



# THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

RE: Proposed Rule 1.18  
4/23/10 Commission Meeting  
Open Session Agenda Item II.B.

COMMISSION FOR THE REVISION OF THE  
RULES OF PROFESSIONAL CONDUCT

TELEPHONE: (415) 538-2161

**DATE:** April 21, 2010

**TO:** Members of the Commission

**FROM:** Kevin Mohr, Commission Consultant

**SUBJECT:** Item II.B. Proposed Rule 1.18 (Duties to Prospective Client) – Possible Reconsideration of the Dashboard and Introduction

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The Rule 1.18 Dashboard and Introduction have passed the 11-day ballot. However, some Commission members included with their vote suggestions for revisions to these documents. Some of the suggested revisions arose from a review of the minority statements. For this agenda item, the Chair will entertain a motion, if made, to rescind the 11-day ballot vote approving the Rule 1.18 Dashboard and Introduction in light of comments received from some Commission members requesting modifications to the Dashboard and Introduction that might afford the Commission's majority position a greater degree of parity with the two separate minority statements submitted by the respective dissenters. If a motion to rescind the 11-day ballot vote approving either the Dashboard, Introduction, or both, is passed, then discussion of revisions to those documents would be in order. The Chair intends to limit the discussion of proposed Rule 1.18 to only the issue of revisions to the Dashboard and Introduction. The following materials are provided.

1. Introduction, ALTA, Draft 3.2 (4/21/10), Clean. This is the version the Commission approved by the 11-day ballot and includes some non-substantive edits (nits) and a paragraph concerning the public comment received.
2. Introduction, ALTB, Draft 3.1 (4/20/10), redline, compared to ALTA, Draft 3.1 (4/19/10). This version implements possible revisions suggested by some members as well as the non-substantive edits (nits) and public comment paragraph that were added to ALTA (described in item #1).
3. Dashboard, Draft 4.2 (04-21-10), redline, compared to Draft 4.1. This version implements possible revisions suggested by some members.
4. Rule 1.18 11-day ballot tallies of votes with text of comments submitted by some members.
5. Minority Statement A and Minority Statement B. These are provided for information only. The Chair has indicated that the respective members of these dissenting groups may articulate their views without seeking full Commission approval.

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

April 2010

(Draft rule following consideration of public comment.)

### *INTRODUCTION:*

Following public comment, the Commission voted not to recommend the adoption of a rule or comment counterpart to Model Rule 1.18. **Model Rule 1.18** is intended to clarify 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 4/9/10).<sup>1</sup>

Although there is no California Rule counterpart, 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 4/9/10]. The Commission determined 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, is better left to the sound discretion of the courts.

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\* **No rule or comment counterpart to Model Rule 1.18 is being recommended by the Commission.**

<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].

*Dissenting Positions.* There are two separate dissenting positions against the Commission’s recommendation not to adopt a rule counterpart to Model Rule 1.18. Both groups of dissenters agree that Model 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. 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. The dissenting groups, however, disagree in an important respect.

*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 B.* Members of the Commission who support this position agree with the importance of having a counterpart to Model Rule 1.18 but believe that there should be no ethical screen provision in the Rule. See Dissent B, immediately following Dissent A, 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.

*Variations in Other Jurisdictions.* Every jurisdiction that has completed its Ethics 2000 review (41 have completed their review) of its Rules of Professional Conduct has adopted some version of Model Rule 1.18. Two of those jurisdictions (D.C., Idaho) do not permit non-consensual screening. Although North Dakota does not provide for screening, representation against the prospective client by the lawyer is permitted if “the lawyer who received the information took reasonable measures to avoid exposure to more significantly harmful information than was reasonably necessary to determine whether to represent the potential client and notice is promptly given to the potential client.” See N.D. Rule 1.18(d)(2). 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., Maryland, Montana, New Jersey, North Carolina, Oregon). Nevada moves into the black letter of the Rule Comments [2] and [5] of the Model Rule.

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

April 2010

(Draft rule following consideration of public comment.)

### *INTRODUCTION:*

Following public comment, the Commission voted not to recommend the adoption of a rule or comment counterpart to Model Rule 1.18. **Model Rule 1.18** is intended to clarify 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 4/9/10).<sup>1</sup>

Although there is no California Rule counterpart, 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 4/9/10]. Moreover, 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.

\* No rule or comment counterpart to Model Rule 1.18 is being recommended by the Commission.

<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].

However, when a formal conflict check is undertaken, the conflict that will result if representation is accepted can become apparent. The Commission believes 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, ~~The the~~ Commission ~~determined~~ concluded 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, is better left to the sound discretion of the courts.

*Dissenting Positions.* There are two separate dissenting positions against the Commission’s recommendation not to adopt a rule counterpart to Model Rule 1.18. Both groups of dissenters agree that Model 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. 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. The dissenting groups, however, disagree in an important respect.

*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. They note that a recent California appellate court decision, *Kirk v. First American Title Ins. Co.* (2d Dist. 4/7/10) Cal.App.4<sup>th</sup>, expressly approved the use of unconsented screening in appropriate circumstances, such as a Rule 1.18 situation. See Dissent A, following the Rule & Comment Comparison Chart, below.

*Dissent B.* Members of the Commission who support this position agree with the importance of having a counterpart to Model Rule 1.18 but believe that there should be no ethical screen provision in the Rule. The dissenters supporting this position disagree with the reading ascribed to *Kirk v. First American Title* by the Commission members who have joined in Dissent A. See Dissent B, immediately following Dissent A, 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.

*Variations in Other Jurisdictions.* Every jurisdiction that has completed its Ethics 2000 review (41 have completed their review) of its Rules of Professional Conduct has adopted some version of Model Rule 1.18. Two of those jurisdictions (D.C., Idaho) do not permit non-consensual screening. Although North Dakota does not provide for screening, representation against the prospective client by the lawyer is permitted if “the lawyer who received the information took reasonable measures to avoid exposure to more significantly harmful information than was reasonably necessary to determine whether to represent the potential client and notice is promptly given to the potential client.” See N.D. Rule 1.18(d)(2). 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., Maryland, Montana, New Jersey, North Carolina, Oregon). Nevada moves into the black letter of the Rule Comments [2] and [5] of the Model Rule.

# Proposed Rule 1.18 [N/A]

## “Duties to Prospective Client”

(NOT RECOMMENDED FOR ADOPTION)

**Summary:** The Commission does not recommend the adoption of Model Rule 1.18. Please see the Introduction for an explanation of the Commission’s recommendation and two separate dissents from that recommendation.

### Comparison with ABA Counterpart

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

### Primary Factors Considered

Existing California Law

Rule

Statute

Evid. Code § 951.

Case law

*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].

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

Other Primary Factor(s)

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

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption 4

Opposed Rule as Recommended for Adoption 5

Abstain 0

Approved on Consent Calendar

Approved by Consensus

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

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Dissenting Position Included. (See Introduction):  Yes  No (There are two separate Dissenting Positions)

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

The absence of this Rule, which has been adopted in some form in every jurisdiction that has completed its Ethics 2000 review, will leave a regulatory gap in California. In addition, a number of lawyers in California reject the concept of non-consensual screening, which is provided for in paragraph (d)(2), in the private law firm context. See Introduction.

Moderately Controversial – Explanation:

Not Controversial

**Your Name**

J. Julien  
Stanley Lamport  
Linda Foy  
Robert L. Kehr  
Raul Martinez  
Paul W. Vapnek  
Mark Tuft  
Dominique Snyder  
Kurt Melchior  
Ignazio Ruvolo  
harry sondheim  
Jerry Sapiro

Total Number of Responses for this Item: 12

**Approve Dashboard for Rule 1.18 (click here to view)**

Result	Responses	Percentage	Graph
Yes	9	75.0%	
No	3	25.0%	
Abstain	0	0.0%	

Total Number of Responses for this Item: 12

**Approve Introduction for Rule 1.18 (click here to view)**

Result	Responses	Percentage	Graph
Yes	8	66.6%	
No	3	25.0%	
Abstain	1	8.3%	

Total Number of Responses for this Item: 12

**Approve Rule & Comment Comparison Table for Rule 1.18 (click here to view)**

Result	Responses	Percentage	Graph
Yes	10	83.3%	
No	1	8.3%	
Abstain	1	8.3%	

Total Number of Responses for this Item: 12

**Approve Public Commenter Table for Rule 1.18 (click here to view)**

Result	Responses	Percentage	Graph
Yes	10	83.3%	
No	1	8.3%	
Abstain	1	8.3%	

Total Number of Responses for this Item: 12

**Comments:**

I await the discussion to make my final vote because I still have questions. My major concern is that I think I agree that we should have no rule because I can see games which can be played on both sides. The client can lock up a particular lawyer he does not want available to the other side and the lawyer can use it in some untoward way. The courts might truly be a better arbiter of these problems.

With respect to the Dashboard, I do not agree that it will create a regulatory gap. A prospective client is still a client, although in a limited sense. We have been regulating this through our equivalent of 1.9 without a problem. I don't see why that would change. If the sentence said that the absence of a rule specifically dealing with duties to prospective clients would create an anomaly that should not exist or something along those lines, I'd be okay with it!

Dashboard: I would include the references to Ev. C. 951 and to Gionis. Although many more references to current CA law are possible, they at least show the existence of Rule 1.18-type obligations. Intro: The first sentence is ambiguous (is it the Rule or its absence that clarifies duties to prospective clients?). It should be made into two sentences. Also, The Intro should state that the commenters approved the Rule, disagreeing only as to either details of or the principle of non-consensual screening, so that the Commission's latest vote is contrary to public comment.

I strongly disagree with the statement in Minority Position B that the Kirk court "endorsed" the Board's position regarding screening. The Kirk court merely agreed with the Board that the matter is unsettled and then proceeded to approve unconsented screening in an appropriate case. That statement should be changed. I also believe that a reference to the Kirk case should be added to Minority Position A, the reference being to the effect that we now have an appellate court opinion explicitly approving unconsented screening in appropriate cases.

I wanted to clarify for your records that while I disagree with the RRC's position on 1.18, I do agree as to the form of the RRC's submission including the Introduction, Dashboard, and Commenter Chart, etc.

I find the introduction to our rejection of Rule 1.18 too passive in the face of the two strong and extensive dissents. In my memo to Stan about reasons to reject the rule, I was more extensive and specific; and I would recommend that we include a stronger argument for our rejection of this rule than we have done to date. I copy pertinent parts of that memo here: "[T]he subject of the potential of conflicts concerning prospective clients is well encompassed in the case law, with Flatt on the one end and Zimmerman on the other as matters stand now. These cases seem to capture the scope of the problem, from turning a would-be client away to regarding the feeler as inconsequential and ignoring it. . . . Where the 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, but may create an insuperable conflict once a formal conflict check is undertaken. The degrees of possibility in talking with a would-be 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. Moreover, the concept of advance or after-the-fact written consent to such a conflict is unrealistic for at least two reasons: On the one hand, the contact with the caller may be a single telephone call in which no address or other means of communication is obtained. On the other hand, the caller may have been speaking to many lawyers during the search for counsel, and may have no interest whatsoever in accommodating a lawyer with whom he or she spoke only briefly and who turned the caller down – perhaps for reasons which must have seemed to the caller very technical and bureaucratic, generating ill will if any feeling at all. The subject can safely be left to the courts, and that is what we should do." On the face of things, it seems excessive to have a meeting of the Commission to address this critique; yet I fear for our position (which I support) if we do not strengthen our argument. With that comment I turn the issue over to management.

I am in favor of adopting rule 1.18 without non-consensual screening.(Minority position B)

1. In the Variations paragraph, second line should read "do not," not "does not." 2. In the fourth line of the Variations paragraph, add "if" so it reads "...is permitted if..."

In the variations in other jurisdictions, at page 3 of 3, line 4, just before the quotation a word is missing, probably the word "provided."

Total Number of Responses for this Item: 12

**Dissent A**  
**Dissent to Recommendation Not to Adopt Proposed Rule 1.18 and in Favor of**  
**Proposed Rule 1.18 With Unconsented Screening**  
**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 significantly harmful 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) 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. The Commission, by a four-five vote, recommend against adopting Rule 1.18. Several members who voted against adoption of the rule favored a rule, but without a limited screening provision in paragraph (d)(2). The result of this narrow vote is not in the best interests of lawyers or the public and should not defeat this rule. Proposal Rule 1.18 is consistent not only with the Model Rule and the rule in many jurisdictions but also with Restatement (3d) The Law Governing Lawyers §15. Lawyers and clients in California deserve the protections provided by Rule 1.18.

## **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 B**  
**Dissenting Position in Favor of Rule 1.18 Without Unconsented Screening**  
**Proposed Rule 1.18 – ALT-B, Attached**

The drafters of this Dissent join in the first paragraph of Dissent A favoring the adoption of a rule counterpart to ABA Model Rule 1.18, but disagree with the recommendation in Dissent A for the adoption of the unconsented screening provisions in paragraph (d)(2) of proposed Draft ALTA. The reasons for opposing the inclusion of paragraph (d)(2) or any provision that would permit unconsented screening are:

1. While a majority of the Commission voted to not adopt Rule 1.18, some members who voted with the majority would support the Rule if it did not allow law firms to use screening without client consent. Because a majority of the Commission did not favor deletion of paragraph (d)(2), which provided for unconsented screening, Commission members opposed to screening without client consent voted against the Rule on the final vote. Those Commission members opposed to unconsented screening would prefer to see no Rule than have a Rule with unconsented screening in paragraph (d)(2).
2. Commission members who subscribe to this view would support a version of Rule 1.18 attached to this statement. The attached version would delete paragraph (d)(2) and related Comments.
3. Paragraph (d)(2) would allow screening in situations where the law in California is still evolving and

in which California courts are in disagreement. (See *Kirk v. First American Title* (2010) \_\_ Cal.App.4<sup>th</sup> \_\_.) In the most recent case to address this issue, the court did not adopt a broad rule permitting screening in all cases. Instead, the court adopted a standard that is highly circumstantial and would not allow for screening in many cases. The court endorsed the Board's decision not to provide for screening in Rule 1.10, stating, "We agree with the Board of Governors that the issue of whether attorney screening can overcome vicarious disqualification in the context of an attorney moving between private law firms is not clearly settled in California." (Slip Opn at p. 35.) The same can be said for not adopting screening in this Rule, particularly since this Rule involves the very circumstance that was involved in the recent case. The courts should be free to develop the law in this area based on experience without having the issue prejudged in a Rule as additional case law precedence would aid in the State Bar's future consideration of whether there should be screening and, if so, its parameters.

4. Commission members oppose allowing ethical screens without client consent in this Rule because it would permit a law firm that has received a prospective client's confidential information to adopt an ethical screen unilaterally and without the prospective client's consent. Allowing screening without a prospective client's consent

undermines the extremely important role of confidentiality and trust in a prospective lawyer-client relationship.

5. The duty of confidentiality expressed in Business & Professions Code section 6068(e)(1) and Rule 3-100 prohibits a lawyer from using or disclosing any information that a client wants the lawyer to hold inviolate or the disclosure of likely would be embarrassing or detrimental to the client. The duty extends to prospective clients, who communicate with lawyers for the purpose of retention, even if it does not result. ***The duty exists to assure that anyone can discuss with a lawyer how the law applies to his or her most intimate problem without fear of consequence.*** This duty also exists because effective representation depends on open communication between lawyer and client. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 (1951) [“Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading.”].)

6. The legal profession invites prospective client candor by imposing an austere duty of confidentiality on lawyers. Through the strict application of this duty, a prospective client never has to worry about revealing confidential information to a lawyer and never has to question their decision to do so. Rule 1.9 extends that purpose by preventing lawyers from putting themselves in a position where they would be tempted to reveal or

use against the prospective client information that the prospective client imparted in confidence.

Rule 1.18 imputes the conflict to the lawyer’s firm in order to assure prospective clients that the lawyer will not be tempted by the interest of the lawyer’s firm to reveal information the prospective client imparted to the lawyer in confidence. Imputation is necessary because the prospective client has no means to assure that information in the possession of a firm representing the prospective client’s adversary will not be shared and used or disclosed against the prospective client’s interests. Imputation does not turn on whether lawyers in large firms are presumed to share information. It turns on the firm’s interest as an advocate for an adversary, the availability of the information within the law firm and the prospective client’s inability to know whether a screen has been violated.

7. The legal profession cannot assure prospective clients that they can communicate with lawyers in confidence when the prospective client cannot verify that the law firm is not using the information in circumstances where the law firm would be tempted to use it against the prospective client. As the Court of Appeal stated in *Adams v. Aerojet General* (2001) 86 Cal.App.4th 1324 in adopting Cal. State Bar Formal Opn. 1998-152:

The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to

the current controversy would otherwise be permitted to represent the former client's adversary. ***"No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. . . . No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent."*** (*Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, supra, at p. IIA-418.) (Emphasis added.)

8. Screening without client consent does not protect prospective clients and undermines prospective clients' ability to communicate with lawyers without fear of consequence because a prospective client cannot be verify compliance. A prospective client who has not expressed confidence in a law firm by consenting to the use of an ethical screen should not be forced to accept screening by law firm fiat. A prospective client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal to learn that information the prospective client expected would be held in

confidence is in the possession of the law firm that now represents the prospective client's adversary in a situation where that information could benefit that adversary.

9. The Bar cannot fulfill the purpose of the duty of confidentiality, and it cannot expect clients to trust that they can communicate with lawyers in confidence, when a law firm can harbor that confidential information behind an unconsented and unverifiable screen while the firm represents the prospective client's adversary.

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

#### **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 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] [RESERVED]

[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.