Several questions have recently been posed to Bar Counsel raising issues as to whether and when counsel might be disqualified from representing one party to litigation due to a preliminary conversation about potential representation with an adverse party. It is not unusual for prospective clients to contact several counsel before selecting an attorney to represent that person. Similarly, in some specialized practices or in areas where geography limits the number of lawyers, it is not unusual for an attorney to have an initial contact from potentially opposing parties about the same adversarial matter. In dealing with these potential conflicts lawyers have guidance not only from new Rule 1.18 of the Maine Rules of Professional Conduct, but also continuing and enduring guidance from Professional Ethics Commission Opinion 156.

In 1997 the Professional Ethics Commission dealt with a goal of what a lawyer was to do when her office was independently contacted by both the husband and the wife to discuss a potential divorce. Both spouses made clear to the lawyer's office that he and/or she did not want the fact that he or she was requesting representation regarding a potential divorce to be disclosed to the other spouse. Opinion 156 addressed under what conditions, if any, the lawyer could represent either spouse. The opinion assumed that neither spouse consented to the lawyer representing the adverse spouse.

Opinion 156 noted that duties of confidentiality existed in favor of both potential clients even though the lawyer had not entered into a formal attorney/client relationship with either of them, citing Professional Ethics Commission Opinion 61. Relying on Opinion 61, the Commission noted that if the lawyer or her staff had obtained secrets or confidential information through telephone conversations she might not be able to represent either party even if the information was not solicited by either the lawyer or her staff.

Opinion 156 noted that the question turned on whether the information disclosed was in fact "confidential" or "secret". Thus, the request by both clients that the fact that they were seeking information about a potential divorce be kept confidential meant that the information constituted a "secret" as defined by former Bar Rule 3.6(h)(5). The definitions utilized by the former Rule have essentially been incorporated in new Rule 1.6(d) of the Maine Rules of Professional Conduct.

Opinion 156 went on to recognize that the mere acquisition of a confidence or secret does not necessarily require disqualification. The prior rule, Bar Rule 3.6(h) only prohibited the use of the confidence or secret to the advantage of another. The Commission went on to note, however, that it is fair to observe that in most instances where there is knowledge of a material confidence or secret, the use of that secret may be unavoidable. The Commission then noted as its conclusion that the lawyer may represent either party unless, as a result of the initial communications, she had obtained confidential information or a secret that was material to the representation disclosed in good faith by the adverse party. In the latter instance, the Commission recommended that the lawyer not represent either party "unless she is certain that her knowledge of the confidence or secret will never be disadvantageous to the disclosing party."

In footnotes to Opinion 156, the Commission took pains to note that disqualification would not occur if the client was communicating confidential information solely to disqualify the attorney from representing the opposing party. In that circumstance, the client was not truly disclosing a "secret" in the context of seeking legal advice. The Commission also noted that disqualification could be avoided when, before any information was given by the caller, the caller was warned that any information given in the initial telephone contact would not be considered confidential and was thus given at the caller's peril.

Opinion 156 anticipated, in large part, new Maine Rule of Professional Conduct 1.18, Duties To Prospective Client. Rule 1.18 specifically addresses the "prospective client", and notes that even when no client/lawyer
relationship ensues, the lawyer shall not use and reveal information learned in a consultation with a prospective client. See Maine Rules of Professional Conduct 1.18(b). Consistent with Opinion 156, Rule 1.18(c) provides that a lawyer shall not represent a client with an interest materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. Moreover, the disqualification would apply to all lawyers in the firm with the lawyer receiving the information unless both the affected client and the prospective client have given informed consent, confirmed in writing, or, the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. See Rule 1.18(d).

The Comments to Rule 1.18 parallel the concerns raised in Opinion 156. Comment 4 to Rule 1.18 stresses that a lawyer should limit initial interviews and initial information to only such information as reasonably appears necessary for the purpose of screening for conflicts purposes. Comment 5 to Rule 1.18 goes on to affirmatively note that a lawyer may condition conversations with a prospective client on that person's informed consent that no information disclosed during the consultation would prohibit the lawyer from representing a different client in the same matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client. Moreover, even in the absence of an agreement, the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Thus, the teaching of Opinion 156 remains important and helpful to this day. A lawyer dealing with prospective clients must limit the inquiry with the prospective client to only that information which is essential to determining whether a potential conflict exists. The lawyer may condition even that initial conversation with the prospective client on the prospective client's agreement that any information provided would not disqualify the attorney from representing an adverse party in the same or substantially related matter. Even then, the attorney, if appropriate protocols have been followed, will not be disqualified from representing an adverse party to the prospective client unless the information provided by the prospective client could be significantly harmful if used in the existing matter.

The importance of strict protocols similar to those suggested by Opinion 156 and Rule 1.18 was recognized by the Court in Butler v. Romanova, 2008 ME 99, 953 A.2d 748. That case affirmed the denial of a motion to disqualify an attorney, in part, due to the protocols installed in an attorney's office to limit the information obtained from a potential client.

In short, Opinion 156 foreshadowed current Rule 1.18 in stressing the importance of severely limiting the information obtained from a prospective client at the time of initial intake. Counsel can avoid inadvertent disqualification by either expressly explaining to the prospective client that any information provided will not be treated as confidential and will not act to disqualify the attorney from potentially representing any opposing party, or, alternatively, by so limiting the information obtained that the attorney obtains no information which would be significantly harmful to the prospective client if used in the matter at issue.