

Legal Ethics in Bankruptcy and Related Ethical Considerations

Robert B. Vandiver, Jr.

Law Office of Robert B. Vandiver, Jr.; Jackson, Tenn.

Prof. Jodi L. Wilson

University of Memphis School of Law; Memphis



DISCOVER



eLearning
elearning.abi.org

Earn CLE credit on demand



Cutting-edge Insolvency Courses

With eLearning:

- **Learn from leading insolvency professionals**
- **Access when and where you want—even on your mobile device**
- **Search consumer or business courses by topic or speaker**
- **Invest in employees and improve your talent pool**

Expert Speakers, Affordable Prices

elearning.abi.org

ABI's eLearning programs are presumptively approved for CLE credit in CA, FL, GA, HI, IL, NV, NJ, NY (Approved Jurisdiction Policy), RI and SC. Approval in additional states may be available for some courses. Please see individual course listings at elearning.abi.org for a list of approved states.

66 Canal Center Plaza • Suite 600 • Alexandria, VA 22314-1583 • phone: 703.739.0800 • abi.org

Join our networks to expand yours:   

© 2014 American Bankruptcy Institute. All Rights Reserved.

JOINT REPRESENTATION IN BANKRUPTCY



ETHICAL CONSIDERATIONS

Robert B. Vandiver, Jr.

Prof. Jodi L. Wilson

JOINT REPRESENTATION

- Rule 1.7, Comment 27:
 - “Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. . . . [D]epending upon the circumstances, a conflict of interest may be present.”
- Rule 1.7, Comment 27a (estate/trust context):

JOINT REPRESENTATION

BENEFIT:	“[M]ore economical and better coordinated plans” because counsel has the big picture.
----------	---

JOINT REPRESENTATION

- Rule 1.7, Comment 27:
 - “Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. . . . [D]epending upon the circumstances, a conflict of interest may be present.”
- Rule 1.7, Comment 27a (estate/trust context):

JOINT REPRESENTATION	
BENEFIT:	“[M]ore economical and better coordinated plans” because counsel has the big picture.
APPROPRIATE IF:	“[I]nterests of the clients in cooperation and achieving common objectives predominate over any inconsistent interests.” AND Lawyer complies with Rule 1.7 regarding informed consent.

JOINT REPRESENTATION

- Rule 1.7, Comment 27:
 - “Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. . . . [D]epending upon the circumstances, a conflict of interest may be present.”
- Rule 1.7, Comment 27a (estate/trust context):

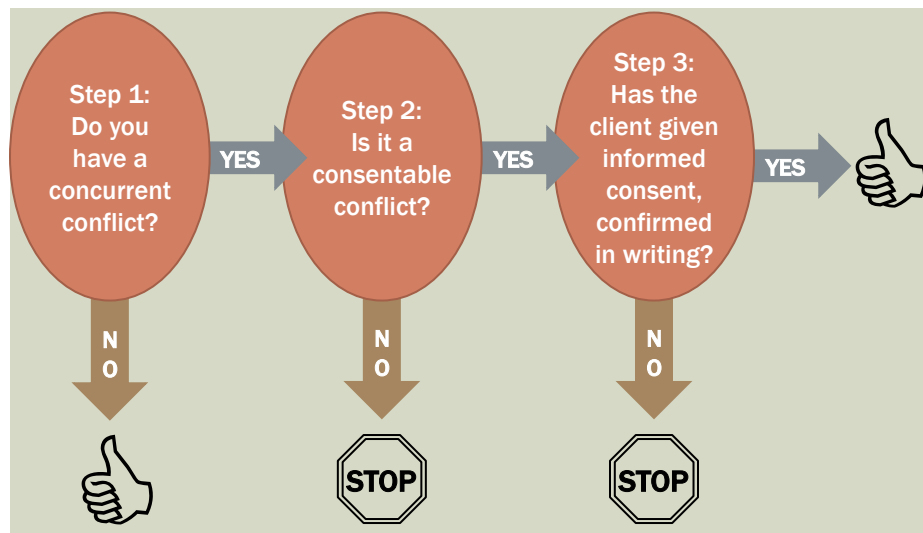
JOINT REPRESENTATION	
BENEFIT:	“[M]ore economical and better coordinated plans” because counsel has the big picture.
APPROPRIATE IF:	“[I]nterests of the clients in cooperation and achieving common objectives predominate over any inconsistent interests.” AND Lawyer complies with Rule 1.7 regarding informed consent.
PROHIBITED IF:	“[I]nterests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests.”

JOINT REPRESENTATION

■ Rule 1.7, Comment 29:

- “[A] lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.”
- “[R]epresentation of multiple clients is improper when it is unlikely that [the lawyer’s] impartiality can be maintained.”
- “Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients’ interests can be adequately served by common representation is not very good.”

RULE 1.7 ANALYSIS



STEP 1: DO YOU HAVE A CONCURRENT CONFLICT?

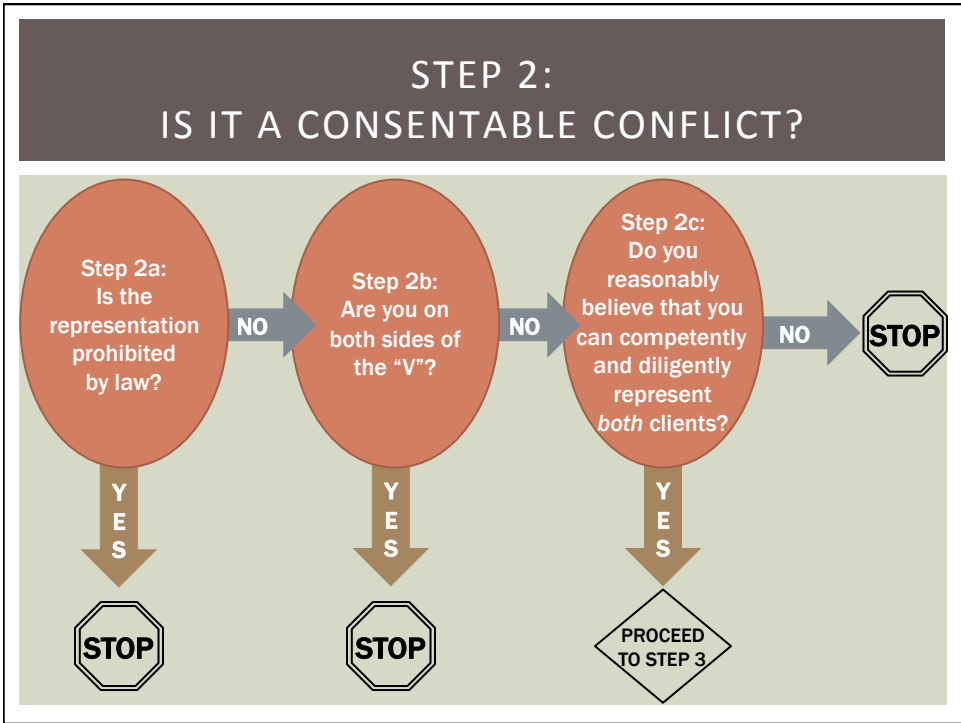
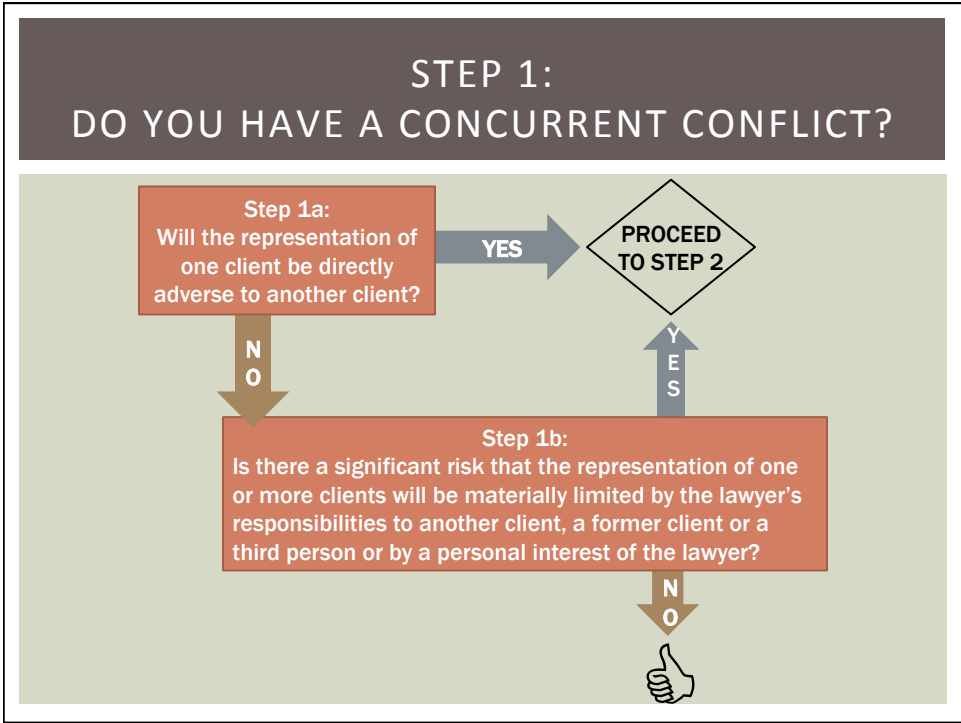
Step 1a:
Will the representation of
one client be directly
adverse to another client?

N
O

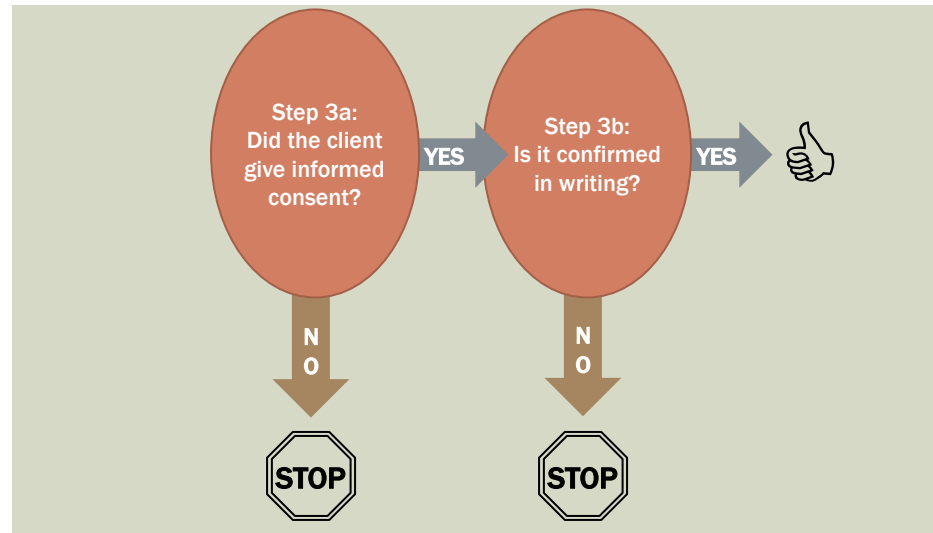
Step 1b:
Is there a significant risk that the representation of one
or more clients will be materially limited by the lawyer's
responsibilities to another client, a former client or a
third person or by a personal interest of the lawyer?

WHAT IS A MATERIAL LIMITATION?

- Rule 1.7, Comment 8:
 - “[A] conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”
 - Critical questions:
 - “[W]hat is the likelihood that a difference in interests will eventuate”?
 - “[I]f it does, will it materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client”?



**STEP 3:
HAS THE CLIENT GIVEN INFORMED CONSENT,
CONFIRMED IN WRITING?**



**CONFIRMED
IN WRITING**

“Confirmed in writing” . . . denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

-Rule 1.0(b).

WHAT IS INFORMED CONSENT?

“Informed consent” denotes agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

-Rule 1.0(e)

INFORMED CONSENT: JOINT REPRESENTATION CONSIDERATIONS

. . . The information required to be provided to the client from whom consent is sought depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information provided must include the implications of the common representation, **including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved**. See Comments [30] and [31] (effect of common representation on confidentiality).

-Rule 1.7, Comment 18.

INFORMED CONSENT: JOINT REPRESENTATION CONSIDERATIONS

[I]t must be assumed that if litigation eventuates between the clients, the [attorney-client] privilege will not protect any such communications, and the clients should be so advised.

-Rule 1.7, Comment 30.

INFORMED CONSENT: JOINT REPRESENTATION CONSIDERATIONS

[C]ontinued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. . . . The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, **advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.**

-Rule 1.7, Comment 31.

JOINT REPRESENTATION
IN BANKRUPTCY



ETHICAL
CONSIDERATIONS

© 2014
Jodi L. Wilson

AMERICAN BANKRUPTCY INSTITUTE

JOINT REPRESENTATION IN BANKRUPTCY



ETHICAL CONSIDERATIONS

Robert B. Vandiver, Jr.

Jodi L. Wilson

1. Husband and Wife who have been married for twenty years (with two minor children) come in to inquire about filing a bankruptcy. The marriage does not appear to be in any trouble. After a preliminary consultation and review of their debts, assets, income and expenses, you believe they should file a five-year Chapter 13 bankruptcy that will cure the arrears on their house, pay off two cars, a furniture note, and pay a very small percentage to unsecured creditors, which consist of credit card debts with total balances of about \$ 50,000.00. Would you accept the case? What, if anything, would/should you do given that this is a joint representation?
2. The bankruptcy for Husband and Wife has been filed, the case has been confirmed, and Husband calls your office and advises you that he and Wife are getting a divorce. They have been submitting payments to the Chapter 13 trustee by means of a cashier's check, once a month. He wants to know if you can "split" their bankruptcy payment so that he pays a certain amount of the payment and she pays a certain amount of the payment. Would you continue representing both parties? Why/why not? What are the ethical ramifications of continuing to represent both parties?
3. Continuing with the facts in # 1, the bankruptcy has been filed and the case has been confirmed. You learn from one of the parties that they are contemplating a divorce, and the payments have been coming out of Husband's check by payroll deduction since the day their case was filed. Husband calls the office and wants to know if you can "fix it" so that some of the payment comes out of Wife's paycheck. Would you inform Wife of his request? Why/why not? Would you continue representing both parties? Why/why not?
4. Continuing with the facts in # 1, the bankruptcy has been filed and the case has been confirmed. Husband calls you and tells you that he is considering divorcing Wife, but that before he can make a decision he needs to know about how it would affect their bankruptcy. He doesn't want Wife to know he is considering this. Would you inform Wife of his request? Why/why not? Would you continue representing both parties? Why/why not?
5. Continuing with the facts in # 1, the bankruptcy has been filed and the case has been confirmed. Husband calls you and tells you he has fallen in love with another woman, that they have been meeting regularly in the afternoons at the Motel 6 on Valentine Street for some "afternoon delight," and that he is going to divorce Wife. He wants to know how if he can just convert to a Chapter 7, give up the house and cars, and be free of all his debts. What, if anything, would you tell Wife about this communication? Would you continue representing both parties? Why/why not?
6. Assume the facts of #1 above, but Husband and Wife both come into the office and tell you that they are getting a divorce. They have hired one attorney who is going to file an uncontested divorce for them, and they have agreed to divide the bankruptcy payment

MEMPHIS CONSUMER BANKRUPTCY CONFERENCE 2014

between them. The divorce decree will say how much each debtor's payment will be. Would you accept the case? How does Rule 1.7 affect your decision? What is the impact of Rule 1.7? What, if anything, would/should you do given that this is a joint representation?

7. Assume the facts of # 1 above, but Husband and Wife advise you that they have separated. She is living in their house, and he is living with a relative. They don't know if or when they will get back together. But for now, they want to split the bankruptcy payment between them, so that a portion of the payment comes out of his paycheck, and the remainder of the payment she makes directly to the Chapter 13 Trustee. Would you accept the case? What is the impact of Rule 1.7? What, if anything, would/should you do given that this is a joint representation?
8. Assume the facts of # 1 above. Husband and Wife have each hired separate divorce attorneys to represent them in a contested divorce proceeding. Both Husband and Wife have given you permission to talk with their divorce attorneys to explain to them the particulars of their debts and how their debts are treated in the Chapter 13 plan. What are the ethical ramifications of talking to the divorce attorneys, either separate or together?
9. You represent a husband and a wife who have been making payments on their confirmed Chapter 13 plan for a year. Half of the payment comes out of his paycheck, the other half comes out of her paycheck. The wife has advised that they are getting a divorce and wants to know if there's anything she can do to reduce her payments in the bankruptcy. You recall that there are no joint debts between them. The wife's debts are solely in her name, and the husband's debts are solely in his name. It is to her benefit to convert her Chapter 13 to a Chapter 7 case where she will not be reaffirming any debts. The only way this will adversely affect the husband is that she will not be assisting him in making the Chapter 13 payment. The amount of the Chapter 13 payment will not change. Would you continue representing both parties? Why/why not? Does it matter to your analysis whether the husband objects to the wife being converted to a Chapter 7?
10. Two divorce attorneys call your office and advise you that they each represent a party in a divorce that has been filed. They have been participating in a mediation that is required by law before any trial can be set on their divorce. The attorneys believe it might be beneficial for the husband and wife to explore their bankruptcy options before going forward with the divorce. Should you meet with both the husband and wife together?
11. Same facts as # 10 above, but now you are meeting with the couple and the wife "doesn't want to ruin her credit" by filing bankruptcy. She wants her husband to be required, as a part of the divorce decree, to make payments on all their ongoing obligations, as well as pay her alimony and child support, so that her credit will not be adversely affected. Otherwise, they are perfect candidates for a Chapter 7 bankruptcy wherein they could discharge \$60,000 worth of credit card debt (that they are both jointly liable on), and reaffirm the indebtedness on two cars, one that she drives and one that he drives. Would you accept joint representation in this case? What advice, if any, would you give to the couple?
12. Same facts as # 10 above, but after meeting with the couple, you determine that while they have \$60,000 worth of credit card debt, all of the credit card debt is in the husband's name only. But both the husband and wife are jointly obligated on their two car loans, which they

want to keep. So the husband would benefit from filing a Chapter 7 to eliminate all of his credit card obligations, but the wife is still concerned about how a bankruptcy filing by her soon to be ex-husband will look on her credit report. Assume that it will reflect negatively on her credit report that the joint automobile obligations were listed as debts that he reaffirmed in his bankruptcy. He decides he wants to file Chapter 7 over her objections. Can you file a Chapter 7 for him?

EXCERPTS

from

TENN. SUP. CT. R. 8

TENNESSEE RULES OF PROFESSIONAL CONDUCT

Amended September 29, 2010, and October 12, 2010; Effective January 1, 2010

RULE 1.0: TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

...

(c) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual awareness of the fact in question. A person's knowledge may be inferred from circumstances.

...

(h) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

...

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and e-mail. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(o) "Material" or "materially" denotes something that a reasonable person would consider important in assessing or determining how to act in a matter.

Rule 1.0 – Selected Comments

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

...

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., RPCs 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See RPCs 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., RPCs 1.8(a) and (g). For a definition of "signed," see paragraph (n).

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.4 – Selected Comments

...

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in RPC 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or has diminished capacity. See RPC 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See RPC 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in withholding or delaying transmission of information to the client, including, for example, when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Other applicable law, including rules or court orders governing litigation, may provide that information supplied to a lawyer may not be disclosed to the client. RPC 3.4(c) directs compliance with such rules or orders.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless:

- (1) the client gives informed consent;
- (2) the disclosure is impliedly authorized in order to carry out the representation; or
- (3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;
- (2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
- (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
- (4) to secure legal advice about the lawyer's compliance with these Rules; or
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or
- (3) to comply with RPC 3.3, 4.1, or other law.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

(c) A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless:

- (1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and
- (2) each affected client gives informed consent.

Rule 1.7 – Selected Comments

General Principles

...

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). . . .

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See RPC 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See RPC 1.9; see also Comments [5] and [29] to this RPC (1.7).

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See RPC 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See RPC 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose

interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adversity between clients, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are: what is the likelihood that a difference in interests will eventuate and, if it does, will it materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client?

...

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See RPC 1.0(e) (definition of informed consent). The information required to be provided to the client from whom consent is sought depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information provided must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

...

Informed Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. The required writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See RPC 1.0(b); see also RPC 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See RPC 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients

the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

...

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is also governed by paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation provided to the client of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. Nevertheless, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent to a future conflict is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of consentability. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in both civil and criminal cases.

...

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise, and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In

estate or trust administration, the identity of the client may be unclear under Tennessee law. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[27a] It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, or co-fiduciaries of an estate or trust. Multiple representation in such contexts often can result in more economical and better coordinated plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. Multiple representations of these kinds are appropriate where the interests of the clients in cooperation and achieving common objectives predominate over any inconsistent interests and where the lawyer complies with Rule 1.7's requirements as to informed consent. A lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. Such conflicts of interest are so serious that Rule 1.7 prohibits a lawyer from undertaking or continuing representation of multiple clients even with the informed consent of each of the clients. See RPC 1.7(b)(1). Unless the plan involves the formation, modification, or termination of a consensual relationship between clients and the lawyer acts as an intermediary in compliance with RPC 2.2, undertaking such a multiple representation will be governed by this rule. See RPC 2.2, Comment [4].

...

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, complication, or even litigation. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that common representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect

that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See RPC 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of RPC 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in RPC 1.16.

...

RULE 1.9(a), (c): DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

...

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

Rule 1.9 – Selected Comments

...

Changing Sides in a Matter

[1a] Representing one side in a lawsuit and then switching to represent the other in the same matter clearly implicates loyalty to the first client and protection of that client's confidences. Similar considerations apply in non-litigation matters. Thus, a lawyer negotiating a complex agreement on behalf of a seller could not withdraw and represent the buyer against the interests of the seller in the same transaction. Nor could a lawyer who has represented multiple clients in a matter ordinarily represent one of the clients against the others in the same matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9].

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The appropriateness of the subsequent representation will depend on the scope of the representation in the former matter, the scope of the proposed representation in the current matter, and its relationship to the former matter. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Substantially Related Matters

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or other work the lawyer performed for the former client or if there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter, unless that information has become generally known. Any conclusion or presumption concerning the type of confidential factual information that would normally have been obtained in the prior representation may be overcome or rebutted by the lawyer by proof concerning the information actually received in the prior representation.

Loyalty to Former Client

[3a] Matters are substantially related if they involve the same transaction or legal dispute or other work the lawyer performed for the former client. For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor. Although the subsequent representation is a different matter, it is substantially related to the former matter because it involves work done for the former client. The lawyer's duty of loyalty survives the termination of the former representation to the extent that it precludes the lawyer from acting to deprive the former client of the benefit of the lawyer's prior work on the former client's behalf.

Protecting Confidentiality

[3b] Even where the current matter does not involve the work previously done by the lawyer for the former client, it may still be substantially related to the former matter if there is a substantial risk that confidential factual information that would normally be obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then ordinarily represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center

would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

...

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.14 – Selected Comments

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or has a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client has a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

...

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator, or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

...

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

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

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

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

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

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

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

(i) the disqualified lawyer is timely screened from any participation in the matter; and

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

(e) When no client-lawyer relationship ensues, a prospective client is entitled, upon request, to have the lawyer return all papers and property in the lawyer's possession, custody, or control that were provided by the prospective client to the lawyer in connection with consideration of the prospective client's matter.