



The State Bar of California

Rule 1.18 Duties to Prospective Client (Rule Approved by the Supreme Court, Effective November 1, 2018)

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

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 section 6068, subdivision (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 section 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.

**NEW RULE OF PROFESSIONAL CONDUCT 1.18
(No Former 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

However, following consideration of public comment that had been received during the 90-day public comment period that supported California’s adoption of a version of Model Rule 1.18, the Commission reconsidered its prior decision and developed a proposed rule that was initially circulated during the 45-day 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

¹ Among the reasons for the Commission initial decision not to recommend a rule counterpart to Model Rule 1.18 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.

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 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 (Duties to Former Clients).

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 principle 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 a 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 Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the 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. A member of the Commission submitted a dissent to this rule that can be found following the Report and Recommendation.

The Board adopted proposed rule 1.18 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. A stylistic change was made in the title of the rule. In Comment [2], an unnecessary comma was deleted. In Comment [4], citation style was revised to conform to the California Style Manual. An omitted asterisk for a defined term was added.