Formal Opinion 2013-1:
DUTIES TO PROSPECTIVE CLIENTS AFTER BEAUTY CONTESTS AND OTHER PRELIMINARY MEETINGS

TOPIC: Duties to Prospective Clients

DIGEST: Rule 1.18 codifies the established principle that New York lawyers owe duties to prospective clients even when no lawyer-client relationship ensues. These duties are determined by the nature of the information received from the prospective client and may restrict the lawyer's ability to use or reveal the information or to represent adverse parties in the same or a substantially related matter. While these duties may be significant, they are less restrictive than the comparable duties owed to former and current clients and permit the use of ethical screens to take on adverse representations.

RULE: 1.18

INTRODUCTORY NOTE

In 2006 we issued Opinion No. 2006-2 on the duties of lawyers to prospective clients. At that time, the New York Code of Professional Responsibility (the predecessor to the New York Rules of Professional Conduct) did not include a rule specifically addressing those duties. Thereafter, in April 2009, Rule 1.18 (Duties to Prospective Clients) was adopted as part of the New York Rules of Professional Conduct, and we are issuing the opinion below to update No. 2006-2 in light of Rule 1.18. Our opinion confirms the principal views expressed in No. 2006-2 but is based primarily on an analysis of Rule 1.18 and includes additional guidance based on the Rule. To that extent, this opinion supersedes No. 2006-2.

QUESTIONS

May a law firm that participated in a beauty contest with a prospective client, but ultimately was not retained by the prospective client, thereafter represent a client in a matter substantially related to the subject of the beauty contest, when the client's interests are materially adverse to the prospective client's interests in the matter? How must the firm handle information it receives from the prospective client?

We analyze the Rule and address these questions in our opinion below. In Part IV we discuss the application of the Rule in three hypothetical beauty contest scenarios.

OPINION

I. Duties to Prospective Clients – Background

New York lawyers have long been subject to ethical duties regarding their relationships with prospective clients. As we stated in No. 2006-2:

> In today's legal environment, where individuals and corporations often conduct extensive searches for legal representation, a law firm must be mindful that participating in a

> beauty contest may…enmesh the firm in a disabling conflict of interest that would require it to decline to represent a client with materially adverse interests in a substantially related matter, or risk a court granting the prospective client's motion for disqualification. A law firm participating in a beauty contest would be mistaken to believe that a court would nonetheless allow it to represent such a client because the beauty contest failed to result in the formation of a formal attorney-client relationship with the prospective client…. Indeed, the formation of an actual attorney-client relationship is not a prerequisite to the disqualification of a firm that participated in a beauty contest.

Before the adoption of Rule 1.18, the duties that New York lawyers owe to prospective clients were not precisely defined and had to be gleaned from case law, bar opinions and rules in other jurisdictions, including the ABA Model Code of Professional Responsibility (which includes a rule substantially similar to Rule 1.18). Although the considerations quoted above from No. 2006-2 remain applicable today, Rule 1.18 now specifies those duties in New York.

The policy behind Rule 1.18 is reflected in Comment 1 to the Rule:

> Prospective clients, like current 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. Prospective clients should therefore receive some, but not all, of the protection afforded to clients.

The Rule balances the need for protection of those who consult lawyers about a possible representation with the need for freedom of the parties to decide not to pursue the representation. It does so by subjecting the lawyers to duties regarding confidential information and adverse representations that are significant but more limited in scope than those owed to current or former clients.

II. Overview of Rule 1.18

Rule 1.18 imposes two main duties on a lawyer who has had discussions with a prospective client about a matter:

- First, the lawyer is restricted from using or revealing information learned in the consultation to the same extent that a lawyer would be restricted with regard to information of a former client.

- Second, the lawyer may not represent a client with materially adverse interests in the same or a substantially related matter if the information received from the prospective client could be significantly harmful to the prospective client in that matter.

Both duties are determined by the nature of the information obtained from the prospective client. While not as extensive as those owed to a current client or in some respects even a former client, these duties can have a significant impact on a law firm, in terms of how the firm must treat the

information it obtains from a prospective client and the firm's ability to represent others in the same or related matters.

Rule 1.18 defines who is a prospective client and provides several important exceptions to the duties outlined above, including exceptions for informed consent and the use of ethical screens. The Rule also provides exceptions for dealings with persons who are not genuinely interested in forming a lawyer-client relationship, including those who may be seeking to prevent the lawyer from representing others.

A. Rule 1.18(a): Definition of "Prospective Client"

The Rule defines "prospective client" as a person who discusses with a lawyer "the possibility of forming a lawyer-client relationship with respect to a matter". The discussion need not result in a lawyer-client relationship but must relate to a possible representation.

Not all persons who communicate information to a lawyer are entitled to protection under Rule 1.18. Paragraph (e) of the Rule excludes from the definition of prospective client a person who communicates unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of a representation, or communicates with a lawyer for the purpose of disqualifying the lawyer from handling certain material adverse representations.

Communications between a lawyer and another person, even a potential client, do not necessarily result in the person becoming a prospective client. The communication must relate to the possibility of representation. Meetings and other communications that do not focus on a particular representation, such as introductory and general promotional calls or visits, as well as social meetings, by themselves generally should not give rise to prospective client duties.

B. Rule 1.18(b): Restriction on Using and Revealing Information

Paragraph (b) of the Rule provides that a lawyer may not use or reveal information learned in a consultation with a prospective client except as permitted by Rule 1.9 with respect to information of a former client. These restrictions are set forth in Rule 1.9(c), which provides that a lawyer may not (1) use "confidential information" of a former client to the "disadvantage" of the former client or (2) reveal "confidential information" of the former client protected by Rule 1.6, which in turn governs confidential information of a current client. Thus, information learned in a consultation with a prospective client is subject to the restriction in paragraph (b) of the Rule only if it is "confidential information", in which case it may not be *used* except to the extent that confidential information of a *former client* may be used and may not be *revealed* except to the extent that confidential information of a *current client* may be revealed.[1]

C. Rule 1.18(c): Restriction on Representation of Others

Paragraph (c) of the Rule provides that a lawyer who has had discussions with a prospective client may not represent a client with interests materially adverse to those of the prospective client in the same or a substantially related matter if the information received from the prospective client "could be significantly harmful" to the prospective client in the matter (disqualifying information), subject to the exceptions in paragraph (d) described below. The restriction on adverse representation in paragraph (c) applies only if the lawyer is subject to the

information restriction in paragraph (b) and received disqualifying information, and thus is narrower than the corresponding restrictions on adverse representation that apply with regard to former and current clients.[2] If a lawyer is disqualified from representing a client under Rule 1.18(c), the disqualification applies to all other lawyers in the firm with which the lawyer is associated, subject to the exceptions in paragraph (d).[3]

D. Rule 1.18(d): Exceptions to Restriction on Representation

Paragraph (d) of the Rule provides two important exceptions to the restriction on representation in paragraph (c). First, the lawyer and the firm may take on an otherwise prohibited representation if both the prospective client and the affected client have given informed consent, confirmed in writing.[4] Second, a disqualified lawyer's firm (but not the disqualified lawyer) may take on the representation if the disqualified lawyer took reasonable steps to limit his or her exposure to disqualifying information in discussions with the prospective client and the firm takes specified steps to implement an effective ethical screen and notifies the prospective client of the representation and the screening measures taken.[5] Neither exception is available, however, unless a reasonable lawyer would conclude that the firm would be able to provide competent and diligent representation in the matter.

III. Interpretive Matters

Rule 1.18 raises several interpretive matters that we believe may be addressed as follows.

A. Scope of Protected Information Under Rule 1.18(b)

As noted above, the restriction in paragraph (b) of the Rule on using and revealing information of a prospective client refers to Rule 1.9 (Duties to Former Clients), which in turn refers to Rule 1.6 (Confidentiality of Information). Accordingly, the restriction applies only to the extent that the information would be protected under Rules 1.6 and 1.9 were it information of a former or current client, as applicable. Thus, the restriction does not apply to information of a prospective client that is not "confidential information" or to the extent that the exceptions in Rules 1.6 and 1.9 would permit confidential information of a former or current client to be used or revealed.

In addition, while paragraph (b) incorporates the restrictions in Rules 1.6 and 1.9, it does so only with regard to information that is "learned in the consultation" with the prospective client. In contrast, Rules 1.6 and 1.9 apply with regard to all confidential information of a former or current client, as applicable, gained "during or relating to the representation of a client, whatever its source".

Finally, Rule 1.18(b) incorporates the use restriction from Rule 1.9, not Rule 1.6, and thus prohibits only use of protected information to the *disadvantage of the prospective client*. Rule 1.6, in contrast, also prohibits use of protected information to the *advantage of the lawyer or a third party*.

B. Use of Informed Consent and Ethical Screens Under Rule 1.18(b)

As noted above, paragraph (d) of the Rule permits the use of informed consent and ethical screens to comply with the restriction on representation in paragraph (c). Although paragraph

(d) does not specifically refer to paragraph (b), we believe that these means can also be used to comply with the restriction on using or revealing information.

With regard to consent, Rule 1.6 permits a lawyer to use and reveal confidential information of a current client if the client gives "informed consent" as defined in Rule 1.0(j). As already noted, the restriction in Rule 1.18(b) effectively incorporates the relevant exceptions in Rules 1.6 and 1.9 and thus should permit the use of informed consent to avoid the restriction. We note that, under Rule 1.6, informed consent need not be confirmed in writing and thus should not have to be for the purpose of Rule 1.18(b). This is not the case for Rule 1.18(c), which restricts representation, because paragraph (d), which specifically relates to paragraph (c), requires that the informed consent be confirmed in writing.

With regard to ethical screens, we stated in No. 2006-2 and continue to believe that such screens "are an appropriate means to rebut a presumption of shared confidences or secrets" within a law firm.[6] Thus, we believe that, if a law firm implements an ethical screen as contemplated in Rule 1.18(d), it may rely on the screen to comply with paragraph (b) as well as paragraph (c).[7]

C. The Ban on Representation Is Less Restrictive With Regard to a Prospective Client Than a Former or Current Client

The restriction in Rule 1.18(c) on representations that are materially adverse to a prospective client applies only if information received from the prospective client "could be significantly harmful" to the prospective client in the matter. The "significantly harmful" test makes this restriction less exacting than the corresponding restriction on representations that are materially adverse to a former client. Under Rule 1.9(a), the bar against adverse representations is automatic; if the relevant parties' interests are materially adverse and the matters are the same or substantially related, the bar applies whether or not the lawyer received any information, harmful or otherwise, from the former client.[8] Under Rule 1.18, in contrast, materially adverse interests do not bar the representation in the absence of significantly harmful information.

Rule 1.18(c) is also less restrictive than the corresponding restriction relating to current clients in Rule 1.7. The latter applies if the representation will involve the lawyer in representing "differing interests" or the lawyer's professional judgment will be adversely affected, whether or not the lawyer received significantly harmful information and whether or not the representation involves the same or a substantially related matter.

In determining whether information received from the prospective client is "significantly harmful", the commentary to the Rule states that the lawyer must consider whether the information "could be significantly harmful if used in that matter". Rule 1.18 cmt. 6. The test focuses on the *potential* use of the information. Thus, we do not believe that a lawyer who receives the information may avoid the bar solely on the ground that he or she will make no *actual* use of the information. Whether information could be "significantly harmful" to a prospective client would depend, of course, on the relevant facts and circumstances of the particular situation.[9]

D. Obtaining Informed Consent

As noted above, a lawyer may comply with the restrictions of Rule 1.18(b) and (c) by obtaining the informed consent of the prospective client and, in the case of paragraph (c), also the affected client. In light of Rule 1.0(j), consent will not be informed unless the lawyer has communicated information adequate for the consenting party to make an informed decision and adequately explained to the party the material risks of the proposed course of conduct (e.g., using or revealing information learned in the consultation or representing others in a substantially related matter) and reasonably available alternatives. We believe that the adequacy of this communication in the context of Rule 1.18, as in any other context under the Rules, will depend on the relevant facts, particularly the sophistication of the consenting party and its familiarity with the retention of legal representation and conflict waivers. For example, if the prospective client is an organization that frequently retains lawyers in connection with litigation or transactional matters, particularly one with in-house legal advisors, it may need to be told little more than that the law firm would be free to use or reveal information received in the consultation or to represent others with materially adverse interests in the same or any related matter, as applicable, in the event the organization does not retain the firm.

As noted above, the consent must be confirmed in writing for the purpose of paragraph (c), though not paragraph (b), of the Rule. In neither case must the consent be signed or otherwise acknowledged in writing by the prospective client, although obtaining a signature or other acknowledgement can, as an evidentiary matter, help support the conclusion that the consent was in fact obtained and was informed.

In No. 2006-2, we stated that, in order to maximize the likelihood that an advance waiver of conflict by a prospective client would be effective, the lawyer should consider, among other things, obtaining the waiver in a writing that explains the preliminary nature of the beauty contest and is signed by the prospective client. While we continue to believe these steps can help ensure the effectiveness of the waiver, we do not believe they are essential in light of the specific language of Rule 1.18, which requires only that the consent be informed and be confirmed in writing. Whether or not any of these non-essential steps should be taken to ensure the effectiveness of a waiver would depend on the relevant facts.

Regardless of the form and degree of informed consent needed on a particular set of facts, it bears repeating that this exception will not be available to the lawyer unless, under Rule 1.18(d)(3), a reasonable lawyer would conclude that the firm would be able to provide competent and diligent representation in the matter.

E. Use of Ethical Screens

Rule 1.18(d) does not specify the procedures to be followed in implementing an ethical screen, and we believe that these will continue to depend, as they did before adoption of the Rule and do in other contexts, on the relevant facts, particularly the nature of the law firm and the information received from the prospective client. The commentary on the Rule sets forth several considerations in this regard.

First, the firm should assess its ability to implement, maintain and monitor screening procedures before undertaking or continuing the representation. In deciding whether the screen will be effective in preventing the internal flow of information about the matter, the firm should consider a number of factors, including its size, practices and organization. A firm that is large and organized in a way that facilitates preventing the flow of information (e.g., separate departments or offices) may be more likely to implement an effective screen, but these factors are not dispositive and a small firm can also satisfy the requirements for an effective ethical screen, although it may need to exercise special care and vigilance. Similarly, allowing the disqualified lawyer to work on other matters with lawyers working on the screened matter may render the screen ineffective under some circumstances, but such a factor would not be dispositive. See R. 1.18 cmt. 7B.

Second, notice and implementation of the screen within the firm should be prompt. According to the commentary, the screen exception will not be available if any lawyer in the firm acquires confidential information from the disqualified lawyer, and subsequent efforts to institute or maintain a screen will not be effective in avoiding the firm's disqualification. See R. 1.18 cmt. 7C. We do not believe, however, that this guidance should prevent disclosure of the information to a limited number of lawyers in the firm for the purpose of evaluating the firm's duties under Rule 1.18 or otherwise or deciding whether to take on the representation, provided that those lawyers are also disqualified from working on the matter and are appropriately screened.

Third, Rule 1.18(d) states that, in order for a law firm to rely on the ethical screen exception, the lawyer who receives the information from the prospective client should take reasonable measures to avoid exposure to more disqualifying information than is reasonably necessary to determine whether to represent the prospective client.[10] While this "necessary" information would include that which the lawyer needs to run a conflicts check, it should not be so limited and in our view may encompass any information reasonably necessary to enable the lawyer to decide whether to pursue a representation.[11]

IV. Application of Rule 1.18 to Beauty Contest Scenarios

In this section we discuss the application of Rule 1.18 to three beauty contest scenarios, two in a litigation setting and the third in a transactional setting. Our analysis, however, is not limited to beauty contests and would apply in any situation where the prospective client communicates with a law firm about a possible representation (e.g., after making a request for proposal (RFP)), whether or not other law firms are approached.

A. Scenario 1

Company A is interested in suing Company B for breach of contract. In an effort to choose litigation counsel, Company A conducts a beauty contest involving several law firms, including Firm X. Firm X presents its qualifications to represent Company A, and Company A does not provide any confidential information about its proposed lawsuit. Company A ultimately decides not to retain Firm X to represent it in the lawsuit, and Company B thereafter seeks to retain Firm X to defend it in the lawsuit against Company A.

Because Firm X obtained no confidential information in the beauty contest, it would not be subject to the restriction in Rule 1.18(b) on using or revealing the information. In addition, Firm X would not be barred under Rule 1.18(c) from representing Company B in the lawsuit against Company A, for two reasons. First, Firm X would not be subject to paragraph (c) if it were not subject to paragraph (b). Second, paragraph (c) would not apply unless the information learned in the consultation could be significantly harmful to Company A if used in the lawsuit. Absent unusual circumstances, information that involves no confidential information is unlikely to fall into this category, as it presumably is information already known or available from sources other than Company A.[12] In this scenario, Rule 1.18 would apply to the individual lawyers who participated in the beauty contest in the same way that it would apply to Firm X: they, too, would not be subject to paragraph (b) or (c).

B. Scenario 2

Scenario 2 is identical to Scenario 1 except that, when Firm X presents its qualifications to represent Company A, Company A provides confidential information regarding the underlying facts and legal theories about its proposed lawsuit. As a result, in Scenario 2 the analysis with regard to the lawyers who participated in the beauty contest may differ from the analysis with regard to Firm X.

Because Company A provided confidential information, the lawyers who participated in the contest would be subject to the restriction in Rule 1.18(b) unless Company A gave informed consent or an exception in Rule 1.6 or 1.9 was available. Thus, absent informed consent or special facts to support an exception, the lawyers who participated in the beauty contest would be prohibited under Rule 1.18(b) from revealing the confidential information or from using it to the disadvantage of Company A in the lawsuit against Company B. In addition, Rule 1.18(c) would bar the lawyers from participating in the defense of Company B because the two companies' interests would be materially adverse, unless use of the confidential information by the lawyers in the lawsuit could not be significantly harmful to Company A, or if the lawyers obtained the informed consent (confirmed in writing) of both Company A and Company B to their participation in the defense.

Firm X would be subject to Rule 1.18(b) and (c) to the same extent as the lawyers who participated in the beauty contest, unless Firm X took appropriate steps to implement and maintain an effective ethical screen as provided in paragraph (d) of the Rule. If the requirements of paragraph (d) were met, lawyers in Firm X other than those who participated in the beauty contest (or who otherwise received confidential information from the participants for compliance or evaluation purposes) would be permitted to represent Company B in the lawsuit against Company A. Firm X would need to notify Company A in writing that it was representing Company B in the lawsuit and of the screening measures taken, promptly after assuming the representation. We believe that implementing an ethical screen as provided in paragraph (d) would also enable Firm X to comply with Rule 1.18(b) without having to obtain Company A's informed consent.[13]

C. Scenario 3

Company A is interested in submitting a bid to acquire Company C in an auction to be conducted by Company C. In an effort to choose counsel to represent it in making the bid, Company A conducts a beauty contest involving several law firms, including Firm X. Firm X presents its credentials to Company A and Company A provides confidential information about the possible terms and structure of its proposed bid. Company A decides not to retain Firm X and Company B thereafter seeks to retain Firm X to represent it in connection with its own bid to acquire Company C.[14]

The analysis of Scenario 3 would be similar to that of Scenario 2, with regard to both the lawyers participating in the beauty contest and Firm X. However, the transactional setting may involve factual considerations that differ from those in a litigation context and may lead to different conclusions on some elements of the analysis. Two possible differences are discussed below.

First, information learned in the consultation may not meet the "significantly harmful" test under Rule 1.18(c) as readily as it might in the litigation context. Because Company B would be competing against Company A in the auction, it is possible that information about Company A's bid, such as the proposed price, could be used by Firm X in helping to structure Company B's bid in a way that makes the latter more competitive with the former. Whether the information would be useful in representing Company B and, if so, whether such use would be *significantly harmful* to Company A would depend on the facts. For example, Company A may have provided information about its bid that, while confidential, is so preliminary, tentative or general as not to be reliable or informative for Company B in any significant way. Similarly, the two parties' bids may be so different in structure and scope and raise such different legal considerations that the information about Company A's bid, while confidential, would have no significant relevance for Company B.

Second, Firm X will need to determine whether Company B's interests are materially adverse to those of Company A in light of all the relevant facts, just as it would in connection with a former client. While the meaning of "adversity" is beyond the scope of this opinion, we note that the factual differences between transactional and litigation settings may result in different conclusions about adversity.[15]

V. Conclusion

Rule 1.18 codifies the established principle that New York lawyers owe duties to prospective clients even when no lawyer-client relationship ensues. Under the Rule, a lawyer who learns confidential information in a consultation with a prospective client may not use or reveal the information except to the extent permitted with confidential information of a former client, and the lawyer may not take on a materially adverse representation in the same or a substantially related matter when the information, if used in the matter, could be significantly harmful to the prospective client. These duties are less restrictive than the comparable duties owed to former and current clients in several respects, and ethical screens may be used to take on otherwise adverse representations. Application of the Rule will depend on the nature of the information received from the prospective client: is it confidential and would its use by the lawyer disadvantage or be significantly harmful to the prospective client?

ENDNOTES

[1] The use restriction with regard to former clients is set forth in Rule 1.9(c)(1) and incorporates the exceptions to the use restriction (though not the restriction itself) with regard to current clients in Rule 1.6. The reveal restriction with regard to former clients is set forth in Rule 1.9(c)(2) and is the same as the reveal restriction (including the exceptions) with regard to current clients in Rule 1.6. Rule 1.6(a) defines "confidential information" and prohibits a lawyer from "knowingly" revealing such information.

[2] For former clients, the representation is barred if it is materially adverse to the former client and, for current clients, if it involves differing interests (subject to exceptions in each case). The bar applies in these cases whether or not the lawyer received any information that could be "significantly harmful". In addition, like the corresponding restriction for former clients but unlike the corresponding restriction for current clients, the restriction in Rule 1.18(c) does not apply to representation in unrelated matters. See Rules 1.7 and 1.9.

[3] No other lawyer in the firm may "knowingly" undertake or continue the representation unless an exception is available.

[4] "Informed consent" is defined in Rule 1.0(j). "Confirmed in writing" is defined in Rule 1.0(e).

Of course a prospective client may decline to give consent or may even seek assurances from the firm that, if not retained by the prospective client, it will not represent others in the same or a related matter and will treat information obtained in the consultation as confidential.

[5] In general, the firm must act promptly and reasonably to notify, as appropriate, other lawyers and non-lawyers in the firm that the personally disqualified lawyer may not participate in the representation; the firm must implement effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and others in the firm; and the disqualified lawyer must be apportioned no part of the fee from the representation. With regard to fee-apportionment, Comment 7 to the Rule states that a screened lawyer is not prohibited from receiving a salary or partnership share established by prior independent agreement, but the lawyer may not receive compensation directly related to the matter. With regard to the notice to be given to the prospective client, Comment 8 states that it should include a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed.

Ethical screens generally may not be used to avoid restrictions on representations adverse to current or former clients. In this regard, paragraph (d) provides significant additional flexibility regarding representations adverse to prospective clients.

[6] A number of courts have endorsed the efficacy of ethical screens to rebut this presumption. See, e.g., American Intern. Group, Inc. v. Bank of America Corp., 827 F. Supp. 2d 341 (S.D.N.Y. Dec. 6, 2011); Arista Records LLC v. Lime Group LLC, No. 06-CV-5936, 2011 WL 672254, *5 (S.D.N.Y. Feb. 22, 2011); Battagliola v. Nat'l Life Ins. Co., 2005 U.S. Dist. LEXIS 650 (S.D.N.Y. Jan. 19, 2005); Papyrus Tech. Corp. v. N.Y.

Stock Exch, Inc., 325 F. Supp. 2d 270 (S.D.N.Y. 2004); In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. 270 (S.D.N.Y. 1994); Solow v. W.R. Grace, 83 NY2d 303 (1994).

[7] The restriction in paragraph (b) on using or revealing protected information would continue to apply to both the disqualified lawyer and the firm.

[8] Restatement (Third) of The Law Governing Lawyers (2000), at Section 132, takes the same position with regard to former clients. See also 1 Geoffrey C. Hazard and W. William Hodes, The Law of Lawyering (3d ed. 2005), §21A.6, at 21A-15 ("Because the relationship between a prospective client and a lawyer by definition never reaches the stage where the duty of loyalty attaches with full force, however, Rule 1.18 [of the ABA Model Code] imposes a less stringent regime on the lawyer than where actual clients and former clients are involved. Put another way, the protections afforded to prospective clients are not as extensive as those provided to 'real' clients.")

[9] Several courts in New York have addressed the "significantly harmful" test in Rule 1.18. See Zalewski v. Shelroc Homes, LLC, 856 F. Supp. 2d 426 (N.D.N.Y. Mar 6, 2012) (disqualifying lawyer from representing plaintiff in lawsuit against prospective client that had explained to the lawyer its views on various settlement issues, including price and timing; although subject to change, such information could provide "an unfair advantage" and "ultimately control the great stakes ahead"); Miness v. Ahuja, 762 F. Supp. 2d 465 (E.D.N.Y. July 31, 2010) (disqualifying lawyer from representing defendant in a lawsuit by prospective client who, in context of a social relationship, had shared his "personal accounts of each relevant event shortly after it happened" and his "strategic thinking concerning how to manage the situation"); Van Acker Constr. Corp. v. Hance, 2011 NY Slip Op. 30092 (N.Y. S. Ct. Jan. 11, 2011) (disqualifying law firm from representing defendant in lawsuit by prospective client where firm, in an 18-minute phone call with the prospective client-plaintiff, had "outlined potential claims" against defendant and "discussed specifics as to the amount of money needed to settle the case").

[10] We believe that a lawyer may do so by informing the prospective client that they do not have a lawyer-client relationship and that the prospective client should provide the lawyer only such information as is necessary to enable a lawyer to decide whether to take on the representation. Other steps may also suffice. We note that paragraph (d) requires the lawyer to take reasonable measures to limit the receipt of information as specified; it does not require that the information received in fact be so limited.

[11] For example, this category might include information about factual and legal matters needed for the lawyer to determine whether the firm would be able to provide effective representation or to provide an estimate of fees and expenses. The lawyer might reasonably seek information in such detail and scope as would enable the lawyer to assess the merits of the matter and to formulate possible legal theories or analyses and possible approaches to the representation, and to gauge the prospective client's reaction to these considerations.

[12] It would be highly incongruous to conclude that use of the information by Firm X could be significantly harmful to Company A for the purpose of paragraph (c) when paragraph (b) would not restrict Firm X's ability to use or reveal the information.

[13] Neither the participating lawyers nor Firm X would be subject to the Rule if it could be established that Company A communicated confidential information to the participating lawyers unilaterally, with no reasonable expectation that Firm X would represent Company A in the lawsuit, or for the purpose of disqualifying Firm X from representing Company B in the lawsuit.

[14] Our analysis of Scenario 3 applies in any transactional setting involving competitive bidding, whether or not a formal auction is held. It also applies outside the competitive bidding situation, for example when a law firm meets with a prospective client to discuss representation in a possible transaction and then represents another person in the same transaction (e.g., as a counterparty to the prospective client).

[15] For example, if the auction involves sales of various assets in separate transactions, the two parties may be bidding on different assets such that their bids are not in competition with each other. This might also be the case where Company B retains Firm X after Company A drops out of the bidding. As long as there is no material adversity of interests between the parties in the matter for which Firm X has been retained – i.e., in the auction – Firm X might reasonably conclude there is no material adversity within the meaning of Rule 1.18(c) and thus may represent Company B, even though the parties may be business competitors or otherwise have differing economic interests outside the auction.

Whether there is material adversity may also depend on the nature of Firm X's representation of Company B. For example, Company B might retain separate M&A counsel to advise on its bid in the auction and retain Firm X solely to advise on ancillary matters, such as obtaining financing for the bid or antitrust or regulatory compliance. In a competitive bidding situation, any advice provided by Firm X that helps to facilitate Company B's bid, directly or indirectly, at the expense of Company A's bid should be analyzed to determine whether the representation is permitted under Rule 1.18(c). It is possible, however, that representing Company B in an ancillary matter may not give rise to the same degree of adversity between the parties as representing Company B in making the bid itself. For example, Firm X might be retained to advise solely on financing in a situation where financing is not a significant factor in winning the auction (e.g., because both bidders have ready access to multiple financing sources on attractive terms). Similarly, Firm X might be retained to advise solely on compliance matters that do not present significant issues for the bid or require special legal expertise that only Firm X possesses.