

1 (As proposed by the Standing Committee on Legal Ethics on April 26, 2009)

2 **Rule 1.18 Duties To Prospective Client**

3 (a) A person who discusses with a lawyer the possibility of forming a client-
4 lawyer relationship with respect to a matter is a prospective client.

5 (b) Even when no client-lawyer relationship ensues, a lawyer who has had
6 discussions with a prospective client shall not use or reveal information learned in
7 the consultation, except as Rule 1.9 would permit with respect to information of a
8 former client.

9 (c) A lawyer subject to paragraph (b) shall not represent a client with
10 interests materially adverse to those of a prospective client in the same or a
11 substantially related matter if the lawyer received information from the prospective
12 client that could be significantly harmful to that person in the matter, except as
13 provided in paragraph (d). If a lawyer is disqualified from representation under this
14 paragraph, no lawyer in a firm with which that lawyer is associated may knowingly
15 undertake or continue representation in such a matter, except as provided in
16 paragraph (d).

17 (d) When the lawyer has received disqualifying information as defined in
18 paragraph (c), representation is permissible if:

19 (1) both the affected client and the prospective client have given
20 informed consent, confirmed in writing, or

21 (2) the lawyer who received the information took reasonable measures
22 to avoid exposure to more disqualifying information than was reasonably
23 necessary to determine whether to represent the prospective client; and

24 (i) the disqualified lawyer is timely screened from any
25 participation in the matter and is apportioned no part of the fee
26 therefrom; the disqualified lawyer reasonably believes that the screen
27 would be effective to sufficiently protect information that could be
28 significantly harmful to the prospective client; and

29 (ii) written notice that includes a general description of the
30 subject matter about which the lawyer was consulted and the
31 screening procedures employed is promptly given to the prospective
32 client.

33 **COMMENT**

34 [1] Prospective clients, like clients, may disclose information to a lawyer, place
35 documents or other property in the lawyer's custody, or rely on the lawyer's advice. A

36 lawyer's discussions with a prospective client usually are limited in time and depth and
37 leave both the prospective client and the lawyer free (and sometimes required) to proceed
38 no further. The principle of loyalty diminishes in importance if the sole reason for an
39 individual lawyer's disqualification is the lawyer's initial consultation with a prospective
40 new client with whom no client-lawyer relationship is formed, either because the lawyer
41 detected a conflict of interest as a result of an initial consultation, or for some other
42 reason (e.g., the prospective client decided not to retain the firm). Hence, prospective
43 clients should receive some but not all of the protection afforded clients.

44 [2] Not all persons who communicate information to a lawyer are entitled to
45 protection under this Rule. A person who communicates information unilaterally to a
46 lawyer, without any reasonable expectation that the lawyer is willing to discuss the
47 possibility of forming a client-lawyer relationship, is not a "prospective client" within the
48 meaning of paragraph (a).

49 [3] It is often necessary for a prospective client to reveal information to the lawyer
50 during an initial consultation prior to the decision about formation of a client-lawyer
51 relationship. The client may disclose such information as part of the process of
52 determining whether the client wishes to form a client-lawyer relationship. The lawyer
53 often must learn such information to determine whether there is a conflict of interest with
54 an existing client and whether the matter is one that the lawyer is willing to undertake.
55 Paragraph (b) prohibits the lawyer from using or revealing that information, except as
56 permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the
57 representation. The duty exists regardless of how brief the initial conference may be.

58 [4] In order to avoid acquiring disqualifying information from a prospective
59 client, a lawyer considering whether or not to undertake a new matter should limit the
60 initial interview to only such information as reasonably appears necessary for that
61 purpose. Where the information indicates that a conflict of interest or other reason for
62 non-representation exists, the lawyer should so inform the prospective client or decline
63 the representation. If the prospective client wishes to retain the lawyer, and if consent is
64 possible under Rule 1.7, then consent from all affected present or former clients must be
65 obtained before accepting the representation.

66 [5] A lawyer may condition conversations with a prospective client on the
67 person's informed consent that no information disclosed during the consultation will
68 prohibit the lawyer from representing a different client in the matter. If the agreement
69 expressly so provides, the prospective client may also consent to the lawyer's subsequent
70 use of information received from the prospective client.

71 [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not
72 prohibited from representing a client with interests adverse to those of the prospective
73 client in the same or a substantially related matter unless the lawyer has received from the
74 prospective client information that could be significantly harmful if used in the matter
75 and the lawyer believes that an effective screen could not be engaged to protect the client.

76 [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers
77 as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the
78 lawyer obtains the informed consent, confirmed in writing, of both the prospective and
79 affected clients. In the alternative, imputation may be avoided if the conditions of
80 paragraph (d)(2) are met and all disqualified lawyers are timely screened and written
81 notice is promptly given to the prospective client and the lawyer reasonably believes that
82 an effective screen will protect the confidential information of the prospective client.
83 Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or
84 partnership share established by prior independent agreement, but that lawyer may not
85 receive compensation directly related to the matter in which the lawyer is disqualified.

86 [8] Notice, including a general description of the subject matter about which the
87 lawyer was consulted, and of the screening procedures employed, generally should be
88 given as soon as practicable after the need for screening becomes apparent.

89 [9] For the duty of competence of a lawyer who gives assistance on the merits of a
90 matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective
91 client entrusts valuables or papers to the lawyer's care, see Rule 1.15.