TO HAVE AND TO HOLD:
ETHICAL ISSUES WHEN REPRESENTING SPOUSES

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Ethical Issues in Joint Representation
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Introduction:

Some of the most difficult ethical challenges confronting elder law attorneys arise from joint representation and obligations of the lawyer to each party represented. Such challenges almost invariably involve conflicts of interest, the parties' expectations of confidentiality (with respect to their respective communications with the lawyer) and future actions regarding service for only one of the clients.

Although the most common joint representation scenario involves spouses, joint representation problems can also arise in multi-generational representation and in the creation of special needs trusts. When a lawyer represents members of a family in addition to spouses, the potential bases for difficulties are broadened. These materials are intended to supplement the presentation on these thorny issues.

I. Concurrent Conflicts of Interests in Representation

Because the Rules do not recognize the representation of the family as an entity client, the attorney must be careful whenever there is more than one person requesting representation from the attorney. For example, attorneys who prepare estate-planning documents may find that it is common for a husband and wife to request the attorney draft wills where each leaves the estate to the other, but that is no guarantee that their interests are aligned. The attorney may find himself/herself in a conflict of interest.

Medicaid planning may appear to be joint representation, but also may be considered a representation of the elder in need of long-term care planning. The elder can be the client even though he or she may not be present in the interview, is not consulted until time for the planning documents are to be executed, or may not have the requisite capacity to give informed consent.

At the beginning of the representation, the attorney must determine whether the representation will be joint or separate. The ACTEC Commentaries on the Model Rules of Professional Conduct (5th ed. 2016) defines the difference as:

Joint and Separate Clients. Subject to the requirements of MRPCs 1.6 and 1.7 (Conflict of Interest: Current Clients), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily
constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same. When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. Nothing in the foregoing should be construed as approving the representation by a lawyer of both parties in the creation of any inherently adversarial contract (e.g., a marital property agreement) which is not subject to rescission by one of the parties without the consent and joinder of the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly, but the law is unclear as to whether all information must be shared between them. As a result, an irreconcilable conflict may arise if one co-client shares information that he or she does not want shared with the other (see discussion below). Absent special circumstances, the co-clients should be asked at the outset of the representation to agree that all information can be shared. The better practice is to memorialize the clients’ agreement and instructions in writing, and give a copy of the writing to the client.

Multiple Separate Clients. There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the informed consents of the clients, this may be permissible if the lawyer reasonably concludes he or she can competently and diligently represent each of the clients. Some estate planners represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients in related matters should do so with care because of the stress it necessarily places on the lawyer’s duties of impartiality and loyalty and the extent to which it may limit the lawyer’s ability to advise each of the clients adequately. For example, without disclosing a confidence of one estate planning client who is the parent of another estate planning client and whose estate plan differs from what the child is expecting, the lawyer may have difficulty adequately representing the child/client in his or her estate planning because of the conflict between the duty of confidentiality owed to the parent and the duty of communication owed to the child. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients), example 1.7.1a. Within the limits of MRPC 1.7 (Conflict of Interest: Current Clients), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. Changed circumstances may, however, create a nonwaivable conflict under MPRC 1.7 (Conflict of
Interest: Current Clients) and require withdrawal even if the clients consented. See *Hotz v. Minyard*, 403 S.E.2d 634 (S.C. 1991) (discussed in annotations). The lawyer’s disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law, such a writing need not be signed by the clients.

Rule 1.7 of the New York Rules of Professional Conduct regarding joint representation is helpful. It prohibits representation when it involves a “concurrent conflict of interest” in the absence of an informed consent. The Rule defines a concurrent conflict of interest in two alternative ways in Rule 1.7(a):

1. the representation will involve the lawyer in representing differing interests; or
2. there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests

However, the Rule also provides for the waiver of a conflict if the requirements of Rule 1.7(b) are satisfied. The requirements include:

(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.

In light of the waiver provisions, many lawyers will regularly disclose the advantages and disadvantages of the joint representation and then seek informed consent in writing to the representation, assuming the other requirements of the waiver provision have been met. “Informed consent” is defined by Rule 1.0(e) as an agreement by an affected person after the lawyer has “communicated adequate information and explanation about the material risk of and reasonably available alternatives to the proposed course of action.”

Comments 29(a) and 30 to Rule 1.7 suggest several factors an attorney should consider in deciding whether to undertake joint representation. Such factors include:

1. “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, embarrassment and recrimination.”
2. Required withdrawal from representing both clients
3. Issues between clients is already contentious or antagonistic
4. “Lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is
improper when it is unlikely that impartiality can be maintained. A lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.”

5. “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.”

The attorney should be mindful of red flags that would indicate that joint representation is not appropriate. Such signs may include blended families where the spouses have different views as to disbursements to the respective step children. Another common source of conflict is when only one spouse has had a prior engagement with the lawyer. The lawyer will need to assure that there is no actual or perceived influence by the spouse with whom the lawyer had the prior engagement. A similar problem may exist in which one spouse makes all the decisions, while the other spouse is either unwilling or unable to make decisions and simply defers all decision-making.

II. Former Client Conflicts of Interest

In addition to protections afforded to current clients the Rules also provide for protection for former clients. Unless the former client gives informed consent in writing, Rule 1.9 prohibits a lawyer from representing a current client against a former client in a matter that is the same or a substantially related matter. It provides:

(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.

Rule 1.9 goes on to explain that this prohibition can be based on representation the attorney was involved in at a previous law firm. It protects former clients by requiring:

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.
Finally, Rule 1.9 addresses a core concern of the Conflicts Rules and that is a concern that confidential information may be revealed. At the core of the conflict rules are the concerns for both loyalty and protection of confidential information. Rule 1.9(c) states:

(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:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

As an initial matter, an attorney must identify the client as a current client or a former client in order to determine what rule applies and thereby what protections are in place. Many elder law attorneys consider clients to be “lifetime clients”. Therefore, all of their clients remain current clients for purposes of the rules. However, the factors that courts consider in determining whether a client is a former client or a current client are, 1) what would a reasonable client believe as to the status of the representation; 2) was there a termination letter; 3) what was the nature of the representation, was it a discrete service; 4) has the attorney maintained contact with the clients subsequent to the completion of the legal service. Whether to terminate the representation after the legal service has been completed has both business tactics issues as well as ethical ramifications.

“Same or substantially the same matter” is defined in Comment 3 to Rule 1.9 it states:

[m]atters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise 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.

It is important to note that the definition of “substantially related” revolves around the kind of information that would be revealed in the former representation. The Rule does not require that the information was actually obtained in the first representation, but merely that it is the type of information that would normally be obtained in the representation. This is also important to keep in mind when talking to prospective clients. See Rule 1.18 of the NY Rules of Professional Conduct.
III. Confidentiality

Issues as to confidentiality also arise in joint representation outside the issues addressed above regarding conflicts. Confidentially is one of the core duties of an attorney and in joint representation, this duty may conflict with the duty of loyalty to each of the joint represented clients. The New York Rule 1.6 specifically defines the protected information as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.” However the rule excludes from confidential information a lawyer’s “legal knowledge or legal research or information that is generally known in the local community or in the trade, field or profession to which the information relates.” Without informed consent or an exception, an attorney is prohibited from disclosing confidential information. An attorney duty to protect confidential information surveys the death of the client. See ABA Informal Opinion 1293 (1974). However, the attorney is impliedly authorized to reveal confidential information in order to carry out the representation. (See Rule 1.14(c) for a specific situation where the attorney is implied authorized to divulge confidential information in order to take appropriate protective action)

The issue of confidentiality arises in joint representation when confidential information is revealed by one client to the attorney, and that client asks that the information not be revealed to the other jointly represented client. As discussed below, the most practical approach is to seek consent of the parties as a condition of representation. The ACTEC Commentaries to Rule 1.7 suggests “[a]bsent special circumstances, the co-clients should be asked at the outset of the representation to agree that all information can be shared. The better practice is to memorialize the clients’ agreement and instructions in writing, and give a copy of the writing to the client.”

However, when no initial consent has been obtained the courts and bar associations have been inconsistent on the attorney’s option to reveal information to the non-disclosing joint client. In New Jersey, the court in A v. B v. Hill Wallack, 726 A.2d 924 (N.J. 1999), found that an attorney could disclose, but was not required to disclose, confidential information to avoid a fraud. The law firm of Hill Wallack was retained to jointly represent a husband and wife in drafting their wills. The clients signed a waiver as to any conflict of interest but the waiver did not contain a waiver as to sharing confidential information. Before the wills had been executed, another client retained Hill Wallack to file a paternity suit against the husband. The firm was not aware of the conflict until after the paternity suit had been filed and the wills had been executed. When the conflict was discovered the firm immediately withdrew from the paternity suit but then the issue arose whether the attorneys should reveal the paternity suit to the wife. The firm sent a letter to the husband stating that they believed they had an ethical obligation to reveal the information. The husband sued Hill Wallack to prevent it from disclosing the information to the wife. The Court found that the husband would be committing a fraud on the wife and therefore the attorney could disclose, but was not required to disclose
because the Court found the effect on the wife to not be a “substantial injury” to her financial interests as required under Rule 1.6.

In New York and Florida, the bar associations have concluded that the attorney must withdrawal but is prohibited from disclosing. In New York State Bar Ass’n. Comm. on Prof’l Ethics, Op. 555 (1984), in a somewhat different factual scenario, found that an attorney who represented joint clients in connection with the formation and operation of a partnership, could not disclose that one of the clients had confessed that he was actively breaching the partnership agreement. In Florida State Bar Ass’n. Comm. on Prof’l Ethics, Op. No. 95-4 (1997), a lawyer represented both husband and wife in a context similar to the Hill Wallack case. Several months after the husband and wife’s wills were executed, the husband informed the lawyer that he had executed a codicil prepared by another law firm that made substantial provisions for a woman with whom he was having an extramarital relationship. Florida held that, not only was the lawyer not obligated to inform the wife of the new information, he was prohibited from disclosure.

The ACTEC Commentaries on Model Rule 1.6 (“Confidentiality of Information”) and the Restatement of Law Governing Lawyer’s suggest that the lawyer should exercise discretion in determining how to respond to the joint client who shares information that the client does not want shared with the other jointly represented client. The ACTEC Commentaries provide for four responses:

1. Take no action with respect to communications regarding irrelevant (or trivial) matters;

2. Encourage the communicating client to provide the information to the other client or to allow the lawyer to do so by explaining the possible consequences of non-disclosure;

3. Withdraw from the representation if the communication reflects serious adversity between the parties; or

4. Take any action in accordance with one spouse’s request or direction if such action would violate the lawyer’s duty of loyalty to the other client, unless the other client gives informed consent.

The ACTEC commentaries go on to suggest that as initial matter the attorney needs to evaluate whether the information has a material impact on the non—disclosing client. For example:

A lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some
action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer’s ability to represent the other client effectively.

In deciding whether the attorney has additional obligations, the ACTEC Commentaries suggest the attorney should exercise discretion by considering the following factors:

1. Consider his or her duties of impartiality and loyalty to the clients;
2. Any express or implied agreement among the lawyer and the joint clients;
3. The reasonable expectations of the clients;
4. The nature of the confidence and the harm that may result if the confidence is, or is not, disclosed; and
5. Whether a letter of withdrawal that is sent to the other client may arouse the other client’s suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

IV. Communication

Rule 1.4 describes the communication obligations of an attorney. It states that an attorney must:

(1) promptly inform the client of:
(i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;
(ii) any information required by court rule or other law to be communicated to a client; and
(iii) material developments in the matter including settlement or plea offers.

(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 a client’s 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 these Rules 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.

Many of the ethical issues regarding joint representation can be avoided by clear communication in an engagement letter or other documents waiving conflicts and discussing the sharing of confidential information among the joint clients. An engagement letter should discuss the potential for these conflicts to arise and include either the clients’ waiver of the conflicts or a specific procedure as to how conflicts will be resolved should they arise (including the possibility of the lawyer’s withdrawal).

Additionally, the attorney should have each party execute an agreement (may be contained in the engagement letter) that states there will be joint representation and that clearly specifies that the lawyer may reveal all confidences to either party and that no information may be withheld. This type of representation is often referred to as a “show and tell approach.” The engagement letter should seek the waiver of any present or subsequent conflicts and the parties consent to this form of representation.

Alternatively, the attorney may represent joint parties but specifically agree to a prohibition from revealing any confidences. This approach has been referred to as the “priestly” approach. The priestly approach is fraught with potential conflicts and may result in the having to withdraw as counsel for one, both or all clients if a conflict arises (e.g., one spouse informs the lawyer of his intention to withdraw all funds held by both spouses as joint tenants).

The NAELA Aspirational Standards suggest that a well-drafted engagement letter will contain the following:
- Identifies the client(s);
- Describes the scope and objectives of representation;
- Discloses any relevant foreseeable conflicts among the clients;
- Explains the lawyer’s obligation of confidentiality and confirms that the lawyer will share information and confidences among the joint clients;
- Sets out the fee arrangement (hourly, flat fee, or contingent); and
- Explains when and how the attorney-client relationship may end.

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1 The author learned the names for these divergent approaches from Charles A. Redd, Stinson Leonard Street LLP, Stt. Louis Missouri.
RULE 1.1:
COMPETENCE
(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
(c) A lawyer shall not intentionally:
(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Comment
Legal Knowledge and Skill
[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.
[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
[3] [Reserved.]
[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation
Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Retaining or Contracting with Lawyers Outside the Firm

Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the needs of the client; the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

Client consent to contract with a lawyer outside the lawyer’s own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client’s prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client’s prior informed consent.

When lawyer from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. See Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (e.g., under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, of a lawyer retains an outside lawyer or law firm to work under the lawyer’s close direction and supervision, and the retaining lawyer closely reviews the outside lawyer’s work, the retaining lawyer usually will not need to consult with the client about the outside lawyer’s role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event,
whenever a retaining lawyer discloses a client’s confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer’s practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 150

RULE 1.3
DILIGENCE

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.
(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.
(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

Comment
[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect.
[2] A lawyer’s work load must be controlled so that each matter can be handled diligently and promptly. Lawyers are encouraged to adopt and follow effective office procedures and systems; neglect may occur when such arrangements are not in place or are ineffective.
[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness. A lawyer’s duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer’s client.
[4] Unless the relationship is terminated, as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the
lawyer is looking after the client’s affairs when the lawyer has ceased to do so. If a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, Rule 20 1.16(e) may require the lawyer to consult with the client about the possibility of appeal before relinquishing responsibility for the matter. Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.

RULE 1.4
COMMUNICATION

(a) A lawyer shall:
(1) promptly inform the client of:
(i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;
(ii) any information required by court rule or other law to be communicated to a client; and
(iii) material developments in the matter including settlement or plea offers.
(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 a client’s 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 these Rules 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.

Comment
[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client
[2] In instances where these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with the client and secure the client’s consent prior to taking action, unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, paragraph (a)(1)(iii) requires that a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously made clear that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).
[3] Paragraph (a)(2) requires that the lawyer reasonably consult with the client about the means to be used to accomplish the client’s objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the
client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client’s behalf. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer’s staff acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

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 interest 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 Rule 1.0(j).

[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 suffers from diminished capacity. See Rule 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 those who the lawyer reasonably believes to be appropriate persons within the organization. See Rule 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 delaying transmission of information 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
RULE 1.6
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);
(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
(3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime;
(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;
(5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

Comment
Scope of the Professional Duty of Confidentiality

[1] This Rule governs the disclosure of information protected by the professional duty of confidentiality. Such information is described in these Rules as “confidential information” as defined in this Rule. Other rules also deal with confidential information. See Rules 1.8(b) and
1.9(c)(1) for the lawyer’s duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer’s duty not to reveal information relating to the lawyer’s prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer’s duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer’s duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. See Rule 1.0(j) for the definition of informed consent. The lawyer’s duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Typically, clients come to lawyers to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is thereby upheld.

[3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule’s reference to other law that may compel disclosure. See Comments [12]-[13]; see also Scope.

[4] Paragraph (a) prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.

[4A] Paragraph (a) protects all factual information “gained during or relating to the representation of a client.” Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the
client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer’s research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not “generally known” simply because it is in the public domain or available in a public file.

Use of Information Related to Representation

[4B] The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of a client or former client unless the client or former client has given informed consent. See Rule 1.0(j) for the definition of “informed consent.” This part of paragraph (a) applies when information is used to benefit either the lawyer or a third person, such as another client, a former client or a business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not (absent the client’s informed consent) use that information to buy a nearby parcel that is expected to appreciate in value due to the client’s purchase, or to recommend that another client buy the nearby land, even if the lawyer does not reveal any confidential information. The duty also prohibits disadvantageous use of confidential information unless the client gives informed consent, except as permitted or required by these Rules. For example, a lawyer assisting a client in purchasing a parcel of land may not make a competing bid on the same land. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client, even to the disadvantage of the former client, after the client-lawyer relationship has terminated. See Rule 1.9(c)(1).

Authorized Disclosure

[5] Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. In addition, lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client’s interests. See Rules 1.14(b) and (c).

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

[6A] The lawyer’s exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In
exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer’s services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client’s intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer’s initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer’s advice, the lawyer’s threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer’s permissible disclosure under paragraph (b) does not waive the client’s attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer’s duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

[6B] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a remote possibility or small statistical likelihood that any particular unit of a mass-distributed product will cause death or substantial bodily harm to unspecified persons over a period of years does not satisfy the element of reasonably certain death or substantial bodily harm under the exception to the duty of confidentiality in paragraph (b)(1).

[6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client’s crime. Disclosure of the client’s intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

[6D] Some crimes, such as criminal fraud, may be ongoing in the sense that the client’s past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services
were involved in the criminal acts that constitute a continuing crime may reveal the client’s refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client’s past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client’s past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer’s services to commit a further crime, such as obstruction of justice or perjury.

[6E] Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that third persons are still relying on the lawyer’s work and the work was based on “materially inaccurate information or is being used to further a crime or fraud.” See Rule 1.16(b)(1), requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law. Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer’s withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer’s own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client’s past acts unless such disclosure is permitted under paragraph (b)(2).

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about compliance with these Rules and other law by the lawyer, another lawyer in the lawyer’s firm, or the law firm. In many situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer’s compliance with these Rules, court orders and other law.

[10] Where a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a claim can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. The lawyer may respond directly to the person who has made an accusation that permits disclosure, provided that the lawyer’s response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer’s law firm, employees or associates.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.
Paragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order.

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Paragraph (b) permits but does not require the disclosure of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer’s decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law. See Comments [12]-[13]. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). E.g., Rule 8.3(c)(1). Rule 3.3(c), on the other hand, requires disclosure in some circumstances whether or not disclosure is permitted or prohibited by this Rule.

Withdrawal

If the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw pursuant to Rule 1.16(b)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(e) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually
carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. See Rules 1.13(b) and (c).

Duty to Preserve Confidentiality

[16] Paragraph (c) requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation. See also Rules 1.1, 5.1 and 5.3. However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms though lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients’ confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client’s informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer’s total book of business; (v) the financial terms of each lawyer-client relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not “confidential information” within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily not permitted, however, if information is protected by Rule 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client’s conduct).
When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with these fiduciary duties – see Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages; initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

RULE 1.7
CONFLICT OF INTEREST: CURRENT CLIENTS
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
(1) the representation will involve the lawyer in representing differing interests; or
(2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.
(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.

Comment
General Principles
[1] Loyalty and independent judgment are essential aspects of a lawyer’s relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer’s professional judgment, can arise
from the lawyer’s responsibilities to another client, a former client or a third person, or from
the lawyer’s own interests. A lawyer should not permit these competing responsibilities or
interests to impair the lawyer’s ability to exercise professional judgment on behalf of each
client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For
former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective
clients, see Rule 1.18. For definitions of “differing interests,” “informed consent” and
“confirmed in writing,” see Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting
reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of
interest exists, i.e., whether the lawyer’s judgment may be impaired or the lawyer’s loyalty may
be divided if the lawyer accepts or continues the representation, (iii) decide whether the
representation may be undertaken despite the existence of a conflict, i.e., whether the conflict
is consentable under paragraph (b); and if so (iv) consult with the clients affected under
paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected
under paragraph (a) include all of the clients who may have differing interests under paragraph
(a)(1) and any clients whose representation might be adversely affected 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). See Rule 1.10(e), which requires every law firm to create,
implement and maintain a conflict-checking system.

[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 Rule 1.16(b)(1). 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 Rule 1.9; see also Comments [5], [29A].

[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
acquired 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 Rules 1.16(d) and (e). The lawyer must continue to
protect the confidences of the client from whose representation the lawyer has withdrawn. See
Rule 1.9(c).

Identifying Conflicts of Interest
[6] The duty to avoid the representation of differing interest prohibits, among other things,
undertaking representation adverse to a current client without that client’s informed consent.
For example, absent consent, a lawyer may not advocate in one matter against another client
that the lawyer represents in some other matter, even when the matters are wholly unrelated.
The client as to whom the representation is 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 may reasonably fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, that is, that the lawyer’s exercise of professional judgment on behalf of that client will be adversely affected by the lawyer’s interest in retaining the current client. Similarly, a conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client 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] Differing interests 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.

[8] Differing interests exist if there is a significant risk that a lawyer’s exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer’s other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer’s duty of loyalty to the others. 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 the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer’s professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer’s Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer’s duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9, or by the lawyer’s responsibilities to other persons, such as fiduciary duties arising from a lawyer’s service as a trustee, executor or corporate director.

Personal-Interest Conflicts

[10] The lawyer’s own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer’s client or with a law firm representing the opponent, such discussions could materially limit the lawyer’s representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.
[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer’s family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer’s sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

**Interest of Person Paying for Lawyer’s Services**

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer’s exercise of professional judgment on behalf of a client will be adversely affected by the lawyer’s own interest in accommodating the person paying the lawyer’s fee or by the lawyer’s responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

**Prohibited Representations**

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client’s consent nor provide representation on the basis of the client’s consent. A client’s consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client’s position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires
examination of the context of the proceeding. Although this paragraph does not preclude a
lawyer’s multiple representation of adverse parties to mediation (because mediation is not a
proceeding before a “tribunal” as defined in Rule 1.0(w)), such representation may be
precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant
circumstances, including the material and reasonably foreseeable ways that the conflict could
adversely affect the interests of that client. Informed consent also requires that the client be
given the opportunity to obtain other counsel if the client so desires. See Rule 1.0(j). The
information that a lawyer is required to communicate to a client depends on the nature of the
conflict and the nature of the risks involved, and a lawyer should take into account the
sophistication of the client in explaining the potential adverse consequences of the conflict.

There are circumstances in which it is appropriate for a lawyer to advise a client to seek the
advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict.
When representation of multiple clients in a single matter is undertaken, the information 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] concerning the effect of common representation on confidentiality.

[19] Under some circumstances it may be impossible to make the disclosure necessary to
obtain consent. For example, when the lawyer represents different clients in related matters
and one client refuses to consent to the disclosure necessary to permit the other client to make
an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the
alternative to common representation is that each party obtains separate representation with
the possibility of incurring additional costs. These costs, along with the benefits of securing
separate representation, are factors that may be considered by the affected client in
determining whether common representation is in the client’s interests. Where the fact,
validity or propriety of client consent is called into question, the lawyer has the burden of
establishing that the client’s consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed
in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the
lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement
by the client made on the record of any proceeding before a tribunal, whether before, during or
after a trial or hearing. See Rule 1.0(e) for the definition of “confirmed in writing.” See also Rule
1.0(x) (“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. The Rule does not require that the information
communicated to the client by the lawyer necessary to make the consent “informed” be in
writing or in any particular form in all cases. See Rules 1.0(e) and (j). 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. See Comment [18].

Revoking Consent
[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time. Whether revoking consent to the client’s own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict
[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure 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 understanding necessary to make the consent “informed” and the waiver effective. See Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. See Rule 1.0(t) for the definition of “screening.” The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client’s advance consent cannot be effective if the particular circumstances that have created an actual
conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). See Comments [14]-[17] and [28] addressing nonconsentable conflicts.

**Conflicts in Litigation**

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients’ consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(1). 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 criminal as well as civil cases. Some examples are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs or co-defendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients’ reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients’ interests. If there is significant risk of an adverse effect on the lawyer’s professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1). Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

**Nonlitigation Conflicts**

[26] Conflicts of interest under paragraph (a)(1) arise in contexts other than litigation. For a discussion of such conflicts in transactional matters, see Comment [7]. Regarding paragraph (a)(2), relevant factors in determining whether there is a significant risk that the lawyer’s professional judgment will be adversely affected include: (i) the importance of the matter to
each client, (ii) the duration and intimacy of the lawyer’s relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). See Comments [8], [29] and [29A].

[27] 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 at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, 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 regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. See Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. Examples include helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, and arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

**Special Considerations in Common Representation**

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client’s informed consent, confirmed in writing, to the common representation.
Factors may be present that militate against a common representation. 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, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. See Rule 1.9(a). In some situations, the risk of failure is so great that multiple 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 or among 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, it is unlikely that the clients’ interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

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. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

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 Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client’s informed consent, the lawyer should 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 even as among the commonly represented clients. 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 two clients and agree to keep that information confidential with the informed consent of both clients.

When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer’s role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitation on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).
[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

**Organizational Clients**

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, (ii) the lawyer’s obligations to either the organizational client or the new client are likely to adversely affect the lawyer’s exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer’s relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer’s work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client’s overall mode of doing business, may be so extensive that the entities would be viewed as “alter egos.” Under such circumstances, the lawyer may conclude that the affiliate is the lawyer’s client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer’s client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer’s ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer’s corporate client.

**Lawyer as Corporate Director**

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the 48 directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer’s resignation from the board, and the possibility of the corporation’s obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer’s professional
judgment, the lawyer should not serve as a director or should cease to act as the corporation’s lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer’s recusal as a director or might require the lawyer and the lawyer’s firm to decline representation of the corporation in a matter.

RULE 1.9
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.
(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
   (1) whose interests are materially adverse to that person; and
   (2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.
(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:
   (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
   (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.
Comment
[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with these Rules. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client. So also, a lawyer who has prosecuted an accused person could not properly represent that person in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.
[2] The scope of a “matter” for purposes of this Rule depends on the facts of a particular situation or transaction. 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.

[3] Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise 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. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then 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. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[4] [Moved to Comment to Rule 1.10.]
[5] [Moved to Comment to Rule 1.10.]
[6] [Moved to Comment to Rule 1.10.]
[7] Independent of the prohibition against subsequent representation, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c).
[8] Paragraph (c) generally extends the confidentiality protections of Rule 1.6 to a lawyer’s former clients. Paragraph (c)(1) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Paragraph (c)(2) provides that a lawyer may not reveal information acquired in the
course of representing a client except as these Rules would permit or require with respect to a current client. See Rules 1.6, 3.3.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraph (a). See also Rule 1.0(j) for the definition of “informed consent.” With regard to the effectiveness of an advance waiver, see Rule 1.7, Comments [22]-[22A]. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.
Ethical Issues: Conflict of Interest, including Spousal Conflict and Multiparty Engagement Issues

Roberta Flowers, Stetson College of Law

Goals of this session

- Understand the ethical issues that can arise in multi-party representation
  - Conflicts of Interest
  - Confidentiality of Information
  - Communication
- Learn ways to avoid the ethical issues
- Have Fun/Learn from each other
I have been a lawyer for

A. 1 year or less  
B. 2-5 years  
C. 5-10 years  
D. Over 10 years  
E. I am not a lawyer, I just wondered in here to get coffee

Gladys and Max make an appointment for estate planning

- Been married 5 years  
- Second marriage for Gladys and Max  
- Each has three children  
- Gladys remains close to her three children (Skylar, Derrick and Katlyn).  
- Max has had a strained relationship with his three kids (Christian, Maria and Eve)  
- Gladys is a lawyer and Max has worked for the county for years.  
- You went to law school with Gladys and you have been on bar committees with her.  
- The house they live in was purchased by Gladys 20 years before the marriage
There would be no difference between Separate and Joint representation in this situation

A. True
B. False

Difference - Comment 29 to Rule 1.7

In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis.

The alternative to common representation can be that each party may have to obtain separate representation.

A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney client privilege, and obtain each client’s informed consent, confirmed in writing, to the common representation.
This is a great case for joint (common) representation

A. Yes, most married couples should be jointly represented.
B. No, couples in a blended family should not be jointly represented.
C. It depends, but I am concerned about this representation.
D. It depends but I do not see any problem yet.

Initial Interview

The couple come into the office together
They appear to have a stable loving marriage (holding hands smiling at each other etc.).
Max does most the talking.
He tells the attorney that they both have agreed that everything will go to the other spouse upon the death of the first spouse.
Upon the death of the second spouse, the estate would be divided up 1/3 to his children to be divided among them and 2/3 to Gladys children to be divided among them.
Gladys attempts to interrupt Max at one point and he places his hand on her leg which silences her immediately
When asked if she had anything to say she said “no”.

Yes, most married couples...
No, couples in a blended fa...
It depends, but I am concer...
It depends but I do not see...
Rule 1.7 - current clients

- Is there a risk of conflict (1.7(a))
  - Differing Interests
  - Significant risk that lawyer’s professional judgment will be adversely affected

- Can the conflict be waived 1.7(b)
  - Reasonable belief that competent and diligent representation can be rendered
  - Not legally prohibited
  - No assertion of a claim by one client against another client
  - Informed consent confirmed in writing

Because of the uneven distribution there is a conflict

A. True
B. False
Is there a risk of conflict? (Comment 29(a))

- One spouse dominant
- Different dispositive incentives
- Overt disagreements
- Antagonistic attitude toward each other
- Estate plan restrictions:
  - Protective in a benevolent way . . . or
  - Controlling and/or manipulative

- Future conflicts that require withdrawal
- Worked with one party previously

Estate Plan was drafted

Purpose of the next question, assume that the will was drafted as indicated above (1/3 to Max’s kids and 2/3 to Gladys’s kids).
Could the attorney if asked by Max after the death of Gladys change his will so that everything goes to his children and nothing to Gladys’s children

A. Yes, a person can change his will at anytime
B. No the attorney would have a conflict of interest.
C. No the attorney can not change a document that he originally drafted.
D. No the attorney owes a duty to Gladys children.
E. No, but he could refer the case to another attorney in the firm, because this conflict only applies to the drafting attorney.

Rule 1.9 - protecting former client

- Same or a substantially related matter
- Interests are materially adverse
- Informed consent confirmed in writing
- Does it matter that Gladys is deceased?
Rule 1.10-Imputation

- Associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9

- Exceptions
  - Based on a personal interest
  - Based on the disqualified lawyer’s association with a prior firm, (Screening required)

There is more to the story

- Prior to Gladys death, she came to see the attorney without Max.
- She explains that her dad many years ago opened an investment account in her name to help teach her about investing.
- She had never mentioned it to Max, because she used it to play the market something Max would never approve of.
- She wants you to draft a codicil that upon her death the stock will be sold and the proceeds would go to the church her Dad and Mom attended.
- The stock is currently worth about $100,000 which represents about 20% of the total amount in the estate.
The attorney can draft the codicil

A. True
B. False

Can the attorney tell Max about Gladys’s investment account?

A. Yes, as it material to the estate planning
B. No, Gladys told you in confidence
C. Yes, as this is joint representation
D. No, because it does not effect the estate plan.
Rule 1.6 -- confidentiality

- General rule: No disclosure of information relating to representation of client without client’s informed consent

Confidentiality of information

- New York/Florida cannot divulge information
- New Jersey can divulge to prevent fraud
- ACTEC/Restatement can divulge
  - Relies on Report of the ABA Trust and Probate Section
    - Action related confidences
    - Prejudicial confidences
    - Factual confidences
  - Balance harm from withdrawal with harm from not disclosing
Could the attorney have protected against these subsequent circumstances

A. No, these situations are inevitable in joint representation
B. No, he should not have represented both of them
C. Yes, because the rules cover these problems
D. Yes

Comment 27 to Rule 1.7 - Avoid disqualifying conflict

At the outset of the common representation

Part of the process of obtaining each client’s informed consent,

Advise each client that information will be shared

The lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other.
Rule 1.4 -- communication

- Promptly advise client of situation where informed consent is required
- Reasonably consult with client regarding how objectives shall be achieved
- Keep client reasonably informed about status of matter
- Explain matter to extent reasonably required for informed decisions

Engagement letters

- The best solution to conflict of interest, communications and confidentiality problems
- Address (among other things):
  - Manner of representation
  - Services to be performed
  - How conflicts of interest shall be resolved
  - How confidential information shall be handled
  - Fees to be charged
  - Termination of engagement
  - Disposition of files after period of dormancy
Questions?
ETHICS IN THE PRACTICE OF ELDER LAW

Roberta K. Flowers
Rebecca C. Morgan

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Who Can I Represent?

“No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other.”
Matthew 6:24

A husband and wife come to an attorney for estate planning. This is a second marriage for both, and both have children from their first marriage. The husband explains that he wants to ensure that all his assets—except for what he bequeaths to his wife—go to his church. The wife would like those assets to go to their children.

**PRACTICAL QUESTION CHECKLIST**

**Protecting Current Clients**
1. Who are the clients and what is the nature of the relationship?
2. Is there a conflict under the rules?
3. Is the conflict consentable?
4. Can the attorney obtain an informed consent from the affected clients?
Protecting Former Clients
1. Has the relationship been terminated and therefore the client is a former client?
2. Is the current client's matter materially adverse to a former client?
3. Is the matter in the current case the same or substantially the same as the former client's matter?
4. Will the former client consent to the current representation?

Protecting Prospective Clients
1. Is the individual a prospective client?
2. Is the current client's matter materially adverse to the prospective client?
3. Is the matter in the current case the same or substantially the same as the prospective client's matter?
4. Did the lawyer obtain information that could be significantly harmful to the prospective client?
5. Will the prospective client consent to the continued representation?
6. Can the firm continue to represent the current client by screening the disqualified attorney?

Attorney Personal Conflicts
1. Is the attorney's interest adverse to the clients?
2. Is the attorney drafting a document that transfers a substantial gift to the attorney?

The prohibitions against conflicts of interest contained in the various rules of professional conduct are based on two important values.¹ The first core value is loyalty. The importance of loyalty to the client is emphasized consistently in the Model Rules of Professional Conduct, even to the extent of protecting former clients or individuals who seek advice but who do not subsequently hire the attorney (prospective clients). Trust

¹. Model Rules of Prof'l Conduct R. 1.7; 1.8; 1.9; 1.18.
in the client/attorney relationship allows the client to believe that the attorney is representing his best interests and to be confident in the attorney’s advice and actions. One is reminded of Lord Henry Brougham’s famous quote, in 1818, “[a]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client.” This famed quote underscores the importance the legal profession places on undivided loyalty. “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” In considering the rules that cover conflict of interest, the attorney should keep in mind the value his profession places on loyalty.

Additionally, the conflict rules are intended to add further protections to confidential information. The rules stress the concern that when a lawyer represents multiple clients concurrently, confidential information may be disclosed, either intentionally or unintentionally. The rules speak to situations in which the confidential information may prohibit the representation or be used against the client. The attorney should agree to the representation only after the client is made aware of the risks and consents to the multiple representation.

In the elder law context, conflict of interest issues can arise in a variety of ways. First, the elder law attorney may be called to undertake joint or common representation in an estate-planning context. The elder law attorney should be alert to conflicts that may arise when she moves to take protective action, as discussed in Chapter 5. A conflict of interest can occur when an attorney speaks with children who are seeking to take protective actions for a parent who was a former client. Finally, elder law attorneys must be circumspect when asked to take on additional roles in the representation, such as acting as the fiduciary, trustee, or guardian, or being named in the will as a beneficiary.

2. Model Rules of Prof’l Conduct R. 1.2(a) sets out the responsibility of the client to set the objectives of the representation.
3. See Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 23 (8th ed. 2009) (quote from 2 Trial of Queen Caroline 8 (1821)).
6. One state bar association recognized that conflict issues are the most frequently asked questions to the state bar ethics hotline. Marcia L. Proctor, Conflict Screening and Former Clients, 70 Mich. B.J. 440 (1991).
The Model Rules concerning conflict of interest depend on the relationship of the attorney to the individual to be protected in the representation. Model Rule 1.7 concerns protections for concurrent clients, Model Rule 1.9 protects former clients, and Model Rule 1.18 protects prospective clients. Model Rule 1.8 addresses situations in which the attorney’s own personal interests conflict with the representation of a client. This chapter will look at each of these rules separately. Although the rules speak to conflict of interest in elder law practice, many times the conflict is not between parties but involves the more subtle issue of “divided loyalty.”

I. Protecting Concurrent Clients

Conflicts of interest can arise in the concurrent representation of multiple clients. Multiple-client representations can take two forms. In the first form, multiple clients can be represented concurrently but separately. Although the representation may be determined by the relationships of the parties, or by the relationship of the issues, each joint client has separate and unique motivations and is represented as such. Each client requires separate representation, and therefore, the confidential information attached to each case is not shared between the concurrent clients. A conflict in separate representation may occur when one concurrent client seeks to take adverse action against another concurrent client. An example of this type of situation arose in the case addressed in Cleveland Bar Association Ethics Opinion 86-5. In that case, the attorney believed that his client’s second wife was acting under a power of attorney that was inconsistent with the prenuptial agreement, but there was nothing he could do because the second wife was also his client in unrelated matters. If the attorney had been representing only the incapacitated husband, he could have called

12. See ACTEC Commentary to R. 1.7, at 91.
the husband's son from his first marriage to report the second wife's conduct. However, because of his relationship to the second wife, he could not act adversely to her and therefore had a conflict of interest.

Joint or common representation is the other way that an attorney can encounter conflicts of interest. In joint representation, the clients have like motivations and use the same attorney to represent them jointly in pursuing a common goal. In joint representation, the information is shared between the clients. A conflict in joint representation may arise if the clients' interests, or objectives of the representation, diverge. Examples of this type of conflict are abundant. For example, if an attorney jointly represents beneficiaries to a will who will receive different bequests, settlement negotiations regarding the will may break down because each beneficiary has his own interest in mind when settling the dispute. Clients with less at stake “may be willing to settle the action for a far less proportionate amount than would be agreeable to major beneficiaries.”

A conflict may arise if the attorney attempts to represent both “innocent” beneficiaries as well as beneficiaries accused of undue influence. An attorney can find himself in a conflict situation if he attempts to represent both the spouse and children in a will contest in a state where the law provides for a spouse's elective right. It should “be obvious from the foregoing discussion that representation of multiple parties must be carefully analyzed to ensure that no conflict exists either in the immediate representation or in the ultimate result.”

The ACTEC Commentary to Rule 1.7 recognizes that there are estate-planning situations in which it is appropriate to represent more than one family member. The Commentary notes that in some circumstances clients may be better served by joint representation. Representing several family members in estate planning allows the attorney

14. See discussion in Chapter 3 regarding confidentiality in joint representation; see also ABA Formal Ethics Opinion 08-450 (2008) (although this case discussed joint representation in insurance representation, it contains helpful language regarding representing joint clients and the sharing of confidential information).


16. Id.

17. Id.
to operate more efficiently and can be more economical for the family. Further, by representing multiple family members, the attorney may have a clearer picture of the family’s situation and the extent of the property considerations.

Additionally, the attorney needs to be aware of entity representation. There are times that the attorney will represent a client as a representative of an entity. Although entity representation is unusual in elder law, an elder law attorney might be representing a family business in estate planning. In this case, the attorney may be representing the family business as an entity in accordance with Model Rule 1.13 and not the individual family members. Although some scholars have argued that entity representation should be considered in regard to families—for example, a family would be treated as an entity with one attorney to represent it—most courts have rejected the idea. As such, entity representation is not available to families.

It is imperative that both the clients and the attorney understand the nature of the representation. As discussed above, concurrent representation can take two forms, joint or separate. NAELA Aspirational Standard B.1 suggests that an elder law attorney, “[i]n representing multiple family members ensures that the family members understand who are the clients and whether the representation is [j]oint (i.e., confidences are shared) or [s]eparate.” In analyzing the potential for conflict under Model Rule 1.7, the attorney must determine the nature of the relationship between the parties themselves as well as between the attorney and the parties. The comment to NAELA Aspirational Standard B.1 provides a good example of joint and separate representation. It posits this hypothetical:

[A]n attorney is asked by a husband and wife to prepare their mirror image estate plans and simultaneously asked by their

18. ACTEC Commentary to R. 1.7, at 91–93.
19. Frank Johns, Model Rule 1.7—Applied to Elder Law: Conflicts in Multiple Client and Family Entity Engagements, 14 WTR NAELA Q1 (2001) (suggesting that a model of entity representation should be adopted by the ABA to realistically deal with families in elder law).
20. See Steven M. Fast, Walking the Line between Protecting the Trustee and Protecting the Beneficiary, SG012 ALI_ABA1 (2001), which includes several sample engagement letters that explain to prospective clients the nature of the representation.
two adult children (and beneficiaries of their estates) to prepare their respective estate plans. The attorney must undertake the conflict-of-interest analysis that is required by state conflicts rules. Assuming multiple representation is permissible and the clients consent, different arrangements of joint or separate representation may be appropriate. One arrangement may be that the attorney represents the husband and wife jointly, and represents each of the children separately but simultaneously. Another arrangement may be that all four are represented jointly, which is appropriate if the estate plan involves a closely held family business in which all four are principals. The attorney should take reasonable steps to ensure that all the clients understand how different types of representation impose different duties on the attorney and different consequences for the clients. The more complex the situation, the more important a well-drafted engagement agreement becomes.

To analyze whether a conflict exists that may preclude concurrent representation, an attorney should look at Comment 2 to Model Rule 1.7. This step-by-step approach will help the attorney determine whether representation can be undertaken in a multiple-current-client situation. The comment provides that:

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).\(^{21}\)

The first step is to clearly identify the clients—not just who the clients are but also the nature of their relationship. If the client is a concurrent client, then the protections for that client are found in Model

\(^{21}\) Model Rules of Prof'l Conduct R. 1.7 cmt. 2.
Rule 1.7. If the client is a former client, then the protections are found in Model Rule 1.9. Finally, if the individual who needs protection from adverse action is a prospective client, then the protections are found in Model Rule 1.18. Although all of these clients are entitled to the attorney's loyalty, the extent of that loyalty will differ based on the type of relationship the client currently has with the attorney. The nature of the client-attorney relationship will determine what protections the client is entitled to. Because the protections afforded a former client are not as broad as those afforded a current client, the delineation of a client as either current or former can be used to determine whether the attorney can accept the representation.

Determining whether a client is a current or former client is oftentimes difficult. The answer will arise out of the actions—or lack thereof—taken by the attorney to terminate the agreement to represent. Questions that can help determine whether a client is a current or former client include the following:

1. Has a formal termination letter been given to the client?
2. Was the original representation a distinct one-time service or ongoing representation?
3. Has there been continuing communication between the client and the attorney?
4. Could a client reasonably believe that the representation was still in place?

Of course, the clearest indication of a client being a former client is when the attorney has sent a disengagement letter at the completion of the prior services. The courts have also considered the nature of the prior services. The ACTEC Commentaries suggest that “the completion of the specific representation undertaken by a lawyer often results in the termination of the lawyer-client relationship. Thus, the completion of the administration of an estate normally results in the termina-

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22. *Id.* at R. 1.18 cmt. 1 provides: “Hence, prospective clients should receive some but not all of the protection afforded clients.”


24. ACTEC Commentary to R. 1.9 (“However, following implementation of the client’s estate plan, the lawyer or the client may terminate the representation by giving appropriate notice, one to the other.”).
tion of the representation provided by the lawyer to the personal representative."

In *Yang Enterprises, Inc. v. Georgalis*, the Florida District Court of Appeal noted that "[d]isqualification of an attorney is an extraordinary remedy" and found that the law firm that had prepared the estate plan for the plaintiff was not disqualified because the plaintiff was no longer a client. The court found that "ministerial work does not meet the definition of 'continuous representation rule'" (citation omitted). The Minnesota Court of Appeals in the *Matter of Trust Created by Hill* found that the definition of a client as a current or former client is a factual determination.

Assuming that the affected client is a current client, the next step is to ascertain whether there is a conflict as defined under Model Rule 1.7(a). Rule 1.7(a) examines two different conflicts. The first is a directly adverse conflict, meaning that the representation of one client is directly adverse to the representation of another client. Comment 6 to Model Rule 1.7 defines "directly adverse" as a lawyer acting "as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." Further, cross-examination of a client is considered directly adverse, and in transactional work, negotiating against another client is considered directly adverse. Of course, the classic example is when one client sues another client. A directly adverse conflict may also ensue if multiple concurrent clients have inconsistent interests in a trust.

A Colorado Court

25. *Id.* (citation omitted).


27. 499 N.W.2d 475 (Minn. Ct. App. 1993).


29. *Model Rules of Prof'l Conduct* R. 1.7 cmt. 6, 7; *see also* Hill v. Hunt, 2008 WL 4108120 (N.D. Tex., Sept. 4, 2008) (In this case, the law firm representing the great-grandson of H.L. Hunt was disqualified in an action over the management of trusts set up by Hunt. The firm also represented the grandson of Hunt, a defendant in the case, in trust litigation in another state.).

30. *See Morse v. Clark*, 890 So. 2d 496 (Fla. Dist. Ct. App. 2004) (finding a conflict where attorney simultaneously represented Morse and Clark in unrelated cases, because Morse was trying to maximize the assets in an estate, which would decrease the assets of the trust in which Clark was the trustee). *See also In re Cutright*, 910 N.E.2d 581 (Ill. 2009) (finding a materially limiting conflict of interest when attorney prepared a document for an 86-year-old client that forgave the entire
of Appeals\textsuperscript{31} found a conflict in an attorney's involvement in competing trusts.\textsuperscript{32} On the other hand, the American Bar Association found that an attorney who prepared a new will for a client who wished to disinherit his son is not directly adverse to the son simply because he has also represented the son in an unrelated matter.\textsuperscript{33}

Even when the clients are not directly adverse, there can be a conflict of interest "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."\textsuperscript{34} This second form of conflict, under Rule 1.7(a), is called a materially limiting conflict. This rule acknowledges that although the clients are not legally at odds, the attorney's responsibility to one client may limit the attorney in what he can do for the other client. For example, an attorney who represents a charity or church might be precluded from representing an individual who wishes to gift money to the charity as part of the individual's estate planning. The "clients would not be directly adverse, but the attorney would be limited in what advice he might give the donor in light of the attorney's fiduciary relationship to the en-

\begin{quote}
\footnotesize
\textsuperscript{31} In re Estate of Klarner, 98 P.3d 892 (Colo. Ct. App. 2003), rev'd on other grounds, 113 P.3d 150 (Colo. 2005) (en banc). ACTEC Commentary to R. 1.7.

\textsuperscript{32} See also Morse v. Clark, 890 So. 2d 496 (Fla. Dist. Ct. App. 2004).

\textsuperscript{33} ABA Formal Op. 05-434 (2004). The committee further concluded that the drafting of the new will did not create a materially limiting conflict unless the attorney was advising the client who to name in the new will (see Appendix 3). See also Chase v. Bowen, 771 So. 2d 1181 (Fla. Dist. Ct. App. 2000). (This case holds that an attorney may ethically assist a client to disinherit a beneficiary, who the attorney represents in an unrelated matter, because a person is free to change his will at any time.) See also Harrison v. Fisons Corp., 819 F. Supp. 1039 (M.D. Fla. 1993) (holding that representing a bank in a fiduciary capacity disqualifies the attorney from representing a party that is adverse to the bank even though it was an unrelated dispute).

\textsuperscript{34} Model Rules of Prof'L Conduct R. 1.7 cmt. 8.
\end{quote}
It is not "the mere possibility of subsequent harm," but rather the "likelihood that a difference in interests will eventuate and, if it does, whether it will 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." "[S]oft-pedal" and "pull your punches" conflicts are inevitable in an elder law practice because of the interwoven relationships of the various individuals who are represented by the attorney. For example, in In re Wyatt's Case, the New Hampshire Supreme Court found a materially limiting conflict where an attorney represented both a ward and a conservator. Due to the nature of the voluntary conservatorship, it was anticipated that there would be disagreements over how the conservator was handling the discretionary spending. Another conflict may present itself if a wealthy,

35. Md. State Bar Ass'n Inc., Op. 2003-08 (2003), as cited in ACTEC commentary to R. 1.7 at 103 (An attorney who chair's church's committee that promotes giving from the congregation may not prepare wills for church members who intend to bequeath property to the church.); State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Adv. Op. 38, at 1 (2007) ("The lawyer . . . holds a fiduciary relationship to the company and is under the duties of loyalty, confidentiality and impartiality. The lawyer's duties to the company would limit his ability to be a fair advisor to the estate-planning client because of the inability to disclose information that could be pertinent to the client's decision. Further, the lawyer's knowledge of the company's financial situation and interest in advancing the economic goals of the company would create a conflict of interest." Moreover, the lawyer "must disclose to the client that [he] is associated with the company and that there may be a conflict of interest.").

36. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8; see also In re Penning, 930 A.2d 144 (D.C. Ct. App. 2007).

37. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8.


39. See In re Shay, 756 A.2d 465 (D.C. 2000) (finding an attorney's representation was "adversely affected" when she represented a couple in estate planning knowing that the husband was married to someone else, and the wife was unaware of that fact). However, no conflict exists if there is no evidence that the interests of the concurrent clients are adverse. Idaho State Bar v. Frazier, 28 P.3d 363, 390 (Idaho 2001).

40. 982 A.2d 396 (N.H. 2009); Andrews et al., supra note 30 at A.2.

41. Chapter 6 contains more expansive discussion of In re Wyatt's Case.
long-standing client brings in his parent for estate planning.\textsuperscript{42} The attorney can represent the parent as long as he is not limited in what he can do for the parent in light of his relationship with the son. The situation can quickly turn into a conflict when the attorney discovers that the parent is bequeathing everything to her daughter, whom she believes needs the money, and nothing to her son. Although the attorney knows that her son—his client—is struggling financially, the attorney might find himself limited in what advice he can give to the mother. Although the two clients are not directly adverse, their diverging interests may affect the attorney’s willingness to provide one client with advice that may be detrimental to the other.\textsuperscript{43}

Materially limiting conflicts can come from an attorney’s relationship with other clients, or even from his personal interests.\textsuperscript{44} If an attorney’s financial interests will affect the way he represents a client, then there is a conflict of interest, and the attorney must obtain informed consent to proceed with that representation. One example of a materially limiting conflict is when an attorney drafts documents that name him as the fiduciary.\textsuperscript{45} The question becomes whether the attorney drafted the documents for his own benefit rather than considering the best interests of his client. Again, the client and the attorney are not directly adverse; however, the attorney is acting without complete independent judgment because he is limited by his con-

\textsuperscript{42} See, e.g., ABA Formal Ethics Op. 02-428 (2002) (see Appendix 3).

\textsuperscript{43} See also ABA Formal Ethics Op. 02-426 (2002) (discussing conflicts that arise when an attorney acts as fiduciary and represents beneficiaries) (see Appendix 3).

\textsuperscript{44} See, e.g., in re Bruzga’s Case, 27 A.3d 804 (2011).

\textsuperscript{45} See Conn Bar Ass’n, Conn. Informal Op. 00-8 (2000) (finding no conflict when attorney drafts will and serves as both the executor and lawyer for the estate); but see in re Randall, 640 F.2d 898 (8th Cir. 1981) (involving the disbarment of a former ABA president for drawing up a will that disinherited the testator’s children and grandchildren and named the attorney sole beneficiary of the entire $2 million estate); Annotations to ACTEC Commentaries, supra note 30 at § A.2, citing N.H. Bar Ass’n, Ethics Comm. Adv. Op. 2008-09/1 (2009) (instructing a lawyer to assure himself that he is “competent to perform the fiduciary role; discusses the client’s options in choosing a fiduciary, including the relative costs of having a lawyer or someone else serve as fiduciary; and make a reasonable determination whether [his] personal interest . . . [in serving as] fiduciary require[s][the client’s informed consent].
cerns for his own best interest. That is not to say that an attorney is forbidden from naming himself as the fiduciary in a document, but that it requires informed consent, and if the client is incapable of giving the consent, then the attorney should refrain from naming himself as the fiduciary. In *In re Colman*, an attorney was suspended for three years because he named himself as a beneficiary of a will in violation of Model Rule 1.8(c), and then subsequently became guardian in charge of the very property he would inherit. The court found this was a materially limiting conflict under Model Rule 1.7. Additionally, before naming himself as the fiduciary, the attorney must assure himself that such an appointment is in the best interests of the client, and that the attorney is not merely acting in his own best interest. If the potential for conflict with a current client exists in regard to Model Rule 1.7(a), then the next issue is whether the representation can continue if the affected client is willing to give informed consent. Comment 2 to Rule 1.7 directs the attorney to question whether the conflict is “consentable”—i.e., is it possible for the client to waive the conflict? Certainly not all conflicts are “waivable.”

46. *In re Evans*, 902 A.2d 56 (D.C. 2006) (suspending an attorney for violating Model Rule 1.7, among other violations. The attorney owned a title company, and, during the course of closing a real estate loan, he discovered that the borrower did not own the property, because the property remained part of an unprobated estate of the borrower’s mother-in-law. The attorney then took on the representation of the borrower to probate the property without informing the client of the conflict and obtaining informed consent.).

47. ACTEC Commentary to R. 1.7 cautions:

[a] lawyer should exercise particular care if an existing client asks the lawyer to prepare for another person a will or trust that will benefit the existing client, particularly if the existing client will pay the cost of providing the estate planning services to the other person. If the representation of both the existing client and the new client would create a significant risk that the representation of one or both clients would be materially limited, the representation can only be undertaken as permitted by MRPC 1.7(b). In any case, the lawyer must comply with MRPC 1.8(f) . . . and should consider cautioning both clients of the possibility that the existing client may be presumed to have exerted undue influence on the other client because the existing client was involved in the procurement of the document.

48. 885 N.E.2d 1238 (Ind. 2008).

The attorney must refer to Model Rule 1.7(b) to determine whether the representation can continue even if the client consents. Model Rule 1.7(b) says:

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 he 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.

"Ordinarily, clients may consent to representation notwithstanding a conflict. However, some conflicts are nonconsentable, [as indicated in paragraph (b)], meaning that the lawyer involved cannot properly ask for such agreement or provide representation. . . ." 50 There are three factors that can determine whether or not the conflict is consentable. The first is whether or not a reasonable lawyer believes that he can provide competent and diligent representation even in light of the conflict. "Consentability" is usually determined by an assessment of whether "the interests of the clients will be adequately protected if they are permitted to give their informed consent to representation burdened by a conflict of interest." 51 The standard is an objective standard—that is, a reasonable attorney standard. Merely because the affected attorney believes he can adequately represent the client does not mean that his belief is reasonable or that it satisfies the rules. The New York City Bar Association suggests using the following guidelines to determine whether the attorney can give competent and diligent representation:

1. [t]he nature of the conflict[;] . . .
2. [t]he likelihood that client confidences or secrets in one matter will be relevant to the other representation[;] . . .

50. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 14.
51. Id. at 1.7 cmt. 15.
3. [t]he ability of the lawyer or law firm to ensure that the confidential information of the clients will be preserved; . . .
4. [t]he ability of the lawyer to explain, and the client’s ability to understand, the reasonably foreseeable risks of the conflict; . . . [and]
5. [t]he lawyer’s relationship with the clients. . . .

The question is not whether an informed attorney would conclude that he can represent the client fairly in spite of the conflict, but whether the representation the client will receive is competent. Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a “non-waivable” conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer who represents the personal representative of a decedent’s estate (or the trustee of a trust) should not represent a creditor in connection with a claim against the estate (or trust). On the other hand, if the potential conflicts between competent, independent parties are not substantial, their common interests predominate.

Second, the attorney must determine whether the representation is prohibited by law. For example, in the state of Florida an attorney cannot represent both husband and wife in a divorce proceeding. Comment 16 to Model Rule 1.7 suggests that there are other substantive laws that prohibit a lawyer from representing more than one defendant in a single capital murder case as well as laws that prevent certain individuals from consenting to representation in light of a conflict.

Finally, a conflict is non-consentable if “the representation . . . involve[s] 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.” This prohibition reflects a core value of the adversarial system. The basis of the adversarial system is the belief that truth emerges when each side has zealous representation that will present the client’s position free of divided loyalty to the opposition in

53. Model Rules of Prof’l Conduct R. 1.7 cmt. 16.
54. Id. at R. 1.7(b)(3); see also Ex parte Osbon, 888 So. 2d 1236 (Ala. 2004); Vinson v. Vinson, 588 S.E.2d 392 (Va. Ct. App. 2003).
the litigation. "Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding." Therefore, in a contested guardianship the attorney would be prohibited from representing both the ward and the petitioners. The results may be different if the guardianship is not contested. Furthermore, although this provision would not preclude the representation of both sides in mediation, other rules, such as Model Rule 1.7(b)(1), might render the conflict nonconsentable.

If the conflict is consentable, then and only then can the attorney properly obtain consent. There are three prerequisites to obtaining a proper consent. The first prerequisite is that the consent must be given by each of the affected clients. The second prerequisite requires the consent to be informed, while the third is that the consent must be confirmed in writing. Consent to continued representation in light of a conflict is only valid as to the client who consents, meaning that a client can only consent to the continued representation as to that client’s matter. The attorney must determine which clients are affected by the conflict, and all affected clients must give informed consent. For example, in In re Hoffman, an attorney violated Model Rule 1.7 when he obtained informed consent from only one of the three siblings he was representing in a will contest. The attorney relied on the one client to obtain the written consent from the other siblings without the attorney ever consulting with the other clients.

A client’s consent must be an informed consent. “Informed consent” is defined in Model Rule 1.0(e) as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct.” The rules require the attorney to explain all possible scenarios to the

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56. Id.
57. 883 So. 2d 425 (La. 2004), ACTEC Commentary to R. 1.7 at 99.
58. 883 So. 2d at 432. The court further found that the attorney violated Rule 1.8(g) by settling the case with the consent of only one client and then distributing the proceeds in accordance with the desires of one client, even in light of another client’s opposition. Id. at 432–33.
59. Model Rules of Prof’l Conduct R. 1.0(e).
client so that he or she is able to make an informed decision.\textsuperscript{60} The volume of information necessary will depend on the complexity of the conflict, the extent of the risks, and the nature of the parties involved.\textsuperscript{61} The client must be advised of all 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.”\textsuperscript{62}

"Overly broad waivers or waivers executed by an inadequately informed client are of little, if any, value."\textsuperscript{63}

Informed consent requires that the client be informed of the risks of the proposed conduct and to any alternative to the proposed conduct. The attorney needs to explain to the client all the material limits on the attorney because of the conflict. For example, an attorney should explain that he cannot pursue benefits for that client that would disadvantage another one of his clients. Additionally, the attorney must explain that if the situation became such that the conflict was no longer waivable, he would be required to withdraw, in which case the client would have to find alternative representation. The attorney would need to explain the client-lawyer privilege and the effects that multiple representation may have on confidentiality.\textsuperscript{64} Finally, the attorney should explain that alternatively the clients could be represented separately rather than jointly. Of course, an additional alternative to the concurrent representation would be to seek independent counsel.

Sometimes the information that needs to be disclosed to obtain an informed consent is confidential information belonging to another client.\textsuperscript{65} The attorney must obtain consent from the client whose confidential information must be disclosed. If that client refuses to consent

\textsuperscript{60} Id. at R. 1.4; see also In re Guardianship of Lillian P., 617 N.W.2d 849 (Wis. Ct. App. 2000) (requiring an attorney to disclose 1) the existence of all potential conflicts, 2) the nature of all conflicts or potential conflicts, and 3) the effect of those conflicts on the attorney’s independent judgment).

\textsuperscript{61} ACTEC Commentary to R. 1.0.

\textsuperscript{62} MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 18.

\textsuperscript{63} SUSAN J. LINK & JOHN W. PROUD, MINNESOTA PROBATE DESKBOOK, at app. A (2011-2012); ACTEC Commentary to R. 1.7; also see ABA Formal Ethics Op. 93-372 (1993) (see Appendix 3).

\textsuperscript{64} MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 18.

\textsuperscript{65} See ABA Formal Ethics Op. 08-450 (2008) (attorney may have to withdraw from representation if the information that is confidential is necessary as part of the attorney’s obligations of communication under Rule 1.4) (see Appendix 3).
to the disclosure, then it may be impossible to obtain an informed consent. The attorney may need to alert the non-disclosing client to the cost of separate representation to convince him that he needs to consent to disclosure in order to obtain a valid consent.

It is necessary that the consent be confirmed in writing. The confirmation can be in the form of a communication from the client to the attorney or vice-versa. The communication may be an electronic transmission. There are times when it may not be feasible to confirm the consent in writing. The attorney may rely initially on the oral consent if written confirmation is received within a reasonable amount of time. The attorney should understand that the written consent does not absolve the attorney of his responsibility to advise the client in person, to allow the client to ask questions, and to ensure that the client really understands what the consequences of the consent are. The written notice requirement is an attempt "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."

II. Protecting Former Clients

The protection afforded former clients is based on the same core values as the protection given to current clients. It is designed to prevent an attorney from betraying confidences or from using a former client’s con-

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67. ACTEC Commentary to Rule 1.0 at 13; Model Rules of Prof’l Conduct R.1.7 cmt. 20.
68. ACTEC Commentary to Rule 1.0 at 13; Model Rules of Prof’l Conduct R.1.7 cmt. 20.
69. Model Rules of Prof’l Conduct R. 1.7 cmt. 20. Bishop v. Maurer, 823 N.Y.S.2d 366, 367 (N.Y. App. Div. 2006). In Bishop, the court found the following language sufficient for a waiver:

Any relationship between a lawyer and a client is subject to Rules of Professional Conduct. In estate planning, ethical rules applicable to conflicts of interest and confidentiality are of primary concern. By countersigning a copy of this letter, you each acknowledge that you have had the opportunity to consult independent legal counsel with respect to your estate planning, and you each affirmatively waive with full understanding any conflict of interest inherent in your both relying on the advice of this firm and its attorneys.

Bishop, 823 N.Y.S.2d at 367 (quoting the plaintiff’s retainer letter). Id.
Who Can I Represent?

Confidential information to that client's disadvantage in the representation of a current client. Confidentiality rules are in place to encourage clients to speak frankly with attorneys. The former-client confidentiality protection allows clients to be confident that their information will be safeguarded even after the representation is terminated. Additionally, these protections prevent attorneys from legally challenging documents they have drafted for a previous client in order to collect a fee from a new client. The public would be even more concerned with the integrity of lawyers if they were permitted to challenge the legality of documents they themselves created in the past. The protections afforded former clients are more limited in scope than those given current clients.

The protection against conflicts of interest for the former client is found in Model Rule 1.9, which states:

(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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; 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:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.\(^\text{70}\)

\(^{70}\) Model Rules of Prof'l Conduct R. 1.9.
The protection against conflicts of interest involving former clients is narrower in scope than the protection afforded current clients in several respects. First, former-client protections under Model 1.9(a) restrict only representation that is in “the same or a substantially related matter.” In other words, just because a person is being sued by an individual represented by his former attorney does not mean that there is a conflict. The fact is that the case the attorney is currently working on must be closely related to the former case in order for the protections of Model Rule 1.9 to be in place. Compare that to the protection afforded current clients under Model Rule 1.7, wherein a conflict exists if a current client is opposing another concurrent client regardless of the subject matter of the litigation. The cases do not have to be substantially related in order for there to be a directly adverse conflict under Model Rule 1.7. Further, Model Rule 1.9(a) only restricts representation against a former client that is materially adverse. Conflicts that fall under Model Rule 1.9(a) are always consentable by the former client. One court, however, recognized that the former client “has the right to be free from any concern that [her former lawyer] may, even inadvertently, betray any confidences which she may have imparted to him. . . . Any doubts should be resolved in favor of disqualification.”

The protection for the former client can be resolved by considering the following questions:

1. Is the person or entity that the attorney is now opposing a former client?
2. Is the matter materially adverse to the former client?
3. Is the matter the same or substantially the same?

71. It is imperative that the attorney understand that any conflict that impacts a current client, even based on the attorney’s relationship with a former client, is covered under Rule 1.7. The rules are organized around whom the protection is meant for, not who is causing the conflict. See Wolfram, supra note 38, at 33 (noting that recent efforts by the ABA did little to resolve the issues that arise when current clients may be impacted by former representation).

72. Annotations to ACTEC Commentaries, supra note 30 at § B.1, quoting Estate of Gallagher, 2007 N.Y. Misc. LEXIS 7639; 238 N.Y.L.J. 83 (N.Y. Surr. Ct. Proc. Act 2007) (a court disqualified a lawyer, in a will contest, from representing the executor because he had served as counsel for both the executor and the contestant to the will when the two had been appointed as co-guardians for the decedent because the case involved allegations of undue influence on the part of the executor).
4. Will the former client consent?
5. Is the person a former client?

A. Is the Person a Former Client?

This issue is predicated by two prerequisites. First, did the attorney previously represent the person or entity? Second, is the client a former client whose agreement with the attorney has been terminated? For an individual to be protected under Rule 1.9, he or she must be a former client, i.e., a relationship between the client and the attorney must have existed previously. In In re Estate of Klehm, the Illinois Appellate Court found that when an attorney represents individuals as co-executors, he is not representing the clients in their personal capacity, and therefore the essential attorney-client relationship that affords them the protections under Rule 1.9 does not apply. The court distinguished representation involving real estate holdings from estate planning, which is personal, and as such, establishes protection if the matters are substantially related.

An individual is given former-client protection only if he or she has been personally represented by the attorney. In the Matter of Bacot v. Winston, the court found no conflict when Bacot petitioned for a guardianship of her father, whereupon his son moved to disqualify Bacot’s attorney, arguing that the firm had represented his father in a previous action. The court refused to disqualify the firm because, among other reasons, it found that the firm had previously represented the daughter (Bacot) and not the father.

B. Is the Matter Materially Adverse to the Former Client?

Obviously, if a former client is being sued by a current client, the parties are adversaries, and thus the prerequisite has been met. However, in some situations the adversity may be less apparent, and the

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73. As to this issue, see discussion under Section 1 of this chapter on the distinction between a current and a former client.
74. 842 N.E.2d 1177 (Ill. App. Ct. 2006). See also Lamotte v. Beiter, 2006 WL 4682182 (N.Y. Sup. Ct. 2006) (court found that an owner of a company is not a former client merely because the law firm previously represented the individual’s company).
75. 873 N.Y.S.2d 509 (N.Y. Sur. Ct. 2008); Annotations to ACTEC Commentaries, supra note 30 at § B.2.
attorney must be wary that the confidential information of the former client is not used to the advantage of the current client.\textsuperscript{76} “Adversity does not exist in the abstract, but concerns the interests of a former client that are at issue.”\textsuperscript{77} However, there is no prohibition against an attorney opposing a position that he advocated for a previous client.\textsuperscript{78} The basis for this finding is that attorneys “represent clients—not legal positions.”\textsuperscript{79}

The Oregon State Bar Association considered the challenge of material adversity in representing successive personal representatives.\textsuperscript{80} The bar found “absent a conflict of interest, there is no reason a lawyer cannot represent a personal representative.” The opinion went on to clarify that the attorney was prohibited from representing the personal representative in the defense of a claim for fees and expenses filed by the first personal representative without the informed consent of that personal representative, confirmed in writing.” An attorney is not precluded from representing the beneficiaries of a will, even in cases where the attorney created the will of the decedent, as long as the beneficiaries’ interests correspond with the attorney’s previous work.\textsuperscript{81} On the other hand, a law firm that represented a decedent in the transfer of property to her son was disqualified from representing the son, who was claiming the transfer was a gift, because the court found that the representation of the son was adverse to the former client, his mother.\textsuperscript{82} The determination is based on whether the current action negatively impacts the former client’s interest.

\textsuperscript{76} Ronald E. Mallen & Jeffrey M. Smith, \textit{Legal Malpractice} § 18:13 (2012 ed.).
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Model Rules of Prof’l Conduct} R. 1.9 cmt. 2, which states:

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.

\textsuperscript{79} Teletronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332, 1338 (Fed. Cir. 1988).
\textsuperscript{82} \textit{In re} Estate of Wright, 881 N.E.2d 362, 370 (Ill. App. Ct. 2007).
C. Is the Matter the Same or Substantially Related?

The protections of Model Rule 1.9 are triggered only if the current representation is the same, or substantially the same, as the representation of the former client. Comment 3 to Model Rule 1.9 defines "substantially related" as follows:

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.\(^{83}\)

Obviously, matters are substantially related when they are tied to a current representation. However, determining if successive representations are substantially related can be difficult. An Oregon Bar Opinion can be helpful in making this distinction. The opinion suggests that "[m]atters can be substantially related in either of two ways: (1) the lawyer's representation of the current client will work some injury or damage to the former client in connection with the same matter in which the lawyer represented the former client; (2) there is a risk that confidential factual information learned in representing the former client could be used to advance the new client's position."\(^{84}\) The opinion calls the first conflict "matter-specific" and the second "information-specific."\(^{85}\) Additionally, the Oregon opinion "cautions against an overboard definition, finding that the fact that two matters may both involve the same disputants, the same industry, and some of the same facts will generally be insufficient, standing alone, to create a matter-specific conflict,"\(^{86}\) and that "acquiring confidential information in a prior representation does not create an 'information-specific' conflict if the information is not material to the new matter and cannot be used to materially advance the new client's position."\(^{87}\)

83. Model Rules of Prof'l Conduct R. 1.9 cmt. 3.
85. Id.
86. Id.
87. Id. See also Estate of Markheim ex rel. Shumway v. Markheim, 957 A.2d 56 (Me. 2008) (finding a conflict based on the information the attorney for the estate would have learned in a previous representation of decedent's son and daughter-in-law).
Therefore, the attorney needs to determine whether there is substantial risk of confidential information that pertained to former representation being used to materially advance a current client's position. This rule requires that there be obvious substantial risk, not just the possibility that the information could be misused. Model Rule 1.9 balances the interests of former clients (a safeguard that prevents their confidential information from being used to their disadvantage) with the interest of attorneys (the ability to earn a living by representing future clients). In most cases, information that is general in nature that pertains to a corporate client will not foreclose future matters being undertaken that are adverse to the corporation simply because the information may be helpful.\textsuperscript{88}

The Rule covers only information that would normally be obtained in the type of representation that the attorney provided for a former client. However, the “former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.”\textsuperscript{89} The key is to identify the nature of the confidential information that would reasonably be obtained in representation of this type. The Oregon State Bar Association applied the “matter-specific” and “information-specific” former-client conflicts categories to an attorney who had provided family estate-planning advice to a married couple in the past and is then asked to represent the wife in a dissolution of the marriage. “Matter-specific” is determined by identifying the nature of the estate planning the attorney provided. A Model Rule 1.9 conflict may exist if the couple had “legally bound themselves to not change their wills or if lawyer’s representation of wife would require lawyer to try to wrest control away from husband of business or estate-planning entities that lawyer had formed while representing wife and husband.”\textsuperscript{90} The Bar determined that there was no “information-

\textsuperscript{88} ACTEC Commentaries to Model Rule 1.9 suggest that “general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.” ACTEC, Commentary to R.19, at 129.

\textsuperscript{89} Model Rules of Prof’l Conduct R. 1.9 cmt. 3

specific" conflict because confidential information is shared between joint clients.\(^{91}\)

The final determination should be whether the confidential information reasonably obtained in the representation of a previous client can be used to materially advance the current client’s position. In *Estate of Harris*,\(^{92}\) a New York court disqualified an attorney who represented a beneficiary in an attempt to remove an executor of an estate based on allegations of mismanagement. The attorney had previously represented the executor in the administration of the estate. The court found that the information obtained in administration of the estate would benefit the current client and therefore required consent. On the other hand, in *Matter of Bacot v. Winston*,\(^ {93}\) the court found no conflict in a contested guardianship matter in which the attorney who represented the petitioner had previously represented the petitioner on behalf of her father in an action for accounting. The court found that the two actions were independent and that the firm had not acquired confidential information of the father that could be used in the guardianship case.

If the information has been publicly disclosed, then the potential for conflict does not exist.\(^ {94}\) Additionally, the passage of time can render information insufficient to disqualify.\(^ {95}\) For example, dated financial information will prove useless in that the financial information will be obsolete and thus be of no value to the current client.

**D. Will the Former Client Consent?**

All former client conflicts are waivable, unlike current client conflicts. Regardless of the nature of the adversity or the relativity of the matter, the former client can waive the conflict.\(^ {96}\) It is paramount that the attorney obtains written informed consent. The informed consent requirement for former clients is identical to the informed consent requirement for current clients. Of course, the former client may have very little

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91. *Id.*
95. MODEL RULES OF PROF’L CONDUCT R. 1.9 cmt. 3
reason to consent, as a waiver provides no benefit to the former client. When a former client readily agrees to allow his attorney to represent the opposing party, it is questionable whether the attorney was competent in his representation of the former client.

In seeking informed consent, the attorney will need to provide the former client with some details concerning the current client. As this is considered confidential information, the current client will need to consent to the disclosure of his confidential information. If the current client will not agree to the disclosure, the attorney will have to withdraw from representation. The attorney should disclose the minimum amount of information necessary to obtain the informed consent. Again, the consent must be confirmed in writing.

III. Protecting Prospective Clients

Finally, the attorney needs to understand that prospective clients are also entitled to some protections under Model Rule 1.18. Model Rule 1.18, which protects prospective clients, is a relatively new addition to the Model Rules of Professional Conduct. The courts and bar associations have long argued that the protections afforded to former clients should not extend to prospective clients in cases when the individual does not retain the attorney. Therefore, although Model Rule 1.18 gives some protections to the prospective client, the protections are not as broad as those given to the current client or even the former client. The prospective client rule was adopted to deal with the recurring issues sometimes referred to as the “consultation problem” or the “beauty contest” issue. Model Rule 1.18 defines the protection for prospective clients who consult with, but do not retain, the attorney. The rule states:

97. See Chapter 2 for a discussion on the problem of accidental clients and Chapter 3 regarding protection of confidential information.
98. MODEL RULES OF PROF'L CONDUCT R. 1.18.
99. Johns, supra note 96 at 249.
101. See Brown, id.
102. See Martyn, supra note 100 at 923 (clients are increasingly “auditioning” attorneys).
(a) A person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information, except as Rule 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 person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

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

1. both the affected client and the prospective client have given informed consent, confirmed in writing; or

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

   i. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

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

In the first part of the analysis, the attorney must consider whether the person who is being adversely affected by the current-client representation is a prospective client. A prospective client is defined in Model Rule 1.18 as "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." The Model Rules provide that not every person who con-

103. Model Rules of Prof'l Conduct R. 1.18(a).
contacts an attorney is afforded the protections under the rule. Comment 2 states that "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship . . . is not . . . a ‘prospective client.’" 104

If in fact the person is deemed a prospective client, then the attorney must consider whether he has received disqualifying information in the course of the initial interview. 105 When confidential information disclosed to an attorney by a prospective client may benefit a current client to the detriment of the prospective client, this information is considered disqualifying. In other words, the nature of the information revealed should be considered in context with the matter for which the attorney or law firm is subsequently retained. The ACTEC Commentaries suggest that "because of the generally non-adversarial nature of estate planning, gathering information from a prospective client at the initial conference will seldom disqualify the lawyer from representing a current or future client in a matter adverse to the prospective client." 106 State ex rel. DeFrances v. Bedell, 107 which was decided before Rule 1.18 was enacted, is instructive. There, the court found no conflict where a man had a one-hour conversation with an attorney about his will, and the attorney subsequently represented the will’s beneficiaries in a contest against the estate. The court’s ruling was based on the premise that no confidential information was shared; the conversation pertained to estate and gift taxes; no record of the meeting was kept; no time was billed to the meeting; and the will was not changed as a result of the conversation. 108

The key to avoiding a conflict of interest is to ensure that no conflicts exist as quickly as possible either before or during the initial interview. 109 Additionally, the attorney should obtain only information

104. *Id.* at R. 1.18 cmt. 2. See also ACTEC Commentary to R. 1.18 at 144-46.
105. Regardless of whether the information the attorney receives disqualifies him from future representation, the attorney is still precluded from revealing the information received. *Model Rules of Prof’l Conduct* R. 1.18(b).
106. ACTEC Commentary to R. 1.18 at 145.
108. *Id.*
that is necessary to determine whether a conflict exists. Model Rule 1.18, comment 5, provides for an attorney to “condition a consultation with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.” Geoffrey C. Hazard and William W. Hodes give the following advice for avoiding disqualification based on conversations with prospective clients:

1. Ask the prospective client to waive confidentiality of the preliminary discussions;
2. Limit initial discussions to matters required for a “conflicts check”;
3. Make the conflicts check before a final decision on undertaking a representation; and,
4. As soon as a decision is reached not to form a lawyer-client relationship, screen the lawyer who received the confidential information, so that disqualification may more readily be avoided if a conflict develops.

It is prudent for the attorney to do an initial conflict check even before the client is interviewed.

The protections of Model Rule 1.18 apply only if the attorney received disqualifying information. The burden falls on the prospective client to persuade the court that disqualifying information was disclosed to the attorney. This is in contrast to Model Rule 1.9, in which no disqualifying information needs be disclosed for the protections of Model Rule 1.9 to apply. If the attorney has received disqualifying information, then Model Rule 1.18(c) protects the prospective client by preventing the attorney from representing an individual who may be materially adverse to the prospective client in the same, or

110. *Id.; see also* Model Rules of Prof’l Conduct R. 1.18 cmt. 4.
111. *Model Rules of Prof’l Conduct* R. 1.18 cmt. 5. The comment goes on to suggest that the prospective client can give informed consent that any information can be used.
substantially related, matter. The term “substantially related” is defined in comment 3 to Model Rule 1.9.

If a conflict is found, Model Rule 1.18(d) allows for continued representation in two different ways. The first way is when the prospective client has given informed consent, confirmed in writing. Second, the disqualified attorney can be screened if the lawyer took steps to avoid obtaining too much information. Specifically, Rule 1.18(d)(2) provides for the law firm to continue representation if 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 is apportioned no part of the fee therefrom; and

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

This screening option recognizes the important balance between protecting prospective clients and a law firm’s economic viability.

115. Johns, supra note 96 at 257.

116. Thirty states have adopted rules that permit screening attorneys who receive confidential information from prospective clients if the attorney took reasonable steps to prevent receiving the confidential information (ARIZ. RULES PROF’L CONDUCT R. 1.18; ARK. RULES PROF’L CONDUCT R. 1.18; Colo. Disciplinary Rules Prof’l Conduct R. 1.18; Conn. Rules Prof’l Conduct R. 1.18; Del. Lawyers Rules Prof’l Conduct R. 1.18; Fla. Bar R. 4-1.18; ILL. RULES PROF’L CONDUCT OF 2010 R. 1.18; Ind. Rules of Court, Rules Prof’l Conduct R. 1.18; Iowa Court Rules R. 32:1.18; Ky. Supr. Ct. Rules R. 3.130(1.18); La. Rules Prof’l Conduct R. 1.18; Me. Rules Prof’l Conduct R. 1.18; Minn. Rules Prof’l Conduct R. 1.18; Nebraska Rules Prof’l Conduct § 3-501.18; Nev. Rules Prof’l Conduct R. 1.18; N.H. Rules Prof’l Conduct R. 1.18; N.M. Rules Prof’l Conduct R. 16–118; N.Y. Rules Prof’l Conduct R. 1.18; Ohio Rules Prof’l Conduct R. 1.18; Okla. Stats. § R. 1.18 (OSCN 2012) Appendix 3–A; Pa. Rules Prof’l Conduct R. 1.18; R.I. Disciplinary Rules Prof’l Conduct R. 1.18; S.C. Rules Prof’l Conduct R. 1.18; S.D. Rules Prof’l Conduct R. 1.18; Utah Rules Prof’l Conduct R. 1.18; Vt. Rules Prof’l Conduct R. 1.18; Wash. Rules Prof’l Conduct R. 1.18; Wis. Supr. Ct. Rules R. 20:1.18; Wyo. Rules Prof’l Conduct for Attorneys at Law R. 1.18).

117. MODEL RULES OF PROF’L CONDUCT R. 1.18(d)(2).
The firm may continue representation if three prerequisites are met: (1) the attorney who obtained the information took steps to prevent obtaining the disqualifying information; (2) the disqualified attorney is screened as defined in Model Rule 1.0(k); and (3) the prospective client is promptly notified. Finally, the D.C. Bar Association has found that an attorney can refer a prospective client to another attorney even if the prospective client would be adverse to the referring attorney's existing client.

IV. Conflicts with Personal Interests

Finally, an attorney must be cognizant of the risk that his personal financial interests may conflict with his ability to adequately represent a client. Conflicts of interest that materially limit representation were discussed previously under Model Rule 1.7. It is unlikely that an elder law attorney would be directly adverse to a client, but that attorney could find himself materially limited by a personal interest. That is to say, an elder law attorney might find that his current client's interests conflict with the attorney's personal interests, and as such, the attorney may be limited in taking actions that would prove harmful to his personal interests. In the right circumstances, the attorney may be able to obtain informed consent from the client after exposing his personal interest in the situation. However, if the personal interest is substantial, or the conflict is significant, the conflict may be non-consentable for this reason: the attorney may not reasonably believe that he can represent the client competently and diligently in light of his personal interest conflict. Therefore, the attorney would need to terminate representation to comply with Model Rule 1.16. Comment 11 to Model Rule 1.7 expounds upon the way in which family relationships can present the attorney with personal interest conflicts and the need to obtain consent.

118. MODEL RULES OF PROF'L CONDUCT R. 1.0(k) says:

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

In addition to the personal interest conflicts that are revealed in Model Rule 1.7, Model Rule 1.8 addresses specific situations in which the attorney's own interests can conflict with a client's interests. The conflict rules are an attempt to identify situations in which there is substantial risk of divided loyalty. Four prohibitive rules exist under Model Rule 1.8 that are particularly relevant to the elder law attorney: Rule 1.8(a), business transactions with clients; 1.8(b), use of information to client's disadvantage; 1.8(c), receipt of gifts from clients; and 1.8(f), payment from a third party. Model Rule 1.8(a) restricts the interaction between an attorney and a client when entering into a business transaction. It provides that

[a] lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

120. The other prohibitions in Rule 1.8 could impact an elder law attorney but are not as likely. These prohibitions include the following: Rule 1.8(d) (obtaining literary rights); Rule 1.8(e) (financial assistance to a client in litigation); Rule 1.8(h) (aggregate settlements); Rule 1.8(i) (acquiring a proprietary interest in subject of litigation); and Rule 1.8(j) (sexual relationship with clients).

121. See Chapter 2 for a complete discussion of payment by a third party. ACTEC Commentary to R. 1.8 says, "It is relatively common for a person other than the client to pay for the client's estate-planning services. Examples include payment by a parent or other relative or by an employer. A lawyer asked to provide legal services on such terms may do so provided the requirements of MRPCs 1.5, 1.7, and 1.8(f) are satisfied." ACTEC Commentary to R. 1.8, at 113 See also ABA Formal Op. 02-428 (2002) (see Appendix 3).

122. Model Rules of Prof'l Conduct R. 1.8(a).
First, it is important to note that the “mandatory procedural safeguards” in this rule “[do] not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.” Additionally, this rule does not apply to attorney’s fees, which are covered in Rule 1.5. It applies to business transactions between the client and lawyer that are outside of the services that the attorney renders as a lawyer, and outside of the services the client routinely receives. This rule must be satisfied if an attorney is buying from the estate of a client. The purchase is not prohibited by Rule 1.8(a); it simply establishes the process that the attorney must follow in transactions with the estate. This process must also be followed when an attorney is receiving a loan from a client. The burden is on the attorney to prove that he has complied with the directives in Rule 1.8(a).

To properly engage in a business transaction with a client, the attorney must ensure that the transaction is fair. In Sodikoff v. State Bar, a California court imposed a six-month suspension on an attorney who entered into a sales contract with the beneficiary of a trust, who lived abroad, while he represented the administrator. The attorney encouraged the beneficiary to sell the property to a company that he owned without informing the beneficiary of his ownership and without in-
forming the client that the property was worth much more than the beneficiary was asking for it. The court can review the transactions that take place between an attorney and a client, and if the court decides that the terms are not fair, it can invalidate the business transaction. In this situation, the attorney and the client are not viewed as individuals with equal bargaining power; therefore, the transaction can be reviewed for fairness. Additionally, the entire transaction must be recorded on paper. Unlike other conflict waivers where only the confirmation is required on paper, the terms of an attorney/client business deal must be in the form of a written agreement. The client must give informed consent to the essential terms of the agreement. This means that the attorney needs to advise the client of the risks inherent to the business transaction in accordance with Model Rule 1.0(e). Finally, the client must be advised in writing to secure independent counsel and be afforded with the opportunity to do that. In In re Disciplinary Action Against Giese, the North Dakota Supreme Court found that “a passing suggestion” that a client should consult with an independent attorney did not satisfy the requirements for an ethical business transaction as set forth in Model Rule 1.8(a). If the client does not seek independent counsel and instead relies on the attorney, then, to comply with Model Rule 1.7, the attorney should advise the client of the risks involved when the attorney serves as both a business partner and lawyer. The rules are designed to protect the client in a client/attorney transaction in which the client is at most risk.

In Chapter 3, Model Rule 1.8(b) was briefly discussed in regard to the protection of confidential information. Model Rule 1.8(b) prohibits the attorney from using the client’s information in any way that would disadvantage the client. However, the rule prohibits the use of this information only if it puts the client at a disadvantage; it does not prohibit the attorney from using the information to his advantage, or to the advantage of a third party. Comment to Model Rule 1.8 makes it clear that there is no prohibition unless the information is clearly detrimental to the client. However, agency principles may prohibit an attorney as agent from using a client’s information.

130. Id. at 430–31; see also In re Lupo, 851 N.E.2d 404 (Mass. 2006).
131. 662 N.W.2d 250, 257 (N.D. 2003).
132. Model Rules of Prof’l Conduct R. 1.8 cmt. 3.
133. See In re Coffey’s Case, 880 A.2d 403 (N.H. 2005).
134. Model Rules of Prof’l Conduct R. 1.8 cmt. 5.
Model Rule 1.8(c) is of special importance to the elder law attorney in that it has been the downfall of many. Model Rule 1.8(c) reads:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.135

First of all, Model Rule 1.8(c) prohibits soliciting gifts from a client. Second, it prohibits the preparation of any legal document that will transfer a substantial gift to the attorney unless the attorney is related to the donor. Therefore, an attorney cannot prepare a will for any client wherein the attorney is a beneficiary unless the client is a relative.136 In People v. Berge,137 the Colorado court suspended an attorney for this exact situation even though he did not actually write the will. Indeed, the will had been prepared by an attorney with whom he shared office space. The attorney also served as a witness to the signing of the will that named him beneficiary. Although the term “substantial gift” is not defined in the actual rule, the ACTEC Commentaries suggest that the value of the gift should be appropriate in relation to the estate.138 If a client is determined to bequeath a gift to an attorney, the attorney should refrain from drafting the will.139 The attorney should request that an outside attorney not affiliated with the beneficiary attorney draft the will. As such, the will should be drafted after the out-

135. Model Rules of Prof’l Conduct R. 1.8(c).
136. See Comm. on Prof’l Ethics & Conduct of State Bar Ass’n v. Behnke, 276 N.W.2d 838 (Iowa 1979); In the Matter of the Estate of Karabatian, 170 N.W.2d 166 (Mich. Ct. App. 1969); Matter of Will of Tank, 503 N.Y.S.2d 495 (Sur. Ct. 1986); In re Disciplinary Action Against Boulger, 637 N.W.2d 710 (N.D. 2001); Mahoning County Bar Ass’n v. Theofilos, 521 N.E.2d 797 (Ohio 1988); State v. Collentine, 159 N.W.2d 50 (Wis. 1968); In re Devaney, 870 A.2d 53 (D.C. 2005).
137. 620 P.2d 23 (Colo. 1980) (en banc).
138. ACTEC Commentary to R. 1.8 at 112.
139. In re Colman, 885 N.E.2d 1238 (Ind. 2008).
side attorney has met with the testator alone to determine the testator’s intent.\textsuperscript{140}

On the other hand, ABA Opinion 02-426 makes it clear that being named fiduciary of a will is a professional responsibility in nature and should not be looked upon as a gift.\textsuperscript{141} That said, the courts have put in place strict rules that require attorneys to determine whether there is a conflict of interest in being named fiduciary in a will.\textsuperscript{142}

\textbf{Conclusion}

Although joint representation is permissible and sometimes beneficial in estate planning with husbands and wives,\textsuperscript{143} an attorney must be alert to indications that the two parties do not have the same objectives. For example, in \textit{In re Plinski},\textsuperscript{144} a husband and wife, who each had adult children from a previous marriage, approached an attorney to draft joint wills. The court found they had adverse interests because the “value of their respective estates were substantially different, clients disagreed over distribution of assets, and wife was susceptible to pressure from husband on financial issues.” In the hypothetical posed at the beginning of this chapter, the clients clearly wanted different things out of the representation. Under Model Rule 1.7(a), the attorney could not represent both of them in the absence of consent because he would be materially limited in pursuing one client’s objectives over the other client’s objectives.

\begin{itemize}
\item \textsuperscript{140} \textit{In re Succession of Tanner}, 895 So. 2d 584 (La. App. 2005) (court upheld a $500,000 gift to attorney); \textit{In re Succession of Walters}, 943 So. 2d 1165 (La. App. 2006) (finding that “related” to includes second cousin).
\item \textsuperscript{141} ABA Formal Ethics Op. 02-426 (2002) (see Appendix 3).
\item \textsuperscript{142} See generally Paula A. Monopoli, \textit{Drafting Attorneys as Fiduciaries: Fashioning an Optimal Ethical Rule for Conflicts of Interest}, 66 U. \textsc{Pitt} L.R. 411 (2005).
\item \textsuperscript{143} ACTEC Commentary to R. 1.7 at 92.
\item \textsuperscript{144} 16 DB Rptr. 114 (2002), \textit{reported in} Or. State Bar Ass’n, Bd. of Governors, Formal Op. No. 2005-86. (“[A] lawyer is charged with all knowledge that a reasonable investigation of the facts would show. Typically, such an investigation will not lead the lawyer to conclude that a conflict exists under Oregon RPC 1.7(a) when . . . joint wills are contemplated, because the interests of spouses in such matters will generally be aligned.”) (citations omitted). See also ACTEC Commentary to R. 1.7 at 91 (discussing the generally “nonadversary character” of estate planners).
\end{itemize}
Chapter 4

Concurrent Representation

Letter to Confirm Consent

Mr. and Mrs. John Brown
123 Main St.
Anywhere, US 10000

RE: Concurrent representation

Dear Mr. and Mrs. Brown:

You and your wife, Mary Brown, have asked me to represent the two of you in development of an estate plan, including revision of your wills, powers of attorney and other matters. The law considers this "joint representation." Because I will be representing you, there are some things that you need to be aware of before I begin my representation.

Under legal ethics rules, a lawyer is required to keep your confidences and not to divulge your confidences to any other people or organizations. However, because I will be representing both of you, this rule will not apply as to any communications that either of you with regards to any information I receive from the two of you. As the information each of you provide to me impacts the estate planning for the other, I will assume that any information provided to me is available to the other of you, and that I am free to divulge such information to the other of you. This does not change the confidentiality that the two of you have with regard to any other person or organization. I will only reveal information you direct me to divulge or for which I have your permission to divulge to other people or organizations.

One other matter impacts my joint representation of you. Should, at any point in my representation of you, the two of you become in conflict with each other, I will be required to withdraw from representation of both of you, and I will not ethically be permitted to continue any representation.
In the event I must withdraw from representation of the two of you due to conflict between you, I will still maintain both of your confidences relative to other people or organizations. If your conflict becomes so strong that you end up in litigation, such as a divorce proceeding, I will resist any subpoena or requests for information. However, I cannot guarantee you that a court will not require me to produce the information or to testify in any proceedings.

Should you have any questions concerning this letter, please do not hesitate to ask me. I look forward to a successful and positive representation of the both of you.

Sincerely,
Chapter 4

Letter to Confirm Consent to Continue Representation That Is Adverse to a Former Client

Mr. and Mrs. John Brown
123 Main St.
Anywhere, US 10000

RE: Former representation

Dear Mr. and Mrs. Brown:

As you are aware, I represented you with regard to your (insert nature of former representation). I have now been asked to represent your (fill in the relationship, Bill and Betty White).

It is my belief that information that I possess as a result of my representation of the two of you may impact my representation of Mr. and Mrs. White. While I will not reveal or use any confidential information I received from you while representing you, I believe the ethics rules for lawyers require me to obtain your permission to represent the Whites, because of the potential conflict of interest that may result.

I am therefore requesting that you sign and return the enclosed Consent to Representation form, which indicates that you have given your consent to my representation of the Whites, knowing of the possibility of a conflict of interest.

Before signing and returning the enclosed consent, if you have any questions concerning this matter, please feel free to call me with questions, or set up an appointment to come and consult with me as to this issue. I will not charge you a consultation fee for this meeting, as I believe it is my obligation to ensure that you are fully informed and comfortable with consenting to my representation of the Whites after having represented the two of you.

I look forward to hearing from you.

Sincerely,

Allen Attorney
Smith & Jones L.L.C.
Informed Consent to Representation

We, John and Mary Brown, have been informed by Allen Attorney that he has been asked to represent Bill and Betty White in a legal matter. He has further informed us that he believes a potential exists for a conflict of interest due to his prior representation of us.

We have discussed this issue with him (or: do not feel we need to discuss this issue with him) and, having been given an opportunity to object to representation as well as the opportunity to discuss any concerns we may have, consent to his representation of Bill and Betty White.

John Brown

Mary Brown

Date

Date