

Rule 1.18 Duties To Prospective Client
(Proposed Rule Adopted by the Board on March 9, 2017)

- (a) A person* who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.
- (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code § 6068(e) and rule 1.6 that the lawyer learned as a result of the consultation, except as rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code § 6068(e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:
 - (1) both the affected client and the prospective client have given informed written consent,* or
 - (2) the lawyer who received the information took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client; and
 - (i) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

Comment

[1] As used in this rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client can be limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Although a prospective client's information is protected by Business and Professions Code § 6068(e) and rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm* is permitted to accept or continue representation of a client with interests adverse to the prospective client.

This rule is not intended to limit the application of Evidence Code § 951 (defining “client” within the meaning of the Evidence Code).

[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 reasonable* expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice is not a “prospective client” within the meaning of paragraph (a). In addition, a person* who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person,* (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]), or who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a prospective client within the meaning of paragraph (a).

[3] 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.

[4] Under paragraph (c), the prohibition in this rule is imputed to other lawyers in a law firm* as provided in rule 1.10. However, under paragraph (d)(1), the consequences of imputation may be avoided if the informed written consent* of both the prospective and affected clients is obtained. See rule 1.0.1(e-1) (informed written consent*). 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. 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 prohibited.

[5] Notice under paragraph (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and the screening procedures employed.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.18
(No Current Rule)
Duties to Prospective Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) reviewed and evaluated ABA Model Rule 1.18 (Duties to Prospective Client) for which there is no California counterpart. In addition, the Commission considered the national standard of ABA Model Rule 1.18. The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rule. In connection with the Commission’s request for 90-day public comment on all of the proposed rules, the Commission reported to the Board that the Commission had determined not to recommend the adoption of Model Rule 1.18.¹

Following consideration of public comment supporting adoption of a version of Model Rule 1.18, the Commission reconsidered its prior decision and has now developed a proposed rule that is recommended for an initial public comment period.

Rule As Issued For 45-day Public Comment

Proposed rule 1.18 is derived from ABA Model Rule 1.18 and imposes duties upon lawyers relating to consultations with prospective clients. In particular, the duty to preserve the confidentiality of information the lawyer acquires during a pre-lawyer/client relationship consultation. Given the historical importance of confidentiality relating to the effective provision of legal services, a rule addressing prospective client duties is appropriate. Although concepts

¹ Among the reasons for that Commission decision were the following.

- (1) The rule is primarily one of guidance for lawyers as to how to conform their communications during a consultation with a person regarding the provision of legal advice or the formation of a possible lawyer-client relationship. It functions less as a disciplinary rule and thus should not be included in a set of disciplinary rules.
- (2) The guidance provided by proposed rule 1.18 is already adequately provided in the Evidence Code, §§ 950 through 962, State Bar Ethics opinions, (e.g., opinions 2003-161 and 2005-168), and case law.
- (3) Paragraph (d)(2), which would permit a lawyer who actually acquired confidential information from a prospective client to be screened, would in effect enable a lawyer in a law firm to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then permit other lawyers in the same firm appear against that person in the very matter in which representation was sought. Permitting screening in a situation that is tantamount to a side-switching conflict is likely to harm public trust and confidence in the legal profession.
- (4) In general, screening without client consent does not protect clients because it cannot be verified by a client. A client should not be forced to accept screening imposed unilaterally by a law firm. A client who has shared confidential information with a lawyer, would feel a sense of betrayal. There is no reason why a prospective client should feel any less sense of betrayal than a former client with whom the prohibited lawyer had formed a lawyer-client relationship. In either situation, the person who retained or consulted with the client has disclosed confidential information and that information should be maintained inviolate subject only to informed consent to do otherwise.

articulated in the rule are already the law in California and do not establish new standards, placing such a rule in the disciplinary rules will alert lawyers to this important duty. The rule will provide lawyers with guidance through a clearly-articulated standard on how to comport themselves during a consultation to protect not only the prospective client but also to protect current clients from losing the lawyer of their choice, thus enhancing public protection and confidence in the legal profession.

Paragraph (a) provides that a person who consults with a lawyer for the purpose of retaining the lawyer or obtaining legal services or advice is a prospective client for purposes of this rule. Paragraph (a) departs from ABA Model Rule 1.18 in that the consultation may be done directly or through an authorized representative. It likewise departs from the model rule by clearly articulating the scope of qualifying consultations so that a prospective client may not simply disclose information in an attempt to disqualify the consulting lawyer from representing an opponent.

Paragraph (b) provides that a lawyer may not use or reveal information learned from a consultation with a prospective client except as permitted by rule 1.9.

Paragraph (c) provides that a lawyer is barred from representing a client with interests adverse to those of the prospective client in the same or substantially-related matter if the lawyer received material confidential information from the prospective client which is material to the matter. An exception to this principal is addressed in paragraph (d). This paragraph departs from the counterpart language in ABA Model Rule 1.18 in that it refers to “material” information rather than the ABA standard of information from a prospective client “that could be significantly harmful” to that person in the matter.

Paragraph (d) provides that when a lawyer has received information prohibiting representation pursuant to paragraph (c), the lawyer may nonetheless continue representation of the affected client if: (1) the prospective client and the affected client provide informed written consent or; (2) the lawyer took steps to avoid exposure to no more information than was necessary to determine if the lawyer could undertake representation of the prospective client and the prohibited lawyer is screened from the case and the prospective client is promptly given written notice regarding compliance with this rule. The screening provision of paragraph (d) balances the need for prospective clients to be secure in their secrets with the need for lawyers to obtain sufficient information to determine whether they should or can accept the representation.

Comment [1], derived in part from ABA Model Rule 1.18, Comment [1], clarifies that the term “prospective client” includes a person’s “authorized representative.” The comment explains that while a prospective client’s information is protected, a law firm may nonetheless accept or continue representation of a client with interests adverse to the prospective client in accordance with paragraph (d). The comment also cites to Evidence Code § 951 and states that the rule is not intended to limit the application of the evidentiary lawyer-client privilege.

Comment [2] is a substantially-truncated version of ABA Model Rule 1.18, Comment [2], which has been supplemented to draw important distinctions about when the rule applies. First, a person who communicates with a lawyer with no reasonable expectation the lawyer is willing to represent the person or provide legal advice is not a prospective client under the rule. Second, a lawyer may expressly disclaim a willingness to consult with a person and that person would not be a prospective client under the rule. Third, a person who communicates with a lawyer without good faith intention to seek legal advice or representation is also not a prospective client under the rule.

Comment [3] is derived from ABA Model Rule 1.18, Comment [4] and cautions lawyers to take care not to expose themselves to more information than is necessary to determine whether to accept the representation.

Comment [4], derived from ABA Model Rule 1.18, Comment [7], but modified to reflect California law (e.g., the requirement of informed written consent), clarifies the application of paragraph (d) and provides how a screened lawyer may be compensated.

Comment [5], derived from ABA Model Rule 1.18, Comment [8], provides the scope of the written notice required pursuant to paragraph (d).

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.18

Commission Drafting Team Information

Lead Drafter: **Dean Zipser**

Co-Drafters: **Lee Harris, Tobi Inlender, Hon. Dean Stout, Mark Tuft**

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.18, from which proposed Rule 1.18 is derived.]¹

Rule 1.18 Duties to Prospective Client

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, 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 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).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

¹ Although there is no rule of professional conduct that incorporates the concept embodied in proposed Rule, Evidence Code § 951 is relevant. Section 951 provides:

951. As used in this article, "client" means 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 him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

See also State Bar Formal Ethics Opns. [2003-161](#) and [2005-168](#).

- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified 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.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed Rule 1.18

Vote: 12 (yes) – 1 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.18

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.18 Duties to Prospective Client

- (a) A person* who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.
- (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code § 6068(e) and rule 1.6 that the lawyer learned as a result of the consultation, except as rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code § 6068(e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:

- (1) both the affected client and the prospective client have given informed written consent,* or
- (2) the lawyer who received the information took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client; and
 - (i) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

Comment

[1] As used in this rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client can be limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Although a prospective client's information is protected by Business and Professions Code § 6068(e) and rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm* is permitted to accept or continue representation of a client with interests adverse to the prospective client. This rule is not intended to limit the application of Evidence Code § 951 (defining "client" within the meaning of the Evidence Code).

[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 reasonable* expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice is not a "prospective client" within the meaning of paragraph (a). In addition, a person* who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person,* (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]), or who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a prospective client within the meaning of paragraph (a).

[3] 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.

[4] Under paragraph (c), the prohibition in this rule is imputed to other lawyers in a law firm* as provided in rule 1.10. However, under paragraph (d)(1), the consequences of imputation may be avoided if the informed written consent* of both the prospective and affected clients is obtained. See rule 1.0.1(e-1) (informed written consent*). 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. 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 prohibited.

[5] Notice under paragraph (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and the screening procedures employed.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.18)

Rule 1.18 Duties to Prospective Client

- (a) A person* who ~~consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter~~, 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 ~~client-lawyer~~lawyer-client relationship ensues, a lawyer who has ~~learned information from~~communicated with a prospective client shall not use or reveal ~~that~~ information protected by Business and Professions Code § 6068(e) and rule 1.6 that the lawyer learned as a result of the consultation, except as rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received ~~information~~ from the prospective client ~~that could be significantly harmful to that person in~~information protected by Business and Professions Code § 6068(e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is ~~disqualified~~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 ~~disqualifying~~ information as defined that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:
 - (1) both the affected client and the prospective client have given informed written consent, ~~confirmed in writing,*~~ or;
 - (2) the lawyer who received the information took reasonable* measures to avoid exposure to more ~~disqualifying~~ information than was reasonably* necessary to determine whether to represent the prospective client; and

- (i) the ~~disqualified~~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 consultations~~As used in this rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client ~~usually are~~can be limited in time and depth and leave both the prospective client and the lawyer free (~~and sometimes required~~)1 to proceed no further. Hence, Although a prospective clients should receive some but not all of the protection afforded clients. Client's information is protected by Business and Professions Code § 6068(e) and rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm* is permitted to accept or continue representation of a client with interests adverse to the prospective client. This rule is not intended to limit the application of Evidence Code § 951 (defining "client" within the meaning of the Evidence Code).

[2] ~~A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person~~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, and is thus not a "prospective client."~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer~~lawyer-client relationship or provide legal advice~~ is not a "prospective client."¹ within the meaning of paragraph (a). In addition, a person* who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person,* (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]), or who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a prospective client within the meaning of paragraph (a).

[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.

[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 ~~consultation~~interview to only such information as reasonably* appears necessary for that purpose. ~~Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.~~

[5] A lawyer may condition a consultation 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.

[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.

[7] Under paragraph (c), the prohibition in this rule is imputed to other lawyers in a law firm* as provided in rule 1.10, ~~but~~. However, under paragraph (d)(1), the consequences of imputation may be avoided if the ~~lawyer obtains the~~ informed written consent*, confirmed in writing, of both the prospective and affected clients is obtained. See rule 1.0.1(e-1) (informed written consent*). In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all ~~disqualified~~prohibited 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~~prohibited.

[8] Notice, including under paragraph (d)(2)(ii) must include 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.~~

~~[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.~~

V. RULE HISTORY

Although the origin and history of Model Rule 1.18 was not the primary factor in the Commission's consideration of proposed Rule 1.18, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 397 - 406, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. Neither this proposed rule nor proposed Rule 1.0 defines "materially adverse" or why the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawyers and makes it more difficult to prosecute a violation.

Commission Response: The term "materially adverse" is not intended to be given a one-size-fits-all construction and is not susceptible to a simple blackletter definition. As in the case of other rules using the same term (e.g., Rule 1.9), the term must be applied in a manner that appreciates the particular facts and circumstances of the matters under consideration. This is the case in the jurisdictions that have adopted a version of this rule. Generally, ethics opinions provide explanatory guidance on applying the term. (See, e.g., New York City Bar Ass'n Op. 2013-01 (10/1/13); see also New York State Bar Ass'n Op. 1103 (7/15/2016) (applying the term in the context of NY Rule 1.9). The Commission anticipates that a similar approach to clarifying the term would be the case in California.

2. OCTC is concerned about the use of the term "knowingly" in paragraph (c) and in the other conflict rules.

Commission Response: The term "knowingly" is a defined term in Rule 1.0.1(f) and includes the concept that "[a] person's knowledge may be inferred from circumstances." The Commission believes this is the appropriate standard for paragraph (c) of this rule.

- **State Bar Court:** No comments received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 45-day public comment period, seven public comments were received. Four comments agreed with the proposed rule, one comment disagreed, and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Duty to Protect Confidential Information of Prospective Client. Model Rule 1.18 imposes a duty on lawyers to protect information disclosed during a consultation by a prospective client. California does not have a similar rule but Evidence Code § 951 defines client to mean "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 him in his professional capacity." Section 951 does not require that a lawyer-client relationship ensue. See also Cal. State Bar Ethics Op. 2003-161. (See proposed Rule 1.18 Materials, attached.)

- CAL 2003-161 (Duties owed a prospective client)

As noted in rule 3-100, Comment [2], the duty of confidentiality encompasses the lawyer-client privilege, the work product doctrine, and ethical standards of confidentiality.

a. Lawyer-Client Privilege. Unlike most jurisdictions in which the attorney-client privilege is created by common law, the lawyer-client privilege in California is a creation of statutory law. See Evidence Code §§ 951-962. It applies only to lawyer-client communications where the client has consulted the lawyer in the latter's professional capacity to secure legal service or advice. (Evid. Code §§ 951, 952). The lawyer-client privilege is a narrow evidentiary privilege that protects a client (and the client's lawyer) from being compelled to disclose privileged communications. (Evid. Code §§ 954, 955). The privilege can be waived. (Evid. Code § 912.) There are statutorily-created exceptions to the lawyer-client privilege. (Evid. Code §§ 956-962). A court cannot create, limit or expand a privilege in California. (See, e.g., *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 739; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 67.)

b. Duty of Confidentiality. As noted above, the duty of confidentiality is set forth in Business & Professions Code § 6068(e)(1). It is much broader than the lawyer-client privilege, which is limited to communications between client and lawyer for the purpose of obtaining legal services or advice from a lawyer in the latter's professional capacity. The duty applies to information acquired by virtue of the

representation of a client, regardless of its source. It includes not only privileged information but also information that is likely to be embarrassing or detrimental to the client, or that the client has requested be kept confidential. (E.g., *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179). Even information in the public record that is not easily discoverable is protected by the duty. (*Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. 179).

Duty of Confidentiality and Lawyer-Client Privilege Compared. The duty of confidentiality overlaps with the evidentiary lawyer-client privilege. The scope of the duty is broader than the privilege in three key respects. *First*, the duty encompasses more information than privilege because the latter is confined to the statutorily defined concept of a “confidential communication” (see Evid. Code § 952 for the definition of a “confidential communication” between a “lawyer” (see Evid. Code § 950 for the definition of “lawyer”) and a “client” (see Evid. Code § 951 for the definition of “client”). For example, the duty encompasses information acquired by virtue of the lawyer-client relationship regardless of the source of that information. *Second*, the duty applies beyond the limited context of an evidentiary setting where a judicial officer is making a decision on whether information may be admitted into evidence. For example, a lawyer who is preparing advertising material may not use information protected by the duty without the client’s consent. *Third*, exceptions to the privilege do not function as an exception to the duty (but see, Evid. Code § 956.5 that provides for an exception that is coextensive with the exception in Bus. & Prof. Code § 6068(e)(2)).

Other Points About the Duty. The duty of confidentiality is a disciplinary standard and lawyers have been subject to discipline for violating the duty. (See, e.g., *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 and *Dixon v. State Bar* (1982) 32 Cal.3d 728.) A violation of the duty may also give rise to non-disciplinary consequences. (See, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256].)

Other laws in California relate, and refer, to the duty. For example, the State Bar Act expressly states that a written fee contract shall be deemed to be confidential under the duty (see Bus. & Prof. Code § 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code § 6453).

c. Attorney Work-Product. In California, attorney-work product is governed by statute. (Code Civ. Proc. §§ 2018.010-2018.080). “A writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.” § 2018.030(a). Any other work product of an attorney “is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party’s claim or defense or will result in an injustice.” § 2018.030(b).

Duty of Confidentiality and Work-Product Compared. There is also overlap between the protection afforded by the duty of confidentiality and the attorney work-product protection. The duty is broader in both scope and function. For example, the duty is not limited to the discovery of a writing that reflects an attorney's impressions, conclusions, opinions, research or theories (see Code of Civ. Proc. § 2018.030). Also, the exceptions to the work-product doctrine do not function as exceptions to the duty (but see, Code of Civ. Proc. § 2018.050 providing for a crime or fraud exception that might in some circumstances be coextensive with the exception in Bus. & Prof. Code § 6068(e)(2)).

B. ABA Model Rule Adoptions

- **Model Rule 1.18.** The ABA State Adoption Chart for Model Rule 1.18, entitled "Variations of the ABA Model Rules of Professional Conduct Rule 1.18," revised December 9, 2016, is available at:
- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_18.authcheckdam.pdf (Last accessed on 2/7/17)

Model Rule 1.18 was adopted by the ABA in 2002 as part of the Ethics 2000 Commission's comprehensive review of the Model Rules. The rule was amended in 2012 as part of the Ethics 20/20 Commission's review of the Model Rules to determine if any further changes to the Model Rules were warranted in light of the increase in cross-border practice and in the use of technology in providing legal services.²

Every jurisdiction except California and six others³ has adopted some version of ABA Model Rule 1.18. Nine jurisdictions have adopted the 2012 rule verbatim,⁴ ten adopted the 2002 version verbatim and have not since amended their rules,⁵ nineteen

² The 2012 amendments were made to paragraphs (a) and (b) as follows:

- (a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with learned information from~~ learned in the consultation a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

³ The six jurisdictions that have not adopted any version of Model Rule 1.18 are: Alabama, Georgia, Michigan, Mississippi, Texas and Virginia.

⁴ The nine jurisdictions that have adopted the 2012 version of the Model Rule verbatim are: Delaware, Iowa, Kansas, Louisiana, Massachusetts, Montana, New Mexico, Oregon and West Virginia.

⁵ The ten jurisdictions are: Alaska, Indiana, Kentucky, Maine, Nebraska, Oklahoma, Rhode Island, South Dakota, Utah and Wisconsin.

jurisdictions have adopted a version of the rule that is a substantially similar variation of the Model Rule,⁶ and six have a substantially modified version of Model Rule 1.2.⁷

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. **General:** Recommend adoption of a rule patterned on Model Rule 1.18 that sets forth duties owed to a prospective client, which is defined as a person who consults with a lawyer in the lawyer's capacity as such for the purpose of obtaining legal services or advice.
 - o **Pros:** There are a number of reasons for recommending the adoption of proposed Rule 1.18:
 - (1) Although the Rules of Professional Conduct historically have not addressed duties owed to a prospective client, being limited to duties owed current and former clients, in certain circumstances a lawyer will incur duties to a prospective client, in particular a duty to preserve the confidentiality of information the lawyer acquires during a pre-lawyer-client relationship consultation. Given the historical importance of confidentiality to the effective provision of legal services, a rule addressing prospective client duties is appropriate. Placing such a rule in the disciplinary rules will alert lawyers to this important duty, thus enhancing compliance and facilitating enforcement, provide important public protection, and should also promote confidence in a legal profession that honors the confidential information of any person that consults with a lawyer, in turn promoting respect for the administration of justice.
 - (2) Proposed Rule 1.18 would be one of the several proposed rules that follow the ABA approach of addressing confidentiality as it applies to current (Rules 1.6, 1.8.2), former (Rule 1.9(c)), and prospective (this Rule, 1.18) clients in several distinct rules. Together these rules provide detailed guidance about the duty of confidentiality by establishing clear standards regarding a lawyer's use or disclosure of confidential information.
 - (3) Proposed Rule 1.18 would also be one of several rules that similarly follow the ABA approach of addressing conflicts of interest between and among clients or prospective clients in several separate rules, i.e., Rule 1.7

⁶ The nineteen jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Maryland, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont and Wyoming.

⁷ The six jurisdictions are: District of Columbia, Nevada, New Jersey, New York, North Dakota and Washington.

(Conflict Of Interest: Current Clients); Rule 1.8.6 (Compensation From One Other Than Client); Rule 1.8.7 (Aggregate Settlements); Rule 1.9 (Duties To Former Clients); Rule 1.10 (Imputation Of Conflicts of Interest: General Rule); Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees); and Rule 1.12 (conflicts of interest involving a former judge, arbitrator, mediator or other third-party neutral).

- (4) 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://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=Insc9IfZpdQ%3d&tabid=838> [last visited 5/16/16]. It will not establish a new standard but will provide guidance to lawyers through a clearly articulated standard on how to comport themselves during a consultation to protect not only the prospective client but also to protect the lawyer's current clients from losing the lawyer of their choice.
- (5) The screening provision of paragraph (d) balances the need for prospective clients to be secure in their secrets and the need for lawyers to obtain sufficient information to determine whether they should – or even can – accept the representation.
- (6) The court in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, which involved a prospective client fact pattern, effectively held that ethical screens provided an appropriate balance between the needs of prospective and current clients. Moreover, the California Supreme court implied that an unconsented ethical screen might even be permitted in cases where a lawyer has obtained material information from an opposing party in the very matter at issue. See *People ex rel Dept. of Corporations v. SpeeDee Oil Exchange Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1154.
- (7) The protection of the client's information is broader than that provided under the Model Rule; the proposed rule protects not only confidential information learned during a consultation but also that information that a lawyer might learn as a result of the consultation, e.g., through subsequent investigation.
- (8) Language derived from California case law concerning conflicts of interest ("material" information) has been substituted in paragraph (c) for imprecise model rule language ("significantly harmful") so as to remove ambiguities regarding the rule's application and to enhance compliance and enforcement.

- (9) Nearly every jurisdiction has adopted a version of Model Rule 1.18, first adopted by the ABA in 2002.
- Cons: There are several reasons not to recommend adoption of a counterpart to Model Rule 1.18.
 - (1) The rule is primarily one of guidance for lawyers as to how to conform their communications during a consultation with a person regarding the provision of legal advice or the formation of a possible lawyer-client relationship. It functions less as a disciplinary rule and thus should not be included in a set of disciplinary rules.
 - (2) In any event, the purported guidance provided by proposed Rule 1.18 is already adequately provided in the Evidence Code, §§ 950 through 962, State Bar Ethics opinions, (e.g., Cal. State Bar Formal Opn. Nos. [2003-161](#) and [2005-168](#)), and case law.
 - (3) Paragraph (d)(2), which would permit a lawyer who actually acquired confidential information of a prospective client to be screened would enable other lawyers in the screened lawyer's firm to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought. Even if the other, non-screened firm lawyers had not been exposed to the prospective client's information in a consultation, this has the potential to cause great harm to the legal services consuming public.
 - (4) Screening without client consent does not protect clients because it cannot be verified by a client. A client should not be forced to accept screening imposed unilaterally by a law firm. A client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal. There is no reason why a prospective client should feel any less sense of betrayal than a former client with whom the prohibited lawyer had formed a lawyer-client relationship. In either situation, the person who retained or consulted with the client has disclosed confidential information and that information should be protected.
2. Recommend adoption of Model Rule 1.18(a), as revised to substitute (i) "for purpose of" for "about the possibility of" and (ii) "or securing legal advice" for "with respect to the matter," and include other language derived from Cal. Evid. Code § 951.
- Pros: The first change clarifies that the person communicating with the lawyer must have come with the purpose of forming a relationship or seeking legal advice and not simply to disclose information in an attempt to disqualify the consulting lawyer from representing the opponent. The second change clarifies that a lawyer-client relationship need not be formed for the duty of

confidentiality to be imposed on the lawyer. These changes bring the Model Rule provision in line with the California Evidence Code. (See Evid. Code § 951.)

- Cons: None identified.
3. Recommend adoption of Model Rule 1.18(b), as revised to include a reference to the source of confidentiality in California (§ 6068(e) and Rule 1.6) to clarify what communicated information is at stake and expressly qualifying such information by the clause “that the lawyer has learned as a result of the representation.”
- Pros: The protection of the client’s information is broadened by these changes than that provided under the Model Rule; the proposed rule protects not only confidential information learned during a consultation but also that information that a lawyer might learn as a result of the consultation, e.g., through subsequent investigation. The references to § 6068(e) and Rule 1.6 clarifies precisely what information that might be gleaned as a result of the consultation is at stake and is to be protected under this Rule.
 - Cons: None identified.
4. Recommend adoption of Model Rule 1.18(c), as revised, but include a reference to the source of confidentiality in California (§ 6068(e) and Rule 1.6) to clarify what communicated information is at stake and substitute “material to the matter” for the Model Rule’s clause, “significantly harmful to that person.” Further, substitute “prohibited” for “disqualified.”
- Pros: The phrase “material to the matter,” language derived from California case law concerning conflicts of interest, is an appropriate substitution for the imprecise and undefined model rule language (“significantly harmful to that person”) and removes ambiguities regarding the rule’s application and to enhance compliance and enforcement. The substitution of “prohibited” for “disqualified” reflects the primary nature of the proposed rule as a disciplinary rather than a civil disqualification standard, and clarifies that actual disqualification is not a prerequisite to a finding that the rule was violated.
 - Cons: The substitution of “prohibited” for “disqualified” is a meaningless change as courts will rely on the proposed rule in disqualification motions just as they cite to the provisions of current rule 3-310 when confronted with a disqualification motion now.
5. Recommend adoption of Model Rule 1.18(d), as revised, which provides that a law firm may continue to represent a current or new client (“affected client”) in the same matter under two conditions: (i) both the prospective client and affected client provide informed written consent; or (ii) the law firm erects a timely screen, notice is promptly provided the prospective client. Importantly, it is specified that the written notice “enable the prospective client to ascertain

compliance with the provisions of this Rule," thus providing clear guidance as to the scope of notice that must be provided. (See paragraph IX.A.6, below.)

- Pros: As noted, [see paragraph 1, "Pros" Nos. (5) & (6)], permitting screening of a lawyer who is prohibited because of information acquired from a consultation with a prospective client, strikes the appropriate balance between the interests of the prospective client in the confidentiality of that person's information and a law firm's clients' ability to retain his or her lawyer of choice.
 - Cons: See Section IX.A.1, "Cons" Nos. (3) and (4).
6. Recommend adoption of five Comments derived from Model Rule 1.18: Comment [1], derived in part from Model Rule 1.18, Cmt. [1] and the first Commission's proposed Rule 1.18, clarifies that the term "prospective client" includes a person's "authorized representative" (as expressly provided in Evid. Code § 951) and states the rule is not intended to limit the application of § 951.

Comment [2], a substantially truncated version of Model Rule 1.18, Cmt. [2], which has been supplemented to draw important distinctions about when the rule applies: (i) a person who communicates with a lawyer with no reasonable expectation the lawyer is willing to represent the person or provide legal advice is not a prospective client; (ii) a lawyer may expressly disclaim a willingness to consult with the person; and (iii) a person who communicates with the lawyer without a good faith intention to seek legal advice or representation is also not a prospective client.

Comment [3], derived from Model Rule 1.18, Cmt. [4], cautions lawyers to take care not to expose themselves to more information than necessary to determine whether to accept the representation, such conduct being a prerequisite to the implementation of an ethical screen. (See introductory clause of paragraph (d).)

Comment [4], derived from Model Rule 1.18, Cmt. [7], but modified to reflect California law, (e.g., the requirement of "informed written consent"), clarifies the application of paragraph (d). The last sentence provides interpretative guidance regarding the application of paragraph (d)(2)(i).

Comment [5], derived from Model Rule 1.18, Cmt. [8], delimits the scope of notice required under paragraph (d)(2)(ii). The last clause has been deleted as repetitive of the rule.

- Pros: All of the proposed Comments explain how the rule should be interpreted or applied, the appropriate function of Comments in the Rules.
- Cons: Some of the Comments restate the rule or state the obvious:

Comment [3] is simply another way of stating the requirement stated in the introductory clause of paragraph (d).

Comment [4] could be reduced to a simple reference to Rule 1.0.1(k).

Comment [5]'s substance belongs in the black letter of the rule as part of paragraph (d)(2)(ii).

B. Concepts Rejected (Pros and Cons):

1. Recommend that paragraph (d)(2)(ii) require only that the prospective client be informed about the fact of a screen rather than be given notice.
 - o Pros: The prospective client is not being represented by the lawyer with respect to the screening and this militates against a broad and detailed notice requirement that might mislead that person into believing that the lawyer is acting in their best interests. If notice is required then the Rule or Comment should expressly require that the lawyer inform the prospective client that the lawyer is not representing them and that prospective client should seek an independent lawyer for legal advice in connection with the screening.
 - o Cons: Simply informing the prior prospective client about the fact of the screen is inadequate information.
2. Recommend adoption of a new paragraph (d)(2)(iii), which has no counterpart in the Model Rule and is derived from Colorado Rule 1.10(d)(4), and which imposes a duty on lawyers in the screening firm to "reasonably believe" that the screen will effectively prevent disclosure of protected information to the firm or the affected client.
 - o Pros: Including this clause, as is also being recommended by the 3-310 the Commission for inclusion in the screening provisions of proposed Rules 1.10, 1.11 and 1.12, provides an objective standard ("reasonably believes") for testing the effectiveness of the screen. It has been included for two reasons: *First*, it provides a better test of the an ethical screen's effectiveness than does Model Rule 1.10(a)(2)(iii)'s requirement that requires the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client "certifications of compliance with the Rules and with the screening procedures" with which the former client has been provided as required by Rule 1.10(d)(2)(ii). The imposition of an objective standard ("reasonably believe") is more protective of a prospective client's interests than the Model Rule's formulaic requirement of providing "certifications" at "reasonable intervals." As provided in proposed Rule 1.0.1(l), "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." That the lawyers' reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not,

then the partner's decision would be a "reasonable resolution of an arguable question of professional duty," so there would be no conflict with Rule 5.2(b) as posited in the "Cons," below. Second, there is no reason why the screening provision in a rule addressing a lawyer's duty to protect the confidential information of a prospective client should be any different from the screening requirements in a rule that protects the confidentiality interests of a former client.

- Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission's proposed Rule 5.2(b) is unclear. Proposed Rule 5.2(b) provides that: "A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm's screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Although the concept of proposed Rule 1.18 exists in current law, e.g., Evidence Code § 951, case law, (e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]; *Barton v. United States District Court*, 410 F.3d 1104 (9th Cir. 2005)), and ethics opinions (State Bar Formal Ops. 2003-161 and 2005-168), the proposed rule would nevertheless be a substantive change in that the concept is now being included as a disciplinary rule.

D. Non-Substantive Changes to the Model Rule:

1. Substituting the term "lawyer" for "member".
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - **Pros:** It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - **Cons:** There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.18 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.18 in the form attached to this Report and Recommendation.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.18(d)(2)**

This message states my dissent from proposed Rule 1.18(d)(2), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

I generally support proposed Rule 1.18. It is consistent with Evid. C. § 951 and related case law, and I believe that placing in the Rules a lawyer's confidentiality duty to prospective clients will make the point more accessible to lawyers and enhance client protection. I nevertheless dissent from this proposal as to proposed paragraph (d)(2).

Proposed paragraph (c) generally prohibits a representation adverse to a person who provided material confidential information to a lawyer while seeking to hire the lawyer. As a general rule, when a lawyer has a conflict based on confidentiality or loyalty obligations, the prohibition applies to all firm lawyers (and this is stated correctly in the second sentence of proposed paragraph (c)).¹

Proposed paragraph (d)(2) would create an exception, permitting the personally prohibited lawyer's firm to accept the adverse representation by creating a non-consensual ethics screen designed to separate the personally prohibited lawyers from the balance of the firm. That paragraph has a threshold requirement that the personally prohibited lawyer "took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client"

Most Rule 1.18 situations will have no need for the proposed paragraph (d)(2) exception because it is common practice for lawyers to limit their initial communications with prospective clients to basic information needed to check for possible conflicts of interest. For example, if a prospective client calls a lawyer because "I've been sued by Mr. X", the lawyer can determine that the firm represents Mr. X, decline the engagement, and have no resulting conflict of interest because the lawyer obtained no confidential information.²

What, then, might be involved in a lawyer obtaining information beyond the identities of the parties or participants, but that would come within the standard of avoiding

¹ The imputed knowledge rule generally presumes that client confidential information obtained by one lawyer in a law firm is deemed to be possessed by all other lawyers in the firm. This presumption "is based on the common-sense notion that people who work in close quarters talk with each other, and sometimes about their work." *Elan Transdermal v. Cygnus Therapeutic Systems*, 809 F. Supp. 1383, 1390 (N.D. Cal. 1992); *Rosenfeld Construction Co. v. Superior Court*, 235 Cal. App.3d 566, 573 (1991); and *Chadwick v. Superior Court*, 106 Cal. App.3d 108, 116 (1980).

² One example of this self-discipline is that many law firm web sites permit a reader to email a firm lawyer but direct the reader to not disclose any confidential information.

“exposure to more information than was reasonably* necessary to determine whether to represent the prospective client”? Here are a few examples:

- A prospective client’s ability to pay fees and litigation costs often is important, and in that situation firms can insist on obtaining detailed financial information about the prospective client “to determine whether to represent the prospective client”. This could include asset and income information, business or employment prospects, and the availability of family members or others to assure payment of fees and costs.
- A lawyer sometimes wants to be certain that the client does not have unreasonable expectations about the representation and can be expected to handle settlement negotiations and other litigation aspects in a practical way. This would cause the lawyer to dig into the client’s motivations. To take one example, a lawsuit intended for strategic business purposes could make the prospective client rigid and cause the client to insist on litigation tactics with which the lawyer might not be comfortable.
- Some representations depend on the client’s credibility, particularly in litigation heavily dependent on disputed findings. A lawyer in that situation can be expected to draw out the prospective client to take the client’s measure as a witness. This also could involve inquiry about other potential witnesses and other sources of relevant information.

The lawyer in any of these situations might spend hours with the prospective client, and might learn private business, financial and personal information of the most sensitive sort, but still qualify for the paragraph (d)(2) exception because the lawyer avoided “exposure to more information than was reasonably* necessary to determine whether to represent the prospective client.” That prospective client then would be faced with an adversary armed with all that confidential information in what, as one commenter pointed out, amounts to side-switching – the clearest and most serious confidentiality violation.

Non-consensual side-switching is problematic. One reported California appellate opinion that permits it, *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776 (2010), presents a rare factual situation. It remains to be seen how the appellate courts will deal with non-consensual screening in varying factual settings. The fundamental problem with unconsented screening is that the prospective client cannot object to the screen and has no way to verify that the prospective client’s confidential information is not available to the lawyers representing the prospective client’s current adversary.

One of the goals of the standards governing lawyer conduct is to engender client trust in lawyers and in their advice. Appropriate legal advice guides clients in lawful conduct, which protects the clients’ interests, avoids injuries to others, prevents disputes, and reduces the burden on the courts. Quite obviously, a lawyer can supply full and reliable legal advice only if the client fully discloses all potentially relevant information to the lawyer, and a client will do that only if the client trusts the lawyer to not misuse the

client's information. A lawyer operating without a command of the facts will supply incomplete, misleading, and even incorrect advice to the client. Without that trust, clients will not fully disclose themselves, as a result will not receive full and reliable advice, and won't trust the advice they do receive. Appellate courts considering non-consensual screening will need to consider whether the practice interferes with these goals.

It also is important that proposed paragraph (d)(2) would create a rigid disciplinary standard that, for example, would apply to all firms without regard to size or organization. See *Filippi v. Elmont Union Free School Dist. Bd. of Educ.*, 722 F. Supp. 2d 295, 307-08 (E.D.N.Y. 2010) (screening rejected because firm had only six lawyers and citing other cases in which screening was rejected due to firm size, one being a fifteen-lawyer firm) and *Hitachi, Ltd. v. Tatung Co.*, 419 F. Supp. 2d 1158, 1165 (N.D. Cal. 2006) (where court determined ethics screen insufficient because the matter was being handled by one of six members of an intellectual property group in an office of a large firm and the tainted member was one of the six members in the same office). This proposed rigid system also would apply without regard to the sensitivity of the information obtained by the screened lawyer. See, e.g., *Energy Intelligence Grp., Inc. v. Cowen & Co., LLC*, 2016 U.S. Dist. LEXIS 92176, *11 (S.D.N.Y. 2016).

For these reasons, I respectfully dissent from proposed Rule 1.18(d)(2) and would leave the topic of non-consensual screening to development by the courts.

**Commission's Response to Dissent Submitted by Robert Kehr
on the Recommended Adoption of Proposed Rule 1.18(d)(2)**

Paragraph (d)(2) strikes a proper balance between the obligation to protect confidential information received from a prospective client and allowing clients access to other lawyers in the firm who have had no contact with the prospective client or exposure to the prospective client's information. The rules adopted in 36 states plus the District of Columbia as well Restatement Third the Law Governing Lawyers §15 (ALI 2000) permit ethical screening as a way of avoiding imputation when limited confidential information is imparted by a prospective client. The rule has been shown to enhance public protection by establishing clear and enforceable standards regarding the obligation to protect a prospective client's confidential information while permitting consumers access to legal services. California's experience with ethical screens in other contexts (e.g., experts, non-attorney employees, former judges, lawyers moving in and out of government service) has proven to be effective. See *Kirk v. First American Title Ins. Co.*(2010) 183 Cal. App. 4th 776, 803.

Paragraph (d)(2) allows imputation to be removed only if the prohibited lawyer limited the information learned to what was reasonably necessary to determine whether to represent the would-be client and the prohibited lawyer is timely screened from participation in the matter. Without the ability to remove imputation in this manner, prospective clients would have the same right as former clients to prevent other lawyers

in the firm from undertaking a subsequent adverse representation over their objection. The Commission believes that removing paragraph (d)(2) would be inconsistent with case law and would unreasonably restrict the right of clients to counsel of their choice.

The provisions of Rule 1.18 reflect the realities of modern practice. Lawyers and law firms are routinely contacted, electronically and otherwise, by prospective clients. Every consultation by a lawyer with a putative client should not expose law firms of various sizes and geographical locations to imputation of the prohibited lawyer's conflict. Under paragraph (d)(2) the lawyer consulting with the prospective client bears the burden of showing that the lawyer took "reasonable" (see Rule 1.0.1(h)) measures to limit the amount of information learned to that which was reasonably necessary to determine whether to accept the representation. Other lawyers in the firm seeking to undertake the subsequent adverse representation bear the burden of showing the timely imposition of adequate procedures to isolate the prohibited lawyer and protect the prospective client's confidential information. (see Rule 1.0.1(k)). Thus, the various scenarios posited by the dissenter may or may not permit the removal of imputation under paragraph (d)(2) depending on the circumstances in a particular case.

It is not correct that a prospective client would be forced to accept screening imposed unilaterally by a law firm and would have no way to verify that the prospective client's confidential information is adequately protected. The Commission believes it has addressed these concerns by modifying paragraph (d)(2)(ii) to impose the same written notice requirements that are required in proposed Rule 1.11(b)(2) and Rule 1.12(c)(2) in order to allow the prospective client to be able to ascertain compliance with the provisions of the rule.

The proposed rule does not create a risk of "side switching" as that concept has been articulated in case law. There is no prospect of side switching in the case of a prospective client because by definition no lawyer-client relationship ensues from the initial consultation and, therefore, the other lawyers in the firm are not changing sides in the same or a substantially related matter.