The Attorney-Client Relationship in the Age of Technology

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I. INTRODUCTION

Advances in technology have greatly increased the ways a lawyer might interact with clients and potential clients. These advances have multiplied the avenues of communication. For example, lawyers of today can communicate by email with clients or potential clients1 and also have all the possibilities the internet offers for communicating in writing, pictures or video.2 Advances in technology also have made it possible for lawyers and potential clients to interact virtually. For example, a lawyer might have a website upon which a potential client might access a questionnaire. The potential client, without the actual knowledge of the attorney responsible for the website, but with the attorney’s general knowledge of the website and questionnaire, might respond to the questionnaire by disclosing all sorts of information.3

Does the attorney-client privilege apply to those disclosures? Does the attorney, for purposes of professional responsibility, owe duties of confidentiality or loyalty or care to the people responding to the questionnaires? Might the disclosures create a basis for disqualification of the attorney in future matters? Might the attorney owe the people responding

1. There was a time when ethics opinions warned against the use of such risky modes of communication as email or cellphones. See, e.g., Iowa Ethics Op. 97-1 (1997) (lawyers should not use email as a means of communication for sensitive information unless the client is given written notice of the confidentiality risk); III. Ethics Op. 90-07 (1990) (mobile phones are not private so lawyers should not use them to communicate with clients).


3. This scenario occurred in Barton v. U.S. Dist. Court, 410 F.3d 1104, 1110 (9th Cir. 2005).

The world of Barton is far removed from the world of the late 1880s when the New York firm of Sullivan & Cromwell finally obtained a telephone ten years after telephones became available. See Lancer, supra note 2, at 164. The firm thought the device beneath it. “At first it was considered unprofessional for a lawyer to have a telephone. Some lawyers were also distrustful of the privacy afforded by the instrument.” Id. at 165 n. 44 (quoting John Forster Dulles, Forward to Arthur H. Dean, William Nelson Cromwell 1854-1948 27-28 (1957)).

to the questionnaires a duty of care such that the attorney could be liable for malpractice?

Advances in communication technology also have altered how the practice of law occurs. The questionnaire scenario is a great example of how lawyers and clients can find each other and interact in ways not imagined in years past. Communications advances have altered the practice in a myriad of other ways as well. For example, because transfer of documents and written communication is so fast and seamless, it is possible to have lawyers in Mumbai work on a project for a New York lawyer who is servicing a client based in New York. The advent of computers and the communications changes that have come along with them were unimaginable in the early 1980s when a law firm partner was heard to claim that lawyers did not need computers on their desks because lawyers had no need to type.

The American Bar Association (ABA) has struggled to have its Model Rules of Professional Conduct (Model Rules) keep pace with this rapidly-changing environment. A significant modification to the Model Rules occurred in 2002 when the ABA introduced Rule 1.18, a rule expressly recognizing for the first time the relationship of an attorney and a prospective client. Rule 1.18 defines this new inhabitant to the analytical framework, the prospective client, and expressly provides that a lawyer owes such an entity duties of confidentiality and loyalty of a limited nature. Indeed, a comment to Rule 1.18 suggests that a lawyer owes a prospective client a duty of competence as well. While the recognition of the concept of a prospective client could have occurred in the pre-technological environment of, for example, the 1960s, the variety of attorney-client interactions possible in the age of the internet was perhaps a catalyst to a more nuanced approach to attorney-client relationship evaluation which includes the possibility of a prospective client.

Since the introduction of Rule 1.18, the world has not stood still but rather advances in technology have continued to increase the possible interactions between attorneys and clients. In 2012 the ABA adopted several amendments to the Model Rules in an attempt to incorporate the realities of the current world in which lawyers and clients and potential client communicate. As a result of the plethora of contact possibilities, the recent

6. See Peter A. Joy & Kevin C. McMunigal, Client or Prospective Client: What's the Difference?, 27 CUMB. J. JUD. 51 (Fall 2012) (“Until the ABA enacted Model Rule 1.18 in 2002, the Model Rules did not recognize the status of ‘prospective client.’”).
7. See MODEL RULES OF PROF'L CONDUCT R. 1.18(a) cmt. 2 (2012).
8. See id. R. 1.18 (b), (c), & (d).
9. See id. R. 1.18 cmt. 9.
changes to the Model Rules, and the more nuanced analysis possible with Model Rule 1.18's recognition of the prospective client entity, the time has come for, to use a technology-based word, a "reboot" with regard to how the profession thinks about the formation of all levels of attorney-client relationships and the contexts and circumstances in which lawyers owe duties to others.

Traditionally, the Model Rules have dealt with duties lawyers owed to clients. The Model Rules did not delve into the question of the formation of the attorney-client relationship, the point at which a party became a client, but recognized the duties a lawyer owed if the party was or had been a client—if there was or had been an attorney-client relationship.10 The question of whether the relationship existed such that the duties contained in the Model Rules attached has been a question beyond the reach of the Model Rules.11 As paragraph seventeen of the Scope section of the Model Rules states, "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."12

Historically, regardless of the context in which the question has arisen, courts have treated the issue of the existence of an attorney-client relationship as a zero-sum matter.13 Though a few courts perhaps were more discriminating,14 most courts saw only two possible conclusions: either there was an attorney-client relationship or there was no attorney-client relationship. As a result, there was no recognition that duties might be owed to a party who was not yet a client but who was moving toward being a client if the relationship never ripened into a full attorney-client relationship. Rather, courts, limited analytically by the binary framework, forced situations into one of the two categories. This is not to say that courts never found an attorney-client relationship in what, under Rule 1.18's teachings

10. Rule 1.7, for example, has long addressed conflicts involving current clients while Rule 1.9 has addressed conflicts involving former clients. See Model Rules of Prof'l Conduct R. 1.7, 1.9 (2012).
11. See Model Rules of Prof'l Conduct Scope ¶ 17 (2012). See also In re Carter, 733 S.E.2d 897 (S.C. 2012) (a discipline case in which the state Office of Disciplinary Counsel looked to state case law as to whether an attorney-client relationship had been formed such that duties attached). See also Susan R. Martyn, Accidental Clients, 33 Hofstra L. Rev. 913, 919 (2005) ("Nearly all lawyer code provisions assume that a professional relationship has been established, but do not explain how that occurs. General legal principles found in contract and tort law fill this gap.").
13. In Vondak v. City of Chicago, No. 03 C 2463, 2004 WL 783951, at *3 (N.D. Ill. Jan. 16 2004), the court applied the attorney-client privilege to questionnaires completed by people seeking legal representation. The court concluded, "an attorney-client relationship existed at the time the questionnaires were completed." See also Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997) (finding a lawyer-client relationship after an in-person consultation).
might be a situation involving a prospective client. Rather, some courts in such situations found an attorney-client relationship such that all duties owed a client attached.\textsuperscript{15}

In determining the existence or lack of an attorney-client relationship, courts have stated various approaches. As the Scope section to the Model Rules states, “Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.”\textsuperscript{16} Consistent with this statement, courts have looked to the existence of a contractual relationship to supply duty and obligation.\textsuperscript{17} In addition, courts have often stated that the test for the existence of an attorney-client relationship turns on the reasonable belief of the possible client.\textsuperscript{18} Some formulations have been phrased to turn on factors such as whether the possible client has disclosed confidential information to the lawyer\textsuperscript{19} or whether the lawyer has rendered legal advice to the possible client.\textsuperscript{20}

With the advent of Rule 1.18, the ABA introduced expressly the concept of the prospective client and provided that a lawyer owes duties of competence, confidentiality, and loyalty to such a person or entity, though perhaps not to the same extent those duties are owed to a client.\textsuperscript{21} With the 2012 refining amendments, Rule 1.18 now no longer defines a prospective client as “[a] person who discusses with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.”\textsuperscript{22} Rather, Rule 1.18 defines a prospective client as “[a] person who consults with a

\textsuperscript{15} See, e.g., Lovell, 941 S.W.2d at 468 (finding a lawyer-client relationship after an in-person consultation); Togstad v. Vesely, Otto, Miller & Keece, 291 N.W.2d 606 (Minn. 1980) (finding a lawyer-client relationship after an in-person consultation).

\textsuperscript{16} Model Rules of Prof’l Conduct Scope ¶ 17 (2012).

\textsuperscript{17} See, e.g., Avocent Redmond Corp. v. Rose Elecs., 491 F. Supp. 2d 1000, 1004 (W.D. Wash. 2007) (noting that the beginning of the analysis is the relevant engagement agreement).

\textsuperscript{18} See infra Part IV.A.

\textsuperscript{19} See, e.g., United States v. Lastyik, No. 2:12-CR-645-TC, 2012 WL 6574125, at *8 (D. Utah Dec. 17, 2012) (“For example, the client’s conduct alone can form an attorney-client relationship if the client provides confidential information to the attorney.”); Pro-Hand Servs. Trust v. Moonbay, 49 P.3d 56 (Mont. 2002) (holding that if the possible client disclosed confidential information, an attorney-client relationship existed).

\textsuperscript{20} See, e.g., Bohn v. Cody, 832 P.2d 71 (Wash. 1992) (“The essence of the attorney-client relationship is whether the attorney’s advice or assistance is sought and received on legal matters.”); Allen v. Steele, 252 P.3d 476, n.3 (Colo. 2011) (“An attorney-client relationship may be ‘inferred from the conduct of the parties’ such as when ‘the client seeks and receives the advice of the lawyer on legal consequences of the client’s past or completed actions.’” (quoting People v. Honnell, 510 P.2d 464, 469 (Colo. 1972))). See also Ingrid A. Minott, The Attorney-Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation, 86 U. Det. Mercy L. Rev. 269, 261-82 (2009) (discussing the rendering of legal advice as an indicator of relationship).

\textsuperscript{21} For example, Rule 1.18 disqualifies a lawyer on the basis of a prospective client only if the lawyer has received “significantly harmful” information even if the matter is the “same or a substantially related matter” to that involving the contact with the prospective client and the lawyer seeks to represent a party with interests “materially adverse” to the prospective client. See Model Rules of Prof’l Conduct R. 1.18(c) (2012). Rule 1.9 disqualifies a lawyer on the basis of a former client upon a showing that the matter is the “same or a substantially related matter” to that involving the contact with the former client and the lawyer seeks to represent a party with interests “materially adverse” to the former client. See Model Rules of Prof’l Conduct R. 1.9(a) (2012).

\textsuperscript{22} Model Rules of Prof’l Conduct R. 1.18(a) (2011) (emphasis added).
lawyer about the possibility of forming a client-lawyer relationship with respect to a matter."

Comment 2 contains a broad outline of some of the possible avenues of consultation, recognizing technological communication possibilities by making clear that a traditional in-person

or telephonic conversation between an attorney and a potential client is not a requirement for the occurrence of a consultation and therefore the existence of a prospective client to whom duties are owed.

In addition, Comment two to Rule 1.18, as revised in 2012, suggests an approach to the analysis to be used to determine when a party is a prospective client and thus when a lawyer owes duties to a party who is not yet a client and may never become a client. Comment two to Rule 1.18 posits expressly in part and implicitly otherwise that the reasonable and good faith belief of the client as to the nature of the relationship with the lawyer should be controlling. The suggested analysis is not contract-based because it cannot be; parties simply do not contract to be prospective clients. Rather, the focus is on the possible client’s honest and reasonable view of nature of the relationship between the attorney and the possible client. It is, however, consistent with fiduciary notions of the relationship as consensual but not necessarily contractual. Indeed, the suggested approach is not different in word from many statements already in use. Yet, the statement in the comment may very subtly encourage courts to more fluidly consider the existence of relationships and be broader in terms of what can be a consensual relationship.

Rule 1.18, as amended in 2012, may positively affect the way all stages of attorney-client relationships are judged. The obvious and most basic change is that the concept of the prospective client is incorporated into any professional responsibility issue in which there is a question of relationship. In addition, it is very likely that courts will incorporate the concept of a prospective client into any disqualification analysis because in the past courts have been greatly influenced by the Model Rules in making disqualification decisions.


24. See Martyn, supra note 11, at 919 (“The typical case that comes to mind involves a prospective client who sits down with a lawyer, discusses a legal matter, and hires the lawyer to proceed.”).


26. The lawyer-client relationship is an agency relationship; the lawyer is the agent of the client principal. The agency relationship carries with it the duty for the agent to act solely in the interest of the principal and translated to the attorney-client relationship, the overarching duty includes duties of confidentiality and loyalty. See Charles E. Rounds, Jr., Lawyer Codes Are Just About License, The Lawyer’s Relationship with the State: Recalling the Common Law Agency, Contract, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship, 60 BAYLOR L. REV. 771, 784 (2008). "An agency is not a contract." Id. at 804. "The formation of an agency does not require, for example, "the exchange of consideration." Id. at 804.

27. See infra Part IV.


client will also affect courts' analysis of malpractice liability.30 Because Rule 1.18 recognizes that a lawyer owes a duty of confidentiality to a prospective client, courts may in the future not conclude that the sharing of information creates a full attorney-client relationship. Likewise, Rule 1.18 recognizes that a lawyer owes a duty of competence to a prospective client. Thus, courts in the future may not conclude that a lawyer who provides legal advice automatically becomes a client as a result. Indeed, the recognition of the prospective client may eliminate, in many situations, a need for a determination of full attorney-client relationship since the key duty at issue may be sufficiently implicated upon a finding that the party is a prospective client.

A more global but less tangible potential result of Rule 1.18 and the age of advanced technology is an overall broadening of the thinking about the formation of an attorney-client relationship and duties that an attorney might owe in a particular situation. Rule 1.18 creates an environment in which contract notions and hard-edged categories of relationships may be less important; context and circumstances matter, even if delineations and categorizations are not possible. Rule 1.18 in general and the discussion of when a possible client might be a prospective client in particular invites an open analysis of all sorts of circumstances. This discussion makes clear that the honest and reasonable belief of the possible client as to the relationship with the lawyer is of utmost importance. The discussion makes clear that the question is the consensual nature of the relationship given the particular circumstances, not necessarily the existence of a contract or contract-like situation.

A circumstance and context driven approach to determining when a lawyer owes duties to anyone, client or otherwise, is consistent with attorney-client privilege law. Courts have always recognized that the application of the attorney-client privilege does not depend on the existence of a contract or even an attorney-client relationship. Rather, courts have applied the privilege when a possible client communicated with a party the possible client reasonably believed to be an attorney for the purpose of obtaining legal advice.31 Thus, the privilege has applied regardless of a recognizable attorney-client relationship. Attorney-client privilege law has also used a reasonable belief analysis with regard to confidentiality. If the party seeking legal advice reasonably believes the communication is confidential the privilege applies.32

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32. See infra Part VI. See, e.g., United States v. Ruebele, 583 F.3d 600, 610 (9th Cir. 2009) (privilege applied if person reasonably believed the communication was confidential).
This article continues in Section II with a discussion of Rule 1.18, its comments, and its 2012 amendments. In Section III the treatment prospective clients receive in the Restatement (Third) of the Law Governing Lawyers is reviewed. Section IV discusses courts’ treatment of the question of the existence of an attorney-client relationship along with the Restatement’s view of the formation of the attorney-client relationship. In Section V the article discusses the changes Rule 1.18 as amended may create. Section VI discusses how a more flexible approach is consistent with attorney-client privilege law. The article concludes in Section VII that Rule 1.18, when paired with rapidly-changing technology that multiplies opportunities and varieties of attorney and client interaction, should lead to a flexible view of relationships and duties owed.

II. Rule 1.18

The ABA added Model Rule 1.18 in 2002. Before the introduction of Rule 1.18, the Model Rules had no provision addressing a lawyer’s interaction with a party who sought to be represented by the lawyer but who was not yet in an attorney-client relationship with the lawyer. In 1990 the ABA issued Formal Opinion 90-358 which provided guidance for dealing with some of the issues Rule 1.18 addressed but not until 2002 did the prospective client concept become a part of the Model Rules.

The version of Rule 1.18 adopted in 2002 provided that “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” The Rule then recognized that an attorney has a duty to protect “information learned in the consultation” to the same extent that a lawyer has a duty to protect a former client’s information.

In addition, since its inception Rule 1.18 has imposed a duty of loyalty on the attorney who has dealt with a prospective client. Rule 1.18(c) provides that a lawyer is prohibited from representing “a client with interests materially adverse to those of a prospective client in the same or a substantially related matter” if the prospective client has shared information with the lawyer that “could be significantly harmful to” the prospective client. The Rule provides a process for screening the lawyer who had received the information.

While not in the text of the Rule, comment nine to Rule 1.18 speaks to a duty of competence owed to a prospective client. Comment nine states

33. See Legislative History of Model Rule 1.18, in Stephen Gdels et al., Regulation of Lawyers: Statutes and Standards 214 (concise ed. 2012).
34. See id. (discussing the Reporter’s Explanation Memo that accompanied the Ethics 2000 Committee proposal suggesting Rule 1.18). See also Joy & McMurtagh, supra note 6 (“Until the ABA enacted Model Rule 1.18 in 2002, the Model Rules did not recognize the status of ‘prospective client.’”).
37. Id. at R. 1.18(b).
38. Id. at R. 1.18(c).
39. Id. at R. 1.18(d).
that one should consult Rule 1.1, the rule requiring lawyer competence, with regard to “a lawyer who gives assistance on the merits of a matter to a prospective client.” Also, comment one to Rule 1.18 specifically notes that a prospective client may rely on a lawyer’s advice. The implication of comments nine and one is that a lawyer owes a prospective client a duty of competence.

In 2012, the ABA amended Rule 1.18. The ABA Commission on Ethics 20/20 noted, in explaining the rationale for amending Rule 1.18:

When a lawyer’s first substantive contact with a potential client was face-to-face, it was relatively easy to determine when a communication gave rise to a prospective client-lawyer relationship. Now such a relationship can arise in many different ways: a lawyer’s website might ask a person to send information about his injury; a lawyer might exchange information with someone on a blog; and a lawyer might use her social networking page to provide advice to “friends.”

In order to clarify when a prospective client and attorney relationship might arise in all circumstances, including situations involving electronic communications, amendments to Rule 1.18 were proposed and adopted by the ABA in August of 2012. In particular, Rule 1.18’s definition of a prospective client was modified to eliminate that a prospective client is one who “discusses” the possibility of representation with a lawyer. Rather, the amended version of Rule 1.18(a) now states: “A person who consults with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”

In its effort to not have lawyer-client interactions thought of in traditional ways, the ABA modified Rule 1.18(b) as well, removing a mention of “discussions” and “consultation” in the provision dealing with the duty of confidentiality. The ABA rewrote section (b) of Rule 1.18 to state that a lawyer owes a duty of confidentiality to a prospective client if that lawyer has “learned information from” the prospective client. The confidentiality duty owed was not modified. The lawyer owes the prospective client the same duty of confidentiality as the lawyer owes to a former client.

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40. Rule 1.1 states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Id. at R. 1.1.
41. Id. at R. 1.18 cmt. 9.
42. Id. at R. 1.18 cmt. 1.
44. See Model Rules of Prof’l Conduct R. 1.18(a) (2012). Rule 1.18(b) and the comments were also slightly modified to be more consistent with the notion of a consultation rather than a discussion. Id. at R. 1.18(b).
45. Model Rules of Prof’l Conduct R. 1.18(b) (2012).
46. See id.
The ABA also modified comments one, four, and five to bolster its effort to broaden the notions of lawyer-client interaction at play in the rule. In comment one the word, “discussions” was eliminated and replaced with “consultations.” 47 In comment four a reference to “the initial interview” was deleted and replaced with “the initial consultation.” 48 And finally, in comment five a reference to “conversations” was eliminated and replaced with a reference to “a consultation.” 49

Perhaps the most significant amendment is a substantial rewriting of comment two to Rule 1.18. Comment two deals with the determination of whether a party is a prospective client—in other words, whether there is a prospective client and attorney relationship. Comment two, as amended, states:

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 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 is not a “prospective client.” 50

This comment makes clear that the focus of analysis for the existence of a prospective client and lawyer relationship is the possible client’s “reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.” 51

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48. Id. at cmt. 4.
49. Id. at cmt. 5.
50. Id. at cmt. 2.
51. Id.
In addition, the last sentence of the comment clarifies that the person must honestly be seeking representation by the attorney. Communication with an attorney might create a “reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship” but if the possible client’s purpose is not an honest effort to secure the attorney’s services, the possible client is not a prospective client for purposes of the Rule 1.18.52

This comment is subtly important because it describes a process in which a person could become a prospective client though the circumstances are far from the “give-and-take” that one might assume has to be present for the formation of a relationship. In a more traditional setting a client pursues legal advice and representation from an attorney in an in-person conversation. The lawyer then consents to the representation and the attorney-client relationship is formed. Or the lawyer consents to consider accepting the person as a client and thus a prospective client and lawyer relationship is formed. Comment two makes clear that a consensual relationship can be formed without what many might think of as a traditional consent.53 Rather, if a lawyer sets up a communications portal that invites certain information about potential representation, and if the lawyer does not place clear warnings on the portal to clarify that no relationship of any sort results from the use of the portal, then a relationship of a consensual sort can be recognized in the absence of a traditional “give-and-take.”

III. THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS AND PROSPECTIVE CLIENTS

The Restatement (Third) of the Law Governing Lawyers treats prospective clients very similarly to Model Rule 1.18, recognizing duties of confidentiality, loyalty, and care. Section fifteen of the Restatement, like Rule 1.18, recognizes that lawyers owe duties to prospective clients.54 The Restatement embraces the reality that “[p]rospective clients are like clients in that they often disclose confidential information to a lawyer, place documents or other property in the lawyer’s custody, and rely on the lawyer’s advice.”55 A comment to section fifteen notes that disclosure of confidential information may be necessary even though no attorney-client relationship exists or forms.56

52. Id.
53. In Duver v. Binegar, 95 So. 2d 565, 571 (La. Ct. App. 2012), in a malpractice context, the court concluded its description of the formation of an attorney-client relationship with the following: “an attorney client relationship cannot exist in the absence of any initial communication—verbal, written, or otherwise—between an attorney and the client.” This statement may reflect a narrower view of possible interactions.
55. Id. at cmt. b.
56. See id. at cmt. c (It is often necessary for a prospective client to reveal and for the lawyer to learn confidential information (see § 59) during an initial consultation prior to their decision about formation of a client-lawyer relationship. For that reason, the attorney-client privilege attaches to communications of a prospective client (see § 70, Comment c). The lawyer must often learn such information to determine whether a conflict of interest exists with an existing client of the lawyer or the
Like Rule 1.18, section fifteen recognizes that a lawyer may owe duties to a prospective client. Section fifteen recognizes a duty of confidentiality by stating that a lawyer owes a person who "discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues" a duty not use or disclose confidential information unless use or disclosure would be permitted for information of a client or former client. Section fifteen also recognizes that the lawyer has a duty to protect the person's property if the lawyer has custody of that property. Section fifteen expresses a duty of loyalty and confidentiality in terms of disqualification almost identical to Rule 1.18 as well, providing for disqualification when the interests of a client are "materially adverse" to a prospective client, the matter is "the same or a substantially related matter," and the prospective client conveyed to the lawyer "confidential information that could be significantly harmful to the prospective client."

Finally, section fifteen of the Restatement, more forcefully than Rule 1.18, recognizes that a lawyer owes a prospective client a duty to "use reasonable care to the extent the lawyer provides the person legal services." Comment e to section 15 explains that a lawyer might render legal advice to a prospective client though no attorney-client relationship yet exists. For example, a lawyer might comment on such matters as whether the person has a promising claim or defense, whether the lawyer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within

lawyer's firm and whether the matter is one that the lawyer is willing to undertake. In all instances, the lawyer must treat that information as confidential in the interest of the prospective client, even if the client or lawyer decides not to proceed with the representation (see Subsection (1)(a); see also § 60(2)). The duty exists regardless of how brief the initial conference may be and regardless of whether screening is instituted under Subsection (2)(a)(ii). The exceptions to the principles of confidentiality and privilege apply to such communications (see §§ 61-67)).

57. Id. at § 15(1). See also section fifteen comment one, which states in part: "This Section summarizes the duties of a lawyer to a person seeking legal services. Duties attach even when no client-lawyer relationship ensues." Id. at cmt. 1.

58. See id. at § 15(1)(a).

59. See id. at § 15(1)(b).

60. Id. at § 15(2). Section 15(2) states:

A lawyer subject to Subsection (1) may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer or another lawyer whose disqualification is imputed to the lawyer under §§ 123 and 124 has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter, except that such a representation is permissible if:

(a) (i) any personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c); or

(b) both the affected client and the prospective client give informed consent to the representation under the limitations and conditions provided in § 122.

61. Id. at § 15(1)(c). See also Restatement (Third) of the Law Governing Lawyers § 51(1) (2000).
which action must be taken and, if the representation does not proceed, what other lawyer might represent the prospective client.\textsuperscript{62}

Thus, posits comment e, an attorney must use reasonable care; prospective clients reasonably might rely on such advice. In particular, comment e states: "Depending on the circumstances, the burden of removing ambiguities rests with the lawyer, particularly as to disclaiming conclusions that the client reasonably assumed from their discussion, for example whether the client has a good claim."\textsuperscript{63}

The Restatement thus supports Rule 1.18 in terms of recognition of duties owed to prospective clients. Unfortunately, however, section fifteen of the Restatement is written in terms of the duties attaching when "a person discusses with a lawyer the possibility of their forming a client-lawyer relationship."\textsuperscript{64} As Rule 1.18 as amended moves forward without the more-limiting word, "discusses," the Restatement, using the word, "discusses," may be less encouraging of the recognition of prospective client and attorney relationships and less encouraging of a broad notion of consensual relationships in general.

IV. HISTORICAL TREATMENT OF THE EXISTENCE OF AN ATTORNEY-CLIENT RELATIONSHIP

A. The Courts

Without the concept of the prospective client for purposes of analysis, courts of the past have sought to categorize situations as ones in which there was an attorney-client relationship and all duties were owed or situations in which the party was a nonclient to whom the lawyer owed no duties.\textsuperscript{65} For example, Knigge v. Corvose\textsuperscript{66} is a case in which the concept of a prospective client could have been most helpful if available to the court. Faced with the question of whether an attorney should be disqualified from participating in the matter before the court, the court analyzed the matter as one involving an attorney-client relationship or no relationship. In Knigge, an attorney had in place a prerecorded telephone message that stated the nature of the attorney's practice and his rates.\textsuperscript{67} The message also stated that the attorney had no staff so the mode of interaction was the voice mail system.\textsuperscript{68} The lawyer's message asked callers to "leave enough

\textsuperscript{63} Id.
\textsuperscript{64} See id. at § 15(1).
\textsuperscript{65} See, e.g., Lowell v. Winchester, 941 S.W.2d 466 (Ky. 1997) (finding a lawyer-client relationship after an in-person consultation); Togstad v. Versly, Otto, Miller & Reece, 291 N.W.2d 686 (Minn. 1980) (finding a lawyer-client relationship after an in-person consultation). See generally Minott, supra note 20 (discussing various approaches to determining the existence of an attorney-client relationship); Martin, supra note 11 (discussing courts' approaches as contract-based or tort-based).
\textsuperscript{67} Id. at *1.
\textsuperscript{68} Id.
information so that I will have an idea about the nature of your call."69
The party seeking the attorney’s disqualification left five or six voice mails
with the lawyer. Once, said the party, the attorney spoke to him in per-
son.70 After the opposing party engaged the attorney as an expert witness,
the party who had contacted the attorney moved to disqualify him.71 The
court ultimately determined that the party was not in an attorney-client
relationship with the lawyer.72

In addition to being a good example of a court deciding between the
two options, recognizing an attorney-client relationship with all comcomi-
tant duties and recognizing no relationship, the Knigge case is also helpful
in providing an example of how courts have framed the analysis. The
Knigge court’s statements with regard to the existence of an attorney-client
relationship are enlightening. The court stated:

The formation of an attorney-client relationship ‘hinges
upon the client’s [reasonable] belief that he is consulting a
lawyer in that capacity and his manifested intention to seek
professional legal advice.’” . . . Formality is not, however,
“an essential element in the employment of an attor-
ney.” . . . Instead, courts must “look at the words and con-
duct of the parties.” . . . Courts have considered several
factors in determining whether an attorney-client rela-
tionship exists, including whether a fee arrangement was en-
tered into or a fee was paid, whether a written retainer
exists, whether the attorney actually represented the indi-
vidual, for example at a deposition, or performed legal ser-
dices for the individual, and whether the purported client
reasonably believed that the attorney was representing
him. . . . A party’s “unilateral belief” that he is represented
by counsel “does not confer upon him the status of client
unless there is a reasonable basis for his belief.” . . . “To
establish a fiduciary or implied attorney-client relationship,
the possible client must show that he submitted confidential
information to a lawyer with the reasonable belief that the
lawyer was acting as his attorney.”73

While the statement seems to say that a potential client’s reasonable belief
as to the relationship is important, the court notes some very traditional
factors to consider and phrases the question as a question of “employment
of an attorney.”74 Employment of an attorney is a phrase with a decidedly
contractual air to it—perhaps a more stringent requirement that a finding

69. Id.
70. Id.
71. Id. at *2.
72. Id. at *3.
73. Id. (citations omitted).
74. Id.
of consensual relationship. Then again, the last sentence of the quoted statement sounds like there can be no relationship absent the sharing of confidential information. One can speculate that the passage is a mash-up of statements made in many cases over the years. On the basis of this passage, however, it is hard to determine how a court should judge a relationship. Is it one test or a bundle of tests?

Another example of analysis is in Lovell v. Winchester.75 In Lovell two parties claimed that an attorney representing the opposing party should be disqualified because the attorney met with them before becoming counsel to the opposing party. There was no dispute that the lawyer met with the parties once and that the parties left original land transaction documents with the lawyer. The lawyer then declined the representation and returned the documents.76 In finding an attorney-client relationship, the court stated:

Consultation with a lawyer may ripen into a lawyer/client relationship that precludes the lawyer from later undertaking a representation adverse to the individual who consulted him. The lawyer/client relationship can arise not only by contract but also from the conduct of the parties. Courts have found that the relationship is created as a result of the client’s reasonable belief or expectation that the lawyer is undertaking the representation. Such a belief is based on the conduct of the parties. The key element in making such a determination is whether confidential information has been disclosed to the lawyer.77

This statement also seems to say that the analysis hinges on the reasonable belief of the possible client as to whether the lawyer is agreeing to the representation but then the last quoted sentence says that the “key” is whether the person has disclosed confidential information to the lawyer. Is the disclosure of confidential information essential in all situations or is it essential only when the question is disqualification. As is true with the Knigge passage, this passage from Lovell makes it difficult to determine how to evaluate relationships.

Other statements, especially from the malpractice context, are even more limiting. Some courts simply refuse to entertain the possibility of malpractice liability absent a contractual relationship.78 For example, in Macawber Engineering, Inc. v. Robson & Miller,79 the court stated that to succeed on a legal malpractice action under Minnesota law, the plaintiff must prove the existence of an attorney-client relationship because the

75. See Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997).
76. Id. at 467.
77. Id. at 468.
78. See, e.g., Macawber Eng’g, Inc. v. Robson & Miller, 47 F.3d 253 (8th Cir. 1995); Allen v. Steele, 252 P.3d 476 (Colo. 2011).
79. Macawber, 47 F.3d at 255.
duty of care results from that relationship. The court continued that "an attorney-client relationship is established when the parties enter an express or implied contract of representation or when an individual seeks and receives legal advice under circumstances which would lead a reasonable person to rely on the advice." In Berry v. McFarland, the Idaho Supreme Court evaluated the existence of an attorney-client relationship in the context of an action for breach of fiduciary duty. The court stated:

As a general rule, no attorney-client relationship exists absent assent by both the possible client and attorney. . . . If the attorney agrees to provide assistance, or engages in conduct that could reasonably be construed as so agreeing, then there is an attorney-client relationship. The scope of the representation depends upon what the attorney has agreed to do.

And in Rosenbaum v. White, an action involving a malpractice claim among others, the court stated:

However, there must be evidence of a consensual relationship, existing only after both the attorney and client have consented to its formation. . . . One way that Indiana courts have held that an implied attorney-client relationship exists is when "[a]n attorney has consented to the establishment of an attorney-client relationship[,] there is proof of detrimental reliance, [and] the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance does nothing to negate it."

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80. Id. at 255-56.
81. Id. at 256.
83. Id.
84. Id. at 411.
85. Rosenbaum v. White, 692 F.3d 593, 601 (7th Cir. 2010).
86. Id. In the context of determining whether a party was a joint client of an attorney for purposes of attorney-client privilege, the court in Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd., 150 F.R.D. 648 (N.D. Cal. 1993), applied a contract-based view of the formation of the attorney-client relationship. The court stated:

It is appropriate to focus on what a party in the given circumstances would reasonably have inferred because in legal theory the attorney-client relationship can be formed, at least for purposes of determining whether a party was, over time, a joint client of the same lawyer with another party, only by contract, express or implied.

Id. at 651. However, the court provided that the reasonable belief of the possible client considering all circumstances, was the determinative factor. Id. at 652-53. In E2Interactive, Inc. v. Blackhawk Network, Inc., No. 09-CV-629-SLC, 2010 WL 3981640 (W.D. Wis. May 17, 2010, the court stated:

"The attorney-client relationship is contractual and subject to the same analysis as other contract formation questions." . . . The attorney-client relationship may be informal and implied from the word and actions of the parties. . . . Whether and when an attorney-client relationship exists depends on the contractual intent and conduct of the parties.

Id. at *4 (citation omitted).
Some courts have placed special emphasis on disclosure of confidential information, stating that a disclosure of confidential information creates an attorney-client relationship. Other courts have emphasized that the rendering of legal advice creates the relationship.

Perhaps one of the most confusing statements regarding determining the existence of an attorney-client relationship is the statement in Capitol Surgical Supplies, Inc. v. Casale, in which the United States Court of Appeals for the Third Circuit summarized Pennsylvania law:

In this case, it is undisputed that there was no express contract between Capitol and Casale for legal services. Therefore, Capitol had to establish the existence of an implied attorney-client relationship. An implied attorney-client relationship is shown if (1) the purported client sought advice or assistance from the attorney; (2) the assistance sought was within the attorney’s professional competence; (3) the attorney expressly or impliedly agreed to provide such assistance; and (4) it is reasonable for the putative client to believe that the attorney was representing him. . . . A request for legal services, and an agreement to provide legal services, are necessary elements to form an attorney-client relationship.

The message from this collection of statements about the formation of an attorney-client relationship is that there is a tremendous amount of variation about what seems to matter. Some courts may be seeking a contract, express or implied, rather than seeking evidence of a consensual relationship. These statements with their various factors of importance also illustrate a perhaps narrow focus on the possible circumstances that can suffice to evidence such a relationship. For example, given that the Lovell court

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87. See, e.g., Diversified Group, Inc. v. Daugardas, 139 F. Supp. 2d 445, 454 (S.D.N.Y. 2001) (“To establish a fiduciary or implied attorney-client relationship, the putative client must show that he submitted confidential information to a lawyer with the reasonable belief that the lawyer was acting as his attorney.”); Black Rush Mining, LLC v. Black Panther Mining, 840 F. Supp. 2d 1085, 1090 (N.D. Ill. 2012) (in a disqualification matter, the court stated: “An implied attorney-client relationship may be demonstrated in the absence of an express agreement if a party shows (1) that it submitted confidential information to a lawyer, and (2) it did so with the reasonable belief that the lawyer was acting as the party’s attorney.”); United States v. Stiger, 413 F.3d 1185, 1196 (10th Cir. 2005) (in a disqualification case the court stated: “To show that an attorney-client relationship existed, Mr. Stiger need only show that (1) [he] submitted confidential information to a lawyer and (2) [he] did so with the reasonable belief that the lawyer was acting as [his] attorney.”) (citation omitted).

88. See, e.g., Knigge v. Corvese, No. 01 Civ. 5743(DLC), 2001 WL 830669, at *3 (S.D.N.Y. July 23, 2001) (noting as a factor whether the lawyer ever performed legal services for the person); Macawber Eng’g, Inc. v. Robson & Miller, 47 F.3d 253, 256 (8th Cir. 1995) (“an attorney-client relationship is established when the parties enter an express or implied contract of representation or when an individual seeks and receives legal advice under circumstances which would lead a reasonable person to rely on the advice”). See also Lancut, supra note 2, at 168 discussing forming an attorney-client relationship by giving legal advice.


stated that the "key" for the creation of an attorney-client relationship was the disclosure of confidential information,\textsuperscript{91} could a person be a client without disclosure of confidential information if the person "had a reasonable belief or expectation that the lawyer [was] undertaking the representation?"\textsuperscript{92} Or is such a belief unreasonable absent the sharing of confidential information?

B. The Restatement (Third) of the Law Governing Lawyers on the Formation of the Attorney-Client Relationship

The Restatement (Third) of the Law Governing Lawyers attempts to outline the methodology for determining whether there is an attorney-client relationship. Section fourteen of the Restatement provides:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
   (a) the lawyer manifests to the person consent to do so; or
   (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.\textsuperscript{93}

Comment a to section fourteen clarifies that "the various duties of lawyers and clients do not always arise simultaneously" and that a lawyer may owe duties to a prospective client.\textsuperscript{94}

In terms of the nature of the analysis, comment a provides that "[a]gency and contract law are also applicable, except when inconsistent with special rules applicable to lawyers."\textsuperscript{95} The comment notes that the relationship is "consensual"\textsuperscript{96} but also states that "when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so."\textsuperscript{97} The comment notes that in some situations the lawyer may be seen to have impliedly consented while in others "the lawyer's duty arises from the principle of

\textsuperscript{91} Lovell v. Winchester, 941 S.W.2d 466, 467 (Ky. 1997).
\textsuperscript{92} Id.
\textsuperscript{93} \textit{Restatement (Third) of the Law Governing Lawyers} §14 (2000).
\textsuperscript{94} Id. at cmt. a.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at cmt. b.
\textsuperscript{97} Id. at cmt. c.
promissory estoppel, under which promises inducing reasonable reliance may be enforced to avoid injustice. 98

This provision is helpful in that it focuses on the formation of the attorney-client relationship as manifestations of a consensual relationship.99 However, providing that a lawyer can be bound without a manifestation of consent but with reasonable reliance by the potential client and reasonable notice to the attorney100 perhaps muddies the water unnecessarily. Indeed, as the comment notes, as justification, this section reaches across doctrines to promissory estoppel.101 Unfortunately, promissory estoppel is not a great fit here since the doctrine of promissory estoppel requires a promise.102 It seems that if a lawyer's actions or inaction can justify a finding of promise, that action or inaction could be the basis for a finding of a manifestation of consent. A broad, more fluid notion of what can comprise a manifestation of consent on the part of the lawyer, one suggested by amended Rule 1.18 and its comments, could perhaps be more useful.

V. THE POTENTIAL EFFECT OF RULE 1.18

There is no doubt that Rule 1.18 and its amendments will be influential with regard to professional responsibilities owed to prospective clients; the Rule is the controlling standard. Lawyers owe duties of confidentiality, loyalty and competence to prospective clients and will be subject to discipline for failing with regard to these duties.103 The broad language in Rule 1.18's comment two about the formation of the prospective client and lawyer relationship encourages analysis that considers the totality of circumstances and context in determining whether duties are owed for purposes of professional responsibility.

Likewise, the more open view of attorney-client relationships present in rule 1.18 as amended also should be influential in disqualification matters. Courts over the years very often have used the Model Rules as guidance when deciding disqualification matters though the Model Rules are not controlling.104 In the days before the existence of Rule 1.18 and its

98. Id. The comment refers to the Restatement (Second) Contracts §90 (1979). This provision deals with the contractual notion of promissory estoppel. See id.


100. See id. at §14(1)(b).

101. See id. at §14 cmt. c.

102. See Restatement (Second) Contracts §90 (1979). Section 90 states:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.


introduction of the prospective client concept, courts’ analyses regarding motions to disqualify often involved determining whether a party and an attorney were\textsuperscript{105} or had even been\textsuperscript{106} in an attorney-client relationship. If a court determined that the party was a client or had been a client, Model Rule 1.7 or Model Rule 1.9 provided guidance about whether a disqualification was appropriate.

In the time since the introduction of the prospective client concept and the conflict principles for prospective clients in Rule 1.18(c) and (d), courts have incorporated the teachings of Rule 1.18 into disqualification analysis\textsuperscript{107}. These courts have used the instruction of Rule 1.18 to identify prospective clients and have applied the conflict of interest principles of Rule 1.18 as well. Because, other than Rule 1.18, there is no body of substantive law regarding the existence of a prospective client, Rule 1.18 and its comments, especially comment two as amended in 2012, can be particularly influential. The lack of prior statements of law regarding prospective clients may allow the analysis of the existence of a prospective client to exist without uncomfortable ties to contract law principles or unfortunate statements of tests and factors. Perhaps the analysis used will be that of comment two—a focus on the honest and reasonable belief of the possible client as to the relationship with the attorney but not a focus on the existence of an implied contractual relationship or the existence of particular factors. The courts’ use of Rule 1.18’s prospective client analysis perhaps will preclude courts from applying tests of attorney-client relationship in many cases because the courts will not need to establish a full attorney-client relationship.\textsuperscript{108}

A recent example of the impact of Rule 1.18 in the disqualification context is In re Marriage of Perry.\textsuperscript{109} In a divorce matter, a wife had three telephone conversations with the attorneys who eventually represented her husband. The court used Rule 1.18 to determine that the wife had been a

\textsuperscript{105} See, e.g., Krutzfeldt Ranch, 272 P.3d 641 (Mont. 2012) (referring to Rules 1.7, 1.9, & 1.10).


\textsuperscript{108} A court not finding a prospective client relationship certainly need not evaluate the existence of an attorney-client relationship. In many disqualification cases, finding a prospective client relationship will provide all necessary guidance on the disqualification question. In those few cases in which a court finds at least a prospective client relationship but Rule 1.18 does not counsel in favor of disqualification because the possible client disclosed no “significantly harmful” information to the attorney, a court might have reason to take the additional step of deciding whether the possible client is or was in fact in an attorney-client relationship with the attorney.

prospective client of the husband’s counsel and acknowledged that Rule 1.18 provides that a lawyer owes duties to a prospective client though there is no traditional attorney-client relationship.\textsuperscript{110} Ultimately, the court did not disqualify the husband’s attorney because the wife did not share significantly harmful information with the attorney.\textsuperscript{111} The disqualification analysis focused not on the existence of a lawyer-client relationship but rather on the existence of a prospective client and lawyer relationship and then used Rule 1.18 for the source of the standard of disqualification. In determining the nature of the relationship, perhaps courts of the future will also applied the broad, context and circumstances analysis suggested by comment two to Rule 1.18.

Rule 1.18 may also affect courts in their determination of malpractice liability. Comment one to Rule 1.18 acknowledges that lawyers may give prospective clients advice.\textsuperscript{112} Comment nine suggests that a lawyer owes a prospective client a duty of competence.\textsuperscript{113} In light of these statements, courts could be more willing to accept that a lawyer may give legal advice to a prospective client and not convert that party to a client. Courts could determine that lawyers are responsible to prospective clients for malpractice if advice given prospective clients is below the appropriate standard of care.

For example, in \textit{Togstad v. Vesely, Otto, Miller & Keefe},\textsuperscript{114} a court evaluated whether an attorney might be liable for malpractice. A woman had met with an attorney about possible claims she and her husband might have related to medical care her husband had received. The woman said that the attorney told her that “he did not think we had a legal case, however, he was going to discuss this with his partner.”\textsuperscript{115} She did not hear from the attorney for a few days and so she concluded that “they had come to the conclusion that there wasn’t a case.”\textsuperscript{116} Later she discovered that she and her husband had claims but the statute of limitations had run.\textsuperscript{117} The Minnesota Supreme Court concluded that there was a lawyer-client relationship,\textsuperscript{118} that the lawyer had rendered legal advice,\textsuperscript{119} and that a jury could find that the attorney had been negligent in rendering that advice.\textsuperscript{120} The \textit{Togstad} court, speaking in 1980, long before Rule 1.18 and the express recognition of the prospective client concept, found an attorney-client relationship in a situation that today a court might very well conclude involved a prospective client and attorney relationship. The \textit{Togstad} court’s willingness to recognize a lawyer-client relationship and malpractice

\textsuperscript{110} \textit{Id.} at *5-6.
\textsuperscript{111} \textit{Id.} at *6.
\textsuperscript{112} \textit{See Model Rules of Prof’l Conduct R. 1.18 cmt. 1} (2012).
\textsuperscript{113} \textit{See id.} at cmt. 9.
\textsuperscript{114} \textit{Togstad v. Vesely, Otto, Miller & Keefe}, 291 N.W.2d 686, 690 (Minn. 1980).
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 694.
\textsuperscript{118} \textit{Id.} at 693.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.} at 694.
liability indicates that modern courts might be willing to recognize malpractice liability in prospective client situations today.

Other courts may not be so amenable and may see malpractice as a separate matter. For example, in Allen v. Steele, a lower court dismissed a claim for legal malpractice and negligent misrepresentation. The plaintiffs claimed that the attorney provided them incorrect information about a statute of limitations and as a result they did not file a matter in a timely fashion. The plaintiffs appealed the negligent misrepresentation claim. The Court of Appeals held that the plaintiffs stated a claim though there was no attorney-client relationship between the plaintiffs and the defendant attorney. The plaintiffs relied on the Restatement (Third) of the Law Governing Lawyers section 15 which states that lawyers owe prospective clients a duty of care. The Colorado Supreme Court reversed. The court stated that “[i]n Colorado, attorneys ‘do not owe a duty of reasonable care to non-clients,’ including prospective clients. . . . An attorney may be liable for legal malpractice only if the plaintiff has proven the existence of an attorney-client relationship.” The court then noted that the Rule 1.18 of the Colorado Rules of Professional Conduct provide that a lawyer owes a prospective client only the duty of confidentiality and the duty to avoid conflicts of interest. The Allen court acknowledged that the Restatement in section fifteen provides that an attorney owes a duty of care to a party who is not a client but stated, [The Restatement] imposes liability for malpractice in the absence of an attorney-client relationship, which contravenes Colorado law. . . . the distinction between a client and a prospective client is fundamental to Colorado law. In Colorado, attorneys do not owe a duty of reasonable care to non-clients—either for legal malpractice or under the ethical rules. . . . A plaintiff must establish the existence of an attorney-client relationship to state a claim of legal malpractice.

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121. See, e.g., Rosenbaum v. White, 692 F.3d 593 (7th Cir. 2012) (in malpractice action court found no attorney-client relationship and refused to consider duties under the Rules of Professional Conduct in a prospective setting).
123. Id.
124. Id.
125. Id.
126. Id.
127. See RESTATMENT (THIRD) OF THE LAW GOVERNING LAWYERS §15 (2000). See also supra the discussion of section 15 of the Restatement in section III.
128. Allen, 252 P.3d at 480.
129. Id. at 482 (quoting Mehaffey, Rider, Windholz & Wilson v. Cent. Bank Denver, 392 P.2d 230, 240 (Colo. 1964)).
130. Id. at 482. Colorado Rule of Professional Conduct Rule 1.18 comment 9 does not contain the reference to the duty of competence included in the Model Rules version of comment 9. The Colorado rule mentions a duty of care or competence only with regard to valuables and papers entrusted to the lawyer and dealt with in Rule 1.15. See COLORADO RULES OF PROF'L CONDUCT R. 1.18 cmt. 9.
131. Id. at 485 (citation omitted).
VI. Consistency with Attorney-Client Privilege Analysis

The generally-accepted understanding of the attorney-client privilege is that the privilege protects confidential communications between an attorney and a client if the purpose of the communications is the obtaining or rendering of legal advice.132 The attorney-client privilege has long been recognized to apply even when a party who seeks to become a client but is not yet a client makes the disclosures. The existence of an attorney-client relationship has never been a requirement for application of the privilege.133 For example, a famous and often-quoted description of the privilege is that in United States v. United Shoe Machinery Corp.,134 which states that the "privilege applies only if...the asserted holder of the privilege is or sought to become a client."135 A recent statement of this idea is in Barton v. United States District Court for the Central District of California.136 The Barton court stated:

There is nothing anomalous about applying the privilege to such preliminary consultations. Without it, people could not safely bring their problems to lawyers unless the lawyers had already been retained. "The rationale for this rule is compelling," because "no person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of the facts decided to accept the employment or decline it."137


133. See Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir. 1994) (the privilege applies when the "asserted holder of the privilege is or sought to become a client"); In re Aulcar, 961 F.2d 65 (5th Cir. 1992) ("No person could ever safely consult an attorney for the first time...if the privilege depended on the chance of whether the attorney after hearing the statement of facts decided to accept employment or decline it."); United States v. Buitrago-Dugand, 712 F. Supp. 1045, 1048 (D.P.R. 1989) ("It is imperative that the privilege attach soon after the prospective client has contacted an attorney, and certainly no later than the point at which the person reveals facts tending to establish a criminal exposure.").


135. Id. at 356-59.


137. Id. at 1111 (quoting People v. Gionis, 892 P.2d 1199, 1205 (1995)). See also Factory Mut. Ins. Co. v. APCom Power, Inc., 662 F. Supp. 2d 896, 899 (W.D. Mich. 2009) (quoting Banner v. City of Flint, 99 F. App'x 29, 36 (6th Cir. 2004)) ("the Sixth Circuit recognizes that "when a potential client consults with an attorney, the consultation establishes a relationship akin to that of an attorney and existing client...Attorneys are bound by the attorney-client privilege and the duty of confidentiality in those circumstances.").
The *Burton* court was evaluating a claim of privilege regarding disclosures made by parties completing questionnaires by way of a lawyer-sponsored website. The website stated that no attorney-client relationship was created by consulting the website and providing information with the questionnaire. The court determined that such a statement did not defeat application of the attorney-client privilege to communications made by way of the website because the privilege can attach before an attorney-client relationship is formed and even if an attorney-client relationship never forms.138 *Burton* court stated: ""Prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer.""139 Thus, Rule 1.18's recognition that lawyers owe prospective clients professional responsibility duties is consistent with attorney-client privilege analysis.140

In addition, the analysis of whether the attorney-client privilege applies in a particular setting has always turned on the reasonable belief of the party making disclosures in an effort to obtain legal advice. As the Eighth Circuit Court of Appeals in *In re Grand Jury Subpoena Duces Tecum*,141 stated,

In some aspects of the law of attorney-client privilege, the client's reasonable beliefs may be relevant. For example, courts have found the privilege applicable where the client reasonably believed that a poseur was in fact a lawyer, reasonably believed that a lawyer represented the client rather than another party, or reasonably believed that a conversation with a lawyer was confidential, in the sense that its substance would not be overheard by or reported to anyone

138. *Burton*, 410 F.3d at 1111.

139. *Id.* See also *Puckett v. Hot Springs School Dist.* No. 23-2, 239 F.R.D. 572, 579-80 (D.S.D. 2006) (if parties seek legal advice and reasonably believe the lawyer with whom they communicate represents them, the attorney-client privilege can apply even though no attorney-client relationship actually exists or develops).

140. *In United States v. Gunhayev*, 276 F.R.D. 671 (M.D. Ala. 2011), an entity sent a form letter inviting the recipient to contact a person regarding possible sexual harassment, a violation of the Fair Housing Act, by a rental agent. *Id.* at 678. The individual to whom the letter recipients were directed was a paralegal. The court was asked to determine whether the notes of the paralegal's conversations with letter recipients who called in were privileged. The court stated: ""The callers contacted CAFHC to explore the possibility of raising potential Fair Housing Act claims, whether or not they . . . ultimately agreed to be represented. Preliminary consultations of this kind are protected by the attorney-client privilege."" *Id.* at 681. See also *United States v. Bennett*, No. CR609-067, 2010 WL 4313905, at *4 (S.D. Ga. 2010) (""This conversation has all of the hallmarks of the typical initial meeting between a lawyer and a potential client. Such conversations—preliminary to entering into a formal representation agreement—are clearly protected by the attorney-client privilege."). See also *Vodak v. City of Chicago*, No. 03 C 2463, 2004 WL 782051 (N.D. Ill. Jan. 16 2004) (privilege applied to questionnaires completed by people seeking legal representation by people they reasonably believed were lawyers).

else. All these situations involve, in essence, reasonable mistakes of fact. 142

Courts have held that if the party had an honest and reasonable belief that the person to whom disclosures were made was a lawyer, the communication can be privileged. 143 In United States v. Rivera, 144 The United States District Court for the Southern District of New York stated,

It is common ground among the parties that the attorney-client privilege attaches to confidential communications made to an individual in the genuine, but mistaken, belief that he is an attorney. (citations omitted) Accordingly, it is irrelevant for the purposes of this motion that Rivera was not an attorney, since the parties agree that his clients were operating under the mistaken belief that he was. 145

Likewise, in Dabney v. Investment Corp., 146 the court stated that the privilege could apply if “the client is genuinely mistaken as to the attorney’s credentials.” Unfortunately, the client in Dabney was not “genuinely mistaken” because at the time of the communication the client knew that the

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142. Id. at 923 (footnotes omitted).

143. See e.g., United States v. Tyler, 745 F. Supp. 423, 425 (W.D. Mich. 1990) (privilege applied if person reasonably believed that cellmate was a lawyer); United States v. Bofia, 513 F. Supp. 517, 523 (D. Del. 1981) (privilege applied if person reasonably believed that one consulted was a lawyer); United States v. Mullen, 776 F. Supp. 620, 621 (D. Mass 1991) (“the attorney-client privilege may apply to confidential communications made to an accountant when the client is under the mistaken, but reasonable, belief that the professional from whom legal advice is sought is in fact an attorney”). In Financial Technologies Intl, Inc. v. Smith, No. 99 Civ 9351 GEL RLE, 2000 WL 1855131 (S.D.N.Y. Dec. 19, 2000), the court faced a claim that the privilege should apply to communications between a corporate client and a person who was not a lawyer but had been employed as the client’s in-house counsel. The court stated:

On balance, the Court finds these sources compelling and is of the opinion that an individual who reasonably believed that the person consulted was a duly admitted attorney should be afforded a measure of protection. The alternative would require individuals to check the background of a prospective attorney to ensure that they were confiding with a “real” attorney. The inherent delay in such a process might well deprive the person of effective counsel at a time when advice is most valuable.

Id. at *6. The court then concluded that the corporate claimant before it must at the least investigate the background of the individual it seek to employ as in-house counsel to confirm the individual’s status as a lawyer. See id. at *6-7. See also United States v. Gumbaytay, 276 F.R.D. 671, 679 (M.D. Ala. 2011) (“the privilege should fairly turn on the client’s reasonable perception of whether she is dealing with a person who appears to be authorized to provide legal advice” (quoting Boca Investing P’ship v. United States, No. 97-602, 1998 WL 426564 (D.D.C. June 9 1998)). See generally Rice, supra note 132, at § 3:13; Wigmore, supra note 132, at 564 (“The theory of the privilege clearly requires that the client’s bona fide belief in the status of his adviser as an admitted attorney should entitle him to the privilege. No doubt an intention to employ only such a person is necessary, as well as a respectable degree of precaution in seeking one. But from that point onward he is entitled to peace of mind, and need not take the risk of deception or of the defective professional title.”).


145. Id. at 568 n.1.

person had not been admitted to any bar.\textsuperscript{147} Some states have incorporated the reasonable belief standard of the status of the lawyer by rule. For example, some states define "lawyer" as that term is used in the privilege statute as "a person authorized, or reasonably believed by the client to be authorized to engage in the practice of law in any state or nation."\textsuperscript{148}

Another setting in which privilege law uses the honest and reasonable belief of the party in the position of client or possible client as the touchstone is when there is a question as to the confidential nature of the communication. If the party communicating with the lawyer honestly and reasonably believes that the communication is confidential, then the privilege applies.\textsuperscript{149} For example, in \textit{United States v. Ruehle},\textsuperscript{150} Ruehle, the Chief Financial Officer of a corporation claimed that he thought his communications with the corporation's attorneys were confidential. Because Ruehle knew before the conversation with the attorneys that the information uncovered by the attorneys would be disclosed to the corporation's independent auditors, the court determined that Ruehle did not establish that he had an honest and reasonable belief that the communications were confidential.\textsuperscript{151}

\section*{VII. Conclusion}

When the flexible analysis of Rule 1.18 as amended in 2012 is paired with the variety of possibilities of lawyer and client interaction, virtual or otherwise, that exists today or may exist tomorrow, thoughts about attorney-client relationships expand as well. One can only guess about the possibilities of interaction in the future. In the 1960s the cartoon, \textit{The Jetsons}, portrayed a family of the future complete with video phones and a robot maid named Rosie. At the time, I am sure that many people thought such things were simply a figment of the cartoonist's imagination appropriate for cartoon drivel and nothing else. Yet, today many of us use Skype to talk with friends and business associates and some of us have robot vacuum cleaners! Who can say today what is possible in the years ahead? A more flexible, circumstances and context approach to determining when a lawyer owes duties to a party, an approach that focuses on the nature of each

\begin{footnotesize}
147. Id.
148. See, e.g., \textit{Ky. R. Evid.} 503(A)(3); \textit{Tex. R. Evid.} 503(A)(3). See also \textit{Restatement (Third) of the Law Governing Lawyers} § 72 (2000) (the privilege applies when the communication involves a person "who is a lawyer or who the client or prospective client reasonably believes to be a lawyer").
149. See, e.g., \textit{United States v. Ruehle}, 583 F.3d 600 (9th Cir. 2009); \textit{United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.}, 874 F.2d 20, 28 (1st Cir. 1989) (client's reasonable belief is "key question"); \textit{Griffith v. Davis}, 161 F.R.D. 687 (C.D. Cal. 1995). In accord, \textit{Restatement (Third) of the Law Governing Lawyers} §71 states:

\begin{quote}
A communication is in confidence with the meaning of [the privilege] if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person . . . or another person with whom communications are protected under a similar privilege.
\end{quote}

150. \textit{Ruehle}, 583 F.3d at 609.
151. Id. ("The notion that Ruehle spoke with [the] attorneys . . . with the reasonable belief that his statements were confidential is unsupported by the record.").
\end{footnotesize}
relationship and its unique facts, an approach that does not unduly focus on factors developed in situations of long ago, should make dealing with situations we have yet to imagine easier. Rule 1.18 and its amendments assists us by suggesting such as approach.