public comment and clarifies that a person who communicates with a lawyer without intending to retain the lawyer but for some other reason, e.g., to cause the lawyer's disqualification from representing the person's opponent in the matter, is not a prospective client and therefore is not afforded the protections of the Rule.</p>
	<p><a href="#">[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.</a></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>

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<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 consultation or during the subsequent investigation,</u> 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>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>[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,</p>	<p>[4] In order to avoid acquiring <del>disqualifying</del> information from a prospective client <u>that would prohibit representation as provided in paragraph (c),</u> a lawyer considering whether or not to undertake a new matter <del>should</del><u>must</u> 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</p>	<p>Comment [4] is similar to Model Rule 1.18, cmt. [4]. The first sentence has been modified to substitute language describing a prohibited representation for the Model Rule term “disqualifying” to reflect that this Rule is primarily intended as a rule of discipline.</p> <p>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>

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<p>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>representation. If the prospective client wishes to retain the lawyer, and if consent is possible under <del>Rule</del> <u>Rules 1.7 and 1.9</u>, then consent from all affected present or former clients must be obtained before accepting the representation.</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 from the prospective client.</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 <del>1.01.0.1</del> <u>1.01.0.1</u> (e) for the definition of informed consent. <del>If However, the agreement expressly so provides, lawyer must take</del> <u>reasonable measures to avoid exposure to more 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>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 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 accepting or continuing the representation of</u> a client with interests <u>materially</u> 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</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</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">"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].</a></p>	<p>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 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>[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), <a href="#">the consequences of</a> imputation may be avoided if the lawyer obtains the informed <a href="#">written</a> consent, <del>confirmed in writing</del>, of both the prospective and affected clients. <del>In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and 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.</del></p>	<p>Comment [7] is based on Model Rule 1.18, cmt. [7]. As the proposed rule does not provide for unconsented screening, the language related to the protocol has been deleted. See also Explanation of Changes for subparagraphs (d) and (d)(2).</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><del>[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. Rule 1.18 leaves open the issue of</del></p>	<p>Comment [8] has no counterpart in the Model Rules. It has been added to effectuate the Board's intent that the law of screening be developed through court decisions. The Comment is intended to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because this Rule does not expressly provide for</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#"><u>whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.</u></a></p>	<p>screening. Model Rule 1.18, cmt. [8], which concerns the required notice in the event a screen is implemented, has been deleted because the proposed Rule does not expressly provide for screening.</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 1.18, cmt. [9].</p>

**Dissent A**  
**Dissent to the State Bar of California Board of Governor's Adoption of Proposed Rule 1.18**  
**without an Unconsented Screening Provision**  
**Proposed Rule 1.18 – ALT-A, Attached**

1. Proposed Rule 1.18 is an important rule that addresses the duties of a lawyer to persons seeking legal services when no client-lawyer relationship ensues. Most jurisdictions have adopted a version of ABA Model Rule 1.18 because important events occur during the period when a lawyer and a prospective client are considering whether to form a professional relationship. For the most part, other rules do not address this pre-retention period. Prospective clients are like clients in that they may disclose confidential information that a lawyer is obligated to protect. At the same time, prospective clients do not have all of the protections afforded clients because the lawyer's interactions with a prospective client are often limited in time and substance and leave both the prospective client and the lawyer free to proceed no further. Therefore, Rule 1.18 provides important guidance for lawyers and protection for prospective clients.

2. Paragraph (a) of the proposed rule defines the limited circumstances in which the rule applies by defining who qualifies as a "prospective client." Paragraph (b) reinforces the duty found in case law that all confidential information of a prospective client is treated as confidential even if the lawyer is not retained. This well settled obligation is not technically covered by proposal Rules 1.6 or 1.9 which deal with confidential client information.

3. Paragraph (c) extends the protection of Rule 1.9(a) to prohibit representations adverse to a prospective client in the same or substantially related matter. Unlike Rule 1.9(a), however, the rule applies only if the lawyer receives confidential information from a prospective client that is material in the later representation. The prospective client situation justifies this treatment because in the period prior to deciding whether to represent a prospective client, it is in the prospective client's interest to share enough information with the lawyer to determine if there is a conflict of interest or whether the parties are willing to enter into a professional relationship. The lawyer may learn early in the consultation that the lawyer or the lawyer's firm has a conflict of interest or there are other reasons for not accepting the engagement. If the discussion stops before material information is shared, the lawyer's regular clients should not be denied counsel of their choice if a substantially related matter arises in the future.

4. Paragraph (d) of the Model Rule provides two ways in which other lawyers in the firm can avoid imputation of a conflict based on receipt of information by the lawyer who consulted with the prospective client and protect against a former prospective client seeking to prohibit the firm from undertaking a subsequent adverse representation. The first is where the affected client and the former prospective client provide informed written

consent. The second is where the lawyer who received the prospective client's information took reasonable measures to avoid exposure to more information that was reasonably necessary to determine whether to represent the prospective client and that lawyer is timely screened from any participation in the subsequent matter, and receives no part of the fee therefrom, and the prospective client is promptly given written notice.

5. Paragraph (d) strikes a proper balance between the interests of the lawyer's existing clients and the interests of prospective clients where no professional relationship ensues and the burden on the lawyer to justify the circumstances in which the limited screening provision in paragraph (d)(2) is permitted. Proposed Rule 1.18, Alt-A (attached), is consistent not only with the Model Rule and the rule in many jurisdictions but also with Restatement (3d) The Law Governing Lawyers §15.

#### **RULE 1.18 DISSENTERS' DRAFT RULE – ALT-A**

#### **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 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 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, although the range of a prospective client's information that is protected is the same as that of a client, 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 matter of the consultation. See Comments [3] and [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]. 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.

[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 information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must 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. See also Comment [7].

[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either accepting or continuing the representation of a client with interests materially 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), the consequences of 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 screened and written notice is promptly given to the prospective client. See Rule 1.0.1(k) (requirements for screening procedures). In some instances, for example when the prospective client is a person who is not experienced in the use of legal services, it may be appropriate at the beginning of the consultation for the lawyer to explain to the prospective client that the lawyer's firm might subsequently screen

the lawyer in the event the lawyer declines the representation and the firm accepts representation of the client's adversary. 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.

## Dissent C

### Dissent from State Bar of California Board of Governor's Decision to Adopt Proposed Rule 1.18

Some members of the Commission voted against the adoption of any counterpart to Model Rule 1.18. This dissent is their explanation.

Conflicts concerning prospective clients are already well encompassed in the case law. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537] (formation of attorney-client relationship assumed); *Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132] (no duties incurred by lawyer during a brief, preliminary consultation).

When a lawyer is in a law firm, the name of the opposing party may mean nothing to the listening lawyer when he or she first hears it. However, when a formal conflict check is undertaken, the conflict that will result if representation is accepted can become apparent. The concurring members of the Commission believe that the possible permutations that can arise from talking with a potential client are so infinite and various that a rule which attempts to create a rigid framework for such

communications is bound to fail in practice. Further, the concept of advance or after-the-fact written consent to such a conflict is unrealistic for at least two reasons. First, the contact with the caller may be a single telephone call in which no address or other means of communication is obtained. Second, the caller may have been speaking to many lawyers during the search for counsel, and thus will have no interest in accommodating a lawyer with whom he or she spoke only briefly, and who turned the caller down – perhaps for reasons that struck the caller as very technical and bureaucratic, generating ill will if any feeling at all. In light of the foregoing considerations, this minority of the Commission assert that a counterpart to Model Rule 1.18 should not be adopted. They believe that the complexities involved in determining whether a lawyer-client relationship was formed, or whether an ethical screen should be permitted to enable a law firm to rebut the presumption of shared confidences when a firm lawyer was exposed to confidential information during a consultation, are better left to the sound discretion of the courts.

**Rule 1.18: Duties to Prospective Client**  
**(Commission's Proposed Rule Following Review of Public Comments)**

- (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 both the affected client and the prospective client have given informed written consent.

**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, although the range of a prospective client's information that is protected is the same as that of a client, 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 matter of the consultation. See Comments [3] and [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]. 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.

- [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 information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must 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 accepting or continuing the representation of a client with interests materially 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), the consequences of imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients.

- [8] Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.
- [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**  
(Comparison of the Current Proposed Rule to the Initial Public Comment Draft)

- (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: both the affected client and the prospective client have given informed written consent.
  - (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.~~ Hence, although the range of a prospective client's information that is protected is the same as that of a client, 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 matter of the consultation. See Comments [3] and [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]. 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.
- [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, that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter ~~should~~must 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 accepting or continuing ~~or accepting~~ the representation of a client with interests materially 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), the consequences of 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.~~

[8] Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

[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  
[Sorted by Commenter]**

**TOTAL = 8**    **Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

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.	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18. However, the Board of Governors has conditionally adopted a rule without a provision for non-consensual screening that was in the public comment draft.
2	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</p>	<p>Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18. However, the Board of Governors has conditionally adopted a rule without a provision for non-consensual screening that was in the public comment draft.</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</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 = 8**  
**Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>ends up retaining the lawyer?</p> <p>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 <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</p>	<p>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.</p> <p>Comment [1] states the same rationale in a somewhat abbreviated fashion. More importantly, that Comment explains that "the range of a prospective client's information that is protected is the same as that of a client." In other words, the same information is protected, whether or not the person consulting the lawyer actually retains the lawyer.</p>

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

**TOTAL = 8**    **Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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 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>	

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

**TOTAL = 8**    **Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Committee on Professional Responsibility and Competence ("COPRAC")	M		1.18(d)	<p>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 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].</p>	<p>1. Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18. However, the Board of Governors has conditionally adopted a rule without a provision for non-consensual screening that was in the public comment draft.</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. The Commission agrees that the sentence is misleading and has revised it.</p>

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

**TOTAL = 8**  
**Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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.	
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>Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18. However, the Board of Governors has conditionally adopted a rule without a provision for non-consensual screening that was in the public comment draft.</p> <p>In light of the Board of Governor's decision, above, no response is required.</p>
				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	The Commission agrees that the sentence is misleading and has revised it.

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

**TOTAL = 8**    **Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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. 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>	
5	Office of the Chief Trial Counsel (“OCTC”)	M		1.18(c), (d)	<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>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>

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

**TOTAL = 8**    Agree = 1  
Disagree = 0  
Modify = 7  
NI = 0

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmts. [6]-[8]	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.	See Response concerning paragraphs (c) and (d).
6	Orange County Bar Association	M		(c) and (d)	1. 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”). We recommend that this be clarified in paragraphs (c) and (d).	1. The Commission believes that Comment [6] sufficiently explains the applicability of paragraphs (c) and (d) and that no further clarification in the rule paragraphs, whose language is nearly identical to the Model Rule, is required.
				(d)(2)	2. Paragraph (d)(2) permits representation of an affected client despite receipt of information that would prohibit the representation under paragraph (c) if, <i>inter alia</i> , “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	2. Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18. However, the Board of Governors has conditionally adopted a rule without a provision for non-consensual screening that was in the public comment draft.

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

**TOTAL = 8**  
**Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2]	<p>the proposed Rule nor the Comments provide guidance as to what would constitute “reasonable measures to avoid exposure.” 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 person contacts a lawyer for the purpose of</p>	<p>3. In light of the Board of Governor’s decision, above, no response is required.</p> <p>4. The Commission agrees that the “beauty contest” scenario the Commenter identifies should be addressed by the Rule and has included the commenter’s proposed language.</p>

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

**TOTAL = 8**    **Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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>	
				Comment [5]	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).	5. The Commission has made the suggested change.
				Comment [6]	6. Comment [5] states that "a lawyer may condition conversations with a prospective client on the person's <b><i>informed consent</i></b> 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 requirement of paragraph (d)(2) and to ensure	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).

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

**TOTAL = 8**  
**Agree = 1**  
**Disagree = 0**  
**Modify = 7**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					that any such agreement be documented for avoidance of doubt.  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.
7	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.	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18. However, the Board of Governors has conditionally adopted a rule without a provision for non-consensual screening that was in the public comment draft.
8	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.	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18. However, the Board of Governors has conditionally adopted a rule without a provision for non-consensual screening that was in the public comment draft.

## Rule 1.18: Duties to Prospective Client

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 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.

**Illinois:** In the rules effective January 1, 2010, Rule 1.18(d) does not require that a prospective client receive notice when a firm employs a screen to avoid a conflict of interest.

**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:** In the rules effective April 1, 2009, Rule 1.18(d) describes in more detail the procedures necessary to avoid a conflict as a result of consultations with prospective clients. Comments 7A-7C offer further guidance regarding these procedures. New York adds Rule 1.18(e), which provides (in language copied partly from Comment 2 to Model Rule 1.18) that a "prospective client" does not include a person who "(1) 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 "(2) communicates with a lawyer for the purpose of disqualifying 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."

**Vermont:** In the rules effective September 1, 2009, Rule 1.18(a) extends prospective client status only to those people who are "in good faith" seeking to hire that attorney.