

**RULE 1.18:  
DUTIES TO PROSPECTIVE CLIENTS**

**Executive Summary**

Proposed Rule 1.18 concerns the important events that occur in the period during which a lawyer and a prospective client are considering whether to form a lawyer-client relationship. Those events often give rise to certain duties of the lawyer to the prospective client that are not adequately dealt with in New York's Disciplinary Rules or, prior to 2002, in the ABA Model Rules of Professional Conduct. The Proposed Rule, which is substantially identical to current ABA Rule 1.18, provides guidance in dealing with prospective clients and provides for discipline if a lawyer violates one of the limited duties owed to prospective clients. Paragraph (a) of the Proposed Rule defines a "prospective client." Paragraph (b) recognizes that the duty of confidentiality extends to information received from prospective clients. Paragraph (c) and (d) govern the conflict of interest issues that arise when a lawyer subsequently takes an adverse position against a former prospective client in the same or a substantially related matter.

**Text of Proposed Rule and COSAC Explanation**

<b>RULE 1.18: DUTIES TO PROSPECTIVE CLIENT</b>	<b>COSAC COMMENTARY</b>
<p>(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.</p> <p>(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.</p>	<p>Proposed Rule 1.18 is identical to ABA Rule 1.18 (2002) except for the reference to the applicable screening procedures of Rule 1.10 in ¶ (d)(2)(i). There is no direct counterpart in New York's Disciplinary Rules.</p> <p>¶ (a) defines the limited application of the Rule by defining who qualifies as a "prospective client."</p> <p>¶ (b) states a lawyer's duty to treat all communications with a prospective client as confidential, a well-settled proposition under the law of attorney-client privilege.</p>

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

(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

(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 in accordance with the requirements of Rule 1.10; and

(ii) written notice is promptly given to the prospective client.

¶ (c) extends the application of Rule 1.9 to prohibit representation adverse to the prospective client in the same or a substantially related matter, but, unlike Rule 1.9, is applicable only when the information received from the prospective client could be "significantly harmful" to that person in the later representation.

¶ (d) is identical to ABA ¶ (d) except that clause (2)(i) is changed to provide that "the disqualified lawyer is timely screened from any participation in the matter in accordance with the requirements of Rule 1.10 and is apportioned no part of the fee therefrom." The italicized language added to make it clear that the screening procedures of Rule 1.10 are applicable. In general, ¶ (d) provides that the prohibition imposed by this Rule can be waived with the informed consent, confirmed in writing, of both the former prospective client and the client on whose behalf the lawyer later plans to take action adverse to the former prospective client. The application of this conflict of interest provision is governed by the standards stated in Proposed Rules 1.7 and 1.9, but the applicable screening provisions are those of Rule 1.10.

**COMMENT**

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who communicates with a lawyer for the sole purpose of preventing the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer who knowingly encourages or induces a client to communicate with a lawyer or lawyers for that improper purpose is subject to discipline under Rules 3.1(b)(2), 4.4 and 8.4(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.

**COSAC COMMENTARY**

Comment [1], which is identical to its ABA counterpart, states three ways in which lawyers may assume obligations to prospective clients: disclosure of information, taking possession of documents or property and giving legal advice. It suggests some of the reasons prospective clients receive less than the protections of former clients under Rule 1.9

The first two sentences of Comment [2] are the same as those of its ABA counterpart. The last two sentences are added; they deal with strategic efforts to disqualify potential adverse counsel. The Comment explains that lawyers are not disqualified when a person unilaterally communicates information without a reasonable expectation that the lawyer will agree to representation or does so, posing as a prospective client, for the purpose of disqualifying the lawyer. See ABA/BNA 20 Man. Prof. Conduct 384 (July 28, 2004) (initial interview doesn't disqualify lawyer if would-be client meant to create conflict).

Comment [3], which is identical to its ABA counterpart, states the lawyer's obligation to preserve confidences of the prospective client, no matter what right the lawyer or law firm may have to undertake later adverse representation.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, 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. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected client.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(g) 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.

Comment [4] is identical to ABA Comment [4]. It explains that a lawyer should obtain only the information required to determine whether to undertake the representation. If a conflict of interest is found to exist, the lawyer should decline the representation or obtain the consent of the prospective client and all affected clients. When the significance of the information obtained is so great that adequate representation cannot be given to the new client, the lawyer must decline the representation.

Comments [5], [6], [8] and [9] are identical to their ABA counterparts. Comment [5] identifies consent in advance of the consultation as one way to avoid later concerns about adverse use of information obtained. See ABA Ethics Op. 90-358 (1990).

Comment [6] reiterates the right of a lawyer to undertake representation adverse to a prospective client from whom no "significantly harmful" information was obtained. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 15 and cmt. c (2000).

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.10 (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed, generally should be given 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.

Comment [7] is identical to ABA Comment [7] except that the reference after the second full sentence is to Rule 1.10 rather than to the 1.0(k). The Comment describes how the imputation otherwise required by ¶ (c) may be avoided by either obtaining the informed consent of the prospective and affected client or by screening under the conditions stated in ¶ (d)(1).

Comment [8] addresses the requirements of ¶ (d)(2).

Comment [9] provides a cross-reference to existing Rules that deal with two of the three issues identified in Comment [1]. Any advice a lawyer gives must be competent under Rule 1.1, and Rule 1.15 requires a lawyer to care for property of "third persons," which would include prospective clients.

### **Changes from Existing New York Code**

There is no analogue to Proposed Rule 1.18 in the New York Disciplinary Rules.

### **Reporter's Notes**

Proposed Rule 1.18 follows the ABA Model Code in stating the circumstances in which lawyers have limited duties to prospective clients, specifying the application of these duties, and providing guidance to lawyers in dealing with prospective clients. The existing New York Code does not take this approach.

Proposed Rule 1.18(b) recognizes a duty to treat all communications with a prospective client as confidential. Judicial decisions in New York dealing with duties owed to prospective clients (confidentiality and avoidance of conflicting interests) are not numerous but are generally consistent with the Proposed Rule.

Paragraph (c) of the Proposed Rule treats prospective clients who have provided confidential information that would be “significantly harmful” to that client in subsequent adverse representation to as former clients under Rule 1.9. This provision is in keeping with judicial decisions in New York. *See, e.g., Bennet Silvershein Assocs. v. Furman*, 776 F. Supp. 800 (S.D.N.Y. 1991) (no disqualification warranted by brief consultation ten years ago about tenuously related matter); *Desbiens v. Ford Motor Co.*, 81 A.D.2d 707 (3d Dep’t 1981) (firm reviewed plaintiff’s file in auto accident and decided not to represent him; this access to the prospective client’s information now bars the firm from handling defense of his product liability claim arising out of the same facts).

Paragraph (d) of the Proposed Rule permits the waiver of the prohibition of the rule with the informed consent, confirmed in writing, of both the prospective client and the client on whose behalf the lawyer later plans to take action adverse to the former prospective client.

Paragraph (d)(1) provides, in the event that “significantly harmful” information is revealed, that the lawyer who received the information may be screened from any involvement in the subsequent matter but others in the law firm may represent the adverse party. This provision is in keeping with judicial decisions in New York. *See, e.g., Cummin v. Cummin*, 264 A.D.2d 637 (1<sup>st</sup> Dep’t 1999) (no disqualification when firm lawyer spoke briefly to opposing party six years earlier and was screened from the present representation).

Comment [4] of the Proposed Rule provides that a person who communicates with a lawyer to disqualify that lawyer as potential adverse counsel in the person’s matter is not entitled to the protection of Rule 1.10 and that a lawyer who knowingly encourages or induces such conduct is subject to professional discipline.

### **Corresponding New York Disciplinary Rules**

Rule 1.18 has no counterpart in New York’s Disciplinary Rules.