

## Professional Responsibility

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# Restatement (3d) of the Law Governing Lawyers

## Chapter 8. Conflicts Of Interest

### Topic 1. Conflicts of Interest—In General

#### § 121. The Basic Prohibition of Conflicts of Interest

Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

#### Comment:

*b. Rationale. The prohibition against lawyer conflicts of interest reflects several competing concerns. First, the law seeks to assure clients that their lawyers will represent them with undivided loyalty. A client is entitled to be represented by a lawyer whom the client can trust. Instilling such confidence is an objective important in itself. For example, the principle underlying the prohibition against a lawyer's filing suit against a present client in an unrelated matter (see § 128, Comment e) may also extend to situations, not involving litigation, in which significant impairment of a client's expectation of the lawyer's loyalty would be similarly likely. Contentious dealings, for example involving charges of bad faith against the client whom the lawyer represents in another matter would raise such a concern. So also would negotiating on behalf of one client when a large proportion of the lawyer's other client's net worth is at risk.*

*Second, the prohibition against conflicts of interest seeks to enhance the effectiveness of legal representation. To the extent that a conflict of interest undermines the independence of the lawyer's professional judgment or inhibits a lawyer from working with appropriate vigor in the client's behalf, the client's expectation of effective representation (see § 16) could be compromised.*

*Third, a client has a legal right to have the lawyer safeguard the client's confidential information (see § 60). Preventing use of confidential client information against the interests of the client, either to benefit the lawyer's personal interest, in aid of some other client, or to foster an assumed public purpose is facilitated through conflicts rules that reduce the opportunity for such abuse.*

*Fourth, conflicts rules help ensure that lawyers will not exploit clients, such as by inducing a client to make a gift to the lawyer (see § 127).*

*Finally, some conflict-of-interest rules protect interests of the legal system in obtaining adequate presentations to tribunals. In the absence of such rules, for example, a lawyer might appear on both sides of the litigation, complicating the process of taking proof and compromising adversary argumentation (see § 128).*

*On the other hand, avoiding conflicts of interest can impose significant costs on lawyers and clients. Prohibition of conflicts of interest should therefore be no broader than necessary. First, conflict avoidance can make representation more expensive. To the extent that conflict-of-interest rules prevent multiple clients from being represented by a single lawyer, one or both clients will be required to find other lawyers. That might entail uncertainty concerning the successor lawyers' qualifications,*

usually additional cost, and the inconvenience of separate representation. In matters in which individual claims are small, representation of multiple claimants might be required if the claims are effectively to be considered at all. Second, limitations imposed by conflicts rules can interfere with client expectations. At the very least, one of the clients might be deprived of the services of a lawyer whom the client had a particular reason to retain, perhaps on the basis of a long-time association with the lawyer. In some communities or fields of practice there might be no lawyer who is perfectly conflict-free. Third, obtaining informed consent to conflicted representation itself might compromise important interests. As discussed in § 122, consent to a conflict of interest requires that each affected client give consent based on adequate information. The process of obtaining informed consent is not only potentially time-consuming; it might also be impractical because it would require the disclosure of information that the clients would prefer not to have disclosed, for example, the subject matter about which they have consulted the lawyer. Fourth, conflicts prohibitions interfere with lawyers' own freedom to practice according to their own best judgment of appropriate professional behavior. It is appropriate to give significant weight to the freedom and professionalism of lawyers in the formulation of legal rules governing conflicts.

- c. *The general conflict-of-interest standard.* The standard adopted in this Chapter answers the four questions to which any conflicts-of-interest standard must respond. Those are (i) What kind of effect is prohibited? (ii) How significant must the effect be? (iii) What probability must there be that the effect will occur? (iv) From whose perspective are conflicts of interest to be determined? The standard adopted here incorporates elements common to all three of the major lawyer codes developed in this century. It casts the answer to each question in terms of factual predicates and practical consequences that are reasonably susceptible of objective assessment by lawyers subject to the rules, by clients whom the rules affect, and by tribunals.

"Adverse" effect relates to the quality of the representation, not necessarily the quality of the result obtained in a given case. The standard refers to the incentives faced by the lawyer before or during the representation because it often cannot be foretold what the actual result would have been if the representation had been conflict-free.

**Illustration:**

1. Lawyer has been retained by A and B, each a competitor for a single broadcast license, to assist each of them in obtaining the license from Agency. Such work often requires advocacy by the lawyer for an applicant before Agency. Lawyer's representation will have an adverse effect on both A and B as that term is used in this Section. Even though either A or B might obtain the license and thus arguably not have been adversely affected by the joint representation, Lawyer will have duties to A that restrict Lawyer's ability to urge B's application and vice versa. In most instances, informed consent of both A and B would not suffice to allow the dual representation (see § 122).

**Illustration:**

3. Clients A and B have come to Lawyer for help in organizing a new business. Lawyer is satisfied that both clients are committed to forming the enterprise and that an agreement can be prepared that will embody their common undertaking. Nonetheless, because a substantial risk of future conflict exists in any such arrangement, Lawyer must explain to the clients that because of future economic uncertainties inherent in any such undertaking, the clients' interests could differ in material ways in the future. Lawyer must obtain informed consent pursuant to § 122 before undertaking the common representation.

Whether there is adverseness, materiality, and substantiality in a given circumstance is often dependent on specific circumstances that are ambiguous and the subject of conflicting evidence. Accordingly, there are necessarily circumstances in which the lawyer's avoidance of a representation is permissible but not obligatory. A lawyer also would be justified in withdrawing from some representations in circumstances in which it would be improper to disqualify the lawyer or the lawyer's firm.

- d. *Representation of a client.* The prohibition of conflicts of interest ordinarily restricts a lawyer's activities only where those activities materially and adversely affect the lawyer's ability to represent a client including such an effect on a client's reasonable expectation of the lawyer's loyalty.

For purposes of identifying conflicts of interest, a lawyer's client is ordinarily the person or entity that consents to the formation of the client-lawyer relationship, see § 14. For example, when a lawyer is retained by Corporation A, Corporation A is ordinarily the lawyer's client; neither individual officers of Corporation A nor other corporations in which Corporation A has an ownership interest, that hold an ownership interest in Corporation A, or in which a major shareholder in Corporation A has an ownership interest, are thereby considered to be the lawyer's client.

*In some situations, however, the financial or personal relationship between the lawyer's client and other persons or entities might be such that the lawyer's obligations to the client will extend to those other persons or entities as well. That will be true, for example, where financial loss or benefit to the nonclient person or entity will have a direct, adverse impact on the client.*

**Illustrations:**

6. *Lawyer represents Corporation A in local real-estate transactions. Lawyer has been asked to represent Plaintiff in a products-liability action against Corporation B claiming substantial damages. Corporation B is a wholly owned subsidiary of Corporation A; any judgment obtained against Corporation B will have a material adverse impact on the value of Corporation B's assets and on the value of the assets of Corporation A. Just as Lawyer could not file suit against Corporation A on behalf of another client, even in a matter unrelated to the subject of Lawyer's representation of Corporation A (see § 128, Comment e), Lawyer may not represent Plaintiff in the suit against Corporation B without the consent of both Plaintiff and Corporation A under the limitations and conditions provided in § 122.*
7. *The same facts as in Illustration 6, except that Corporation B is not a subsidiary of Corporation A. Instead, 51 percent of the stock of Corporation A and 60 percent of the stock of Corporation B are owned by X Corporation. The remainder of the stock in both Corporation A and Corporation B is held by the public. Lawyer does not represent X Corporation. The circumstances are such that an adverse judgment against Corporation B will have no material adverse impact on the financial position of Corporation A. No conflict of interest is presented; Lawyer may represent Plaintiff in the suit against Corporation B.*

*In yet other situations, the conflict of interest arises because the circumstances indicate that the confidence that a client reasonably reposes in the loyalty of a lawyer would be compromised due to the lawyer's relationship with another client or person whose interests would be adversely affected by the representation.*

**Illustration:**

8. *The same facts as in Illustration 7, except that one-half of Lawyer's practice consists of work for Corporation A. Plaintiff could reasonably believe that Lawyer's concern about a possible adverse reaction by Corporation A to the suit against Corporation B will inhibit Lawyer's pursuit of Plaintiff's case against Corporation B (see §§ 125 & 128). Lawyer may not represent Plaintiff in the suit against Corporation B unless Plaintiff consents to the representation under the limitations and conditions provided in § 122. Because Lawyer's representation of Corporation A is assumed in Illustration 7 not to be adversely affected by the representation of Plaintiff, the consent of Corporation A to the representation is not required.*

*Significant control of the nonclient by the client also might suffice to require a lawyer to treat the nonclient as if it were a client in determining whether a conflict of interest exists in a lawyer's representation of another client with interests adverse to the nonclient.*

**Illustration:**

9. *The same facts as in Illustration 7, except that X Corporation has elected a majority of the Directors of Corporation B and has approved its key officers. Officers of X Corporation regularly supervise decisions made by Corporation B, and Lawyer has regularly advised X Corporation on products-liability issues affecting all of the corporations in which X Corporation owns an interest. X Corporation has used that advice to give direction about minimizing claims exposure to Corporation B. Although Lawyer does not represent Corporation B, Lawyer's earlier assistance to X Corporation on products-liability matters was substantially related to the suit that Plaintiff has asked Lawyer to file against Corporation B (see § 132). Lawyer may not represent Plaintiff in the suit against Corporation B unless Plaintiff, X Corporation, and Corporation B consent to the representation under the limitations and conditions provided in § 122. In the circumstances, informed consent on behalf of Corporation B may be provided by officers of X Corporation who direct the legal affairs of Corporation B pursuant to applicable corporate law.*

*A conflict of interest can also arise because of specific obligations, such as the obligation to hold information confidential, that the lawyer has assumed to a nonclient.*

**Illustration:**

10. *Lawyer represents Association, a trade association in which Corporation C is a member, in supporting legislation to protect Association's industry against foreign imports. Lawyer does not represent any individual members of Association, including Corporation C, but at the request of Association and Lawyer, Corporation C has given Lawyer confidential information about Corporation C's cost of production. Plaintiff has asked Lawyer to sue Corporation C for unfair*

competition based on Corporation C's alleged pricing below the cost of production. Although Corporation C is not Lawyer's client, unless both Plaintiff and Corporation C consent to the representation under the limitations and conditions provided in § 122, Lawyer may not represent Plaintiff against Corporation C in the matter because of the serious risk of material adverse use of Corporation C's confidential information against Corporation C.

*e(i). Withdrawal or consent in typical cases of postrepresentation conflict. If a lawyer withdraws from representation of multiple clients because of a conflict of interest (or for any other reason), the rule stated in § 132 prohibits representation in the same or a substantially related matter of a remaining client whose interests in the matter are materially adverse to the interests of a now-former client. For example, two clients previously represented by lawyers in a firm in the same transaction pursuant to effective consent might thereafter have a falling out such that litigation is in prospect (see §§ 130 & 128). The firm may not withdraw from representing one client and take an adversary position against that client in behalf of the other in the subsequent litigation (see § 132, Comment c). The firm must obtain informed consent from both clients (see § 122) or withdraw entirely. Consent in advance to such continued representation may also be provided as stated in § 122, Comment d. The fact that neither joint client could assert the attorney-client privilege in subsequent litigation between them (see § 75) does not by itself negate the lawyer's more extensive obligations of confidentiality under § 60 and loyalty under § 16(1).*

*f. Sanctions and remedies for conflicts of interest. In addition to the sanction of professional discipline, disqualifying a lawyer from further participation in a pending matter is a common remedy for conflicts of interest in litigation (§ 6, Comment i). For matters not before a tribunal where disqualification can be sought, an injunction against a lawyer's further participation in the matter is a comparable remedy (§ 6, Comment c).*

*When a conflict of interest has caused injury to a client, the remedy of legal malpractice is available (§§ 48 and following). Availability of the sanction of fee forfeiture is considered in § 37. If the result in a matter was affected prejudicially by conflicting loyalties or misuse of confidential information by the lawyer, the result will sometimes be reversed or set aside. Some conflicts of interest subject a lawyer to criminal sanctions.*

## § 122. Client Consent to a Conflict of Interest

- (1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.
- (2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:
  - (a) the representation is prohibited by law;
  - (b) one client will assert a claim against the other in the same litigation; or
  - (c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

### Comment:

*b. Rationale. The prohibition against lawyer conflicts of interest is intended to assure clients that a lawyer's work will be characterized by loyalty, vigor, and confidentiality (see § 121, Comment b). The conflict rules are subject to waiver through informed consent by a client who elects less than the full measure of protection that the law otherwise provides. For example, a client in a multiple representation might wish to avoid the added costs that separate representation often entails. Similarly, a client might consent to a conflict where that is necessary in order to obtain the services of a particular law firm.*

*Other considerations, however, limit the scope of a client's power to consent to a conflicted representation. A client's consent will not be effective if it is based on an inadequate understanding of the nature and severity of the lawyer's conflict (Comment c hereto), violates law (Comment g(i)), or if the client lacks capacity to consent (Comment c). Client consent must also, of course, be free of coercion. Consent will also be insufficient to permit conflicted representation if it is not reasonably likely that the lawyer will be able to provide adequate representation to the affected clients, or when a lawyer undertakes to represent clients who oppose each other in the same litigation (Comment g(iii)).*

*In effect, the consent requirement means that each affected client or former client has the power to preclude the representation by withholding consent. When a client withholds consent, a lawyer's power to withdraw from representation of that client and proceed with the representation of the other client is determined under § 121, Comment e.*

*While a lawyer may elect to proceed with a conflicted representation after effective client consent as stated in this Section, a lawyer is not required to do so (compare § 14, Comment g (required representation by order of court)). A lawyer might be unwilling to accept the risk that a consenting client will later become disappointed with the representation and contend that the consent was defective, or the lawyer might conclude for other reasons that the lawyer's own interests do not warrant proceeding. In such an instance, the lawyer also may elect to withdraw if grounds permitting withdrawal are present under § 32. After withdrawal, a lawyer's ability to represent other clients is as described in § 121, Comment e.*

*c(i). The requirement of informed consent—adequate information. Informed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.*

*Information relevant to particular kinds of conflicts is considered in several of the Sections hereafter. In a multiple-client situation, the information normally should address the interests of the lawyer and other client giving rise to the conflict; contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict; the effect of the representation or the process of obtaining other clients' informed consent upon confidential information of the client; any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and the consequences and effects of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients (see § 121, Comment e). Where the conflict arises solely because a proposed representation will be adverse to an existing client in an unrelated matter, knowledge of the general nature and scope of the work being performed for each client normally suffices to enable the clients to decide whether or not to consent.*

*When the consent relates to a former-client conflict (see § 132), it is necessary that the former client be aware that the consent will allow the former lawyer to proceed adversely to the former client. Beyond that, the former client must have adequate information about the implications (if not readily apparent) of the adverse representation, the fact that the lawyer possesses the former client's confidential information, the measures that the former lawyer might undertake to protect against unwarranted disclosures, and the right of the former client to refuse consent. The former client will often be independently represented by counsel. If so, communication with the former client ordinarily must be through successor counsel (see § 99 and following).*

*The lawyer is responsible for assuring that each client has the necessary information. A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and that the consent is invalid. A lawyer's failure to inform the clients might also bear on the motives and good faith of the lawyer. On the other hand, clients differ as to their sophistication and experience, and situations differ in terms of their complexity and the subtlety of the conflicts presented. The requirements of this Section are satisfied if the client already knows the necessary information or learns it from other sources. A client independently represented—for example by inside legal counsel or by other outside counsel—will need less information about the consequences of a conflict but nevertheless may have need of information adequate to reveal its scope and severity. When several lawyers represent the same client, responsibility to make disclosure and obtain informed consent may be delegated to one or more of the lawyers who appears reasonably capable of providing adequate information.*

*Disclosing information about one client or prospective client to another is precluded if information necessary to be conveyed is confidential (see § 60). The affected clients may consent to disclosure (see § 62), but it also might be possible for the lawyer to explain the nature of undisclosed information in a manner that nonetheless provides an adequate basis for informed consent. If means of adequate disclosure are unavailable, consent to the conflict may not be obtained.*

*The requirement of consent generally requires an affirmative response by each client. Ambiguities in a client's purported expression of consent should be construed against the lawyer seeking the protection of the consent (cf. § 18). In general, a lawyer may not assume consent from a client's silent acquiescence. However, consent may be inferred from active participation in a representation by a client who has reasonably adequate information about the material risks of the representation after a lawyer's request for consent. Even in the absence of consent, a tribunal applying remedies such as disqualification (see § 121, Comment f) will apply concepts of estoppel and waiver when an objecting party has either induced reasonable reliance on the absence of objection or delayed an unreasonable period of time in making objection.*

*Effective client consent to one conflict is not necessarily effective with respect to other conflicts or other matters. A client's informed consent to simultaneous representation of another client in the same matter despite a conflict of interest (see Topic 3) does not constitute consent to the lawyer's later representation of the other client in a manner that would violate the former-client conflict rule (see § 132; see also § 121, Comment c(i)).*



*Illustration:*

1. Client A and Client B give informed consent to a joint representation by Lawyer to prepare a commercial contract. Lawyer's bill for legal services is paid by both clients and the matter is terminated. Client B then retains Lawyer to file a lawsuit against former Client A on the asserted ground that A breached the contract. Lawyer may not represent Client B against Client A in the lawsuit without A's informed consent (see § 132). Client A's earlier consent to Lawyer's joint representation to draft the contract does not itself permit Lawyer's later adversarial representation.

c(ii). The requirement of informed consent—the capacity of the consenting person. Each client whose consent is required must have the legal capacity to give informed consent. Consent purportedly given by a client who lacks legal capacity to do so is ineffective. Consent of a person under a legal disability normally must be obtained from a guardian or conservator appointed for the person. Consent of a minor normally is effective when given by a parent or guardian of the minor. In class actions certification of the class, determination that the interests of its members are congruent, and assessment of the adequacy of representation are typically made by a tribunal.

In some jurisdictions, a governmental unit might lack legal authority under applicable law to give consent to some conflicts of interest (see Comment g(ii) below).

When the person who normally would make the decision whether or not to give consent—members of a corporate board of directors, for example—is another interested client of the lawyer, or is otherwise self-interested in the decision whether to consent, special requirements apply to consent (see §§ 131 & 135, Comment d). Similarly, an officer of a government agency capable of consenting might be disabled from giving consent when that officer is a lawyer personally interested in consenting to the conflict.

- d. Consent to future conflicts. Client consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. A client's informed consent to a gift to a lawyer (see § 127) ordinarily should be given contemporaneously with the gift.

On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

*Illustrations:*

2. Law Firm has represented Client in collecting commercial claims through Law Firm's New York office for many years. Client is a long-established and sizable business corporation that is sophisticated in commercial matters generally and specifically in dealing with lawyers. Law Firm also has a Chicago office that gives tax advice to many companies with which Client has commercial dealings. Law Firm asks for advance consent from Client with respect to conflicts that otherwise would prevent Law Firm from filing commercial claims on behalf of Client against the tax clients of Law Firm's Chicago office (see § 128). If Client gives informed consent the consent should be held to be proper as to Client. Law Firm would also be required to obtain informed consent from any tax client of its Chicago office against whom Client wishes to file a commercial claim, should Law Firm decide to undertake such a representation.
3. The facts being otherwise as stated in Illustration 2, Law Firm seeks advance consent from each of its Chicago-office corporate-tax clients to its representation of any of its other clients in matters involving collection of commercial claims adverse to such tax clients if the matters do not involve information that Law Firm might have learned in the tax representation. To provide further assurance concerning the protection of confidential information, the consent provides that, should Law Firm represent any client in a collection matter adverse to a tax client, a procedure to protect confidential information of the tax client will be established (compare § 124, Comment d). Unless such a tax client is shown to be unsophisticated about legal matters and relationships with lawyers, informed consent to the arrangement should be held to be proper.

If a material change occurs in the reasonable expectations that formed the basis of a client's informed consent, the new conditions must be brought to the attention of the client and new informed consent obtained (see also Comment f hereto (client revocation of consent)). If the new conflict is not consentable (see Comment g hereto), the lawyer may not proceed.

- e. *Partial or conditional consent.* A client's informed consent to a conflict can be qualified or conditional. A client might consent, for example, to joint representation with one co-party but not another. Similarly, the client might condition consent on particular action being taken by the lawyer or law firm. For example, a former client might consent that the conflict of one individually prohibited lawyer should not be imputed (see § 123) to the rest of the firm, but only if the firm takes steps to assure that the prohibited lawyer is not involved in the representation (see § 124; see also Illustration 3 hereto). Such a partial or conditional consent can be valid even if an unconditional consent in the same situation would be invalid. For example, a client might give informed consent to a lawyer serving only in the role of mediator between clients (see § 130, Comment d), but not to the lawyer representing those clients opposing each other in litigation if mediation is unavailing (see Comment g(iii) hereto).
- f. *Revocation of consent through client action or a material change of circumstances.* A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent (see § 21(2)). Revoking consent to the client's own representation, however, does not necessarily prevent the lawyer from continuing to represent other clients who had been jointly represented along with the revoking client. Whether the lawyer may continue the other representation depends on whether the client was justified in revoking the consent (such as because of a material change in the factual basis on which the client originally gave informed consent) and whether material detriment to the other client or lawyer would result. In addition, if the client had reserved the prerogative of revoking consent, that agreement controls the lawyer's subsequent ability to continue representation of other clients.

A material change in the factual basis on which the client originally gave informed consent can justify a client in withdrawing consent. For example, in the absence of an agreement to the contrary, the consent of a client to be represented concurrently with another (see Topic 3) normally presupposes that the co-clients will not develop seriously antagonistic positions. If such antagonism develops, it might warrant revoking consent. If the conflict is subject to informed consent (see Comment (g)(iii) hereto), the lawyer must thereupon obtain renewed informed consent of the clients, now adequately informed of the change of circumstances. If the conflict is not consentable, or the lawyer cannot obtain informed consent from the other client or decides not to proceed with the representation, the lawyer must withdraw from representing all affected clients adverse to any former client in the matter (see § 121, Comment e).

A client who has given informed consent to be represented as a joint client with another would be justified in revoking the consent if the common lawyer failed to represent that client with reasonable loyalty (see Comment h hereto). The client would also be justified in revoking consent if a co-client materially violated the express or implied terms of the consent, such as by abusing the first client's confidential information through disclosing important information to third persons without justification. Improper behavior of the other client or the lawyer might indicate that one or both of them cannot be trusted to respect the legitimate interests of the consenting client.

#### **Illustration:**

- 4. Client A and Client B validly consent to be represented by Lawyer in operating a restaurant in a city. After a period of amicable and profitable collaboration, Client A reasonably concludes that Lawyer has begun to take positions against Client A and consistently favoring the interests of Client B in the business. Reasonably concerned that Lawyer is no longer properly serving the interests of both clients, Client A withdraws consent. Withdrawal of consent is effective and justified (see Comment h hereto). Lawyer may not thereafter continue representing either Client A or Client B in a matter adverse to the other and substantially related to Lawyer's former representation of the clients (see § 121, Comment e(i)).

In the absence of valid reasons for a client's revocation of consent, the ability of the lawyer to continue representing other clients depends on whether material detriment to the other client or lawyer would result and, accordingly, whether the reasonable expectations of those persons would be defeated. Once the client or former client has given informed consent to a lawyer's representing another client, that other client as well as the lawyer might have acted in reliance on the consent. For example, the other client and the lawyer might already have invested time, money, and effort in the representation. The other client might already have disclosed confidential information and developed a relationship of trust and confidence with the lawyer. Or, a client relying on the consent might reasonably have elected to forgo opportunities to take other action.

#### **Illustrations:**

- 5. On Monday, Client A and Client B validly consent to being represented by Lawyer in the same matter despite a conflict of interest. On Wednesday, before either Client B or Lawyer has taken or forgone any significant action in reliance, Client A withdraws consent. Lawyer is no longer justified in continuing with the joint representation. Lawyer also may not continue to represent Client B alone without A's renewed informed consent to Lawyer's representation of B if doing so would violate other Sections of this Chapter, for example because A's and B's interests in the matter would be antagonistic or because Lawyer had learned confidential information from A relevant in the matter (see § 132; see also § 15, Comment

- c, & § 121, Comment e(i)). Similarly, if Client A on Wednesday did not unequivocally withdraw consent but stated to Lawyer that on further reflection Client A now had serious doubts about the wisdom of the joint representation, Lawyer could not reasonably take material steps in reliance on the consent. Before proceeding, Lawyer must clarify with Client A whether A indeed gives informed consent and whether the joint representation may thereby continue.
6. Clients A and B validly consent to Lawyer representing them jointly as co-defendants in a breach-of-contract action. On the eve of trial and after months of pretrial discovery on the part of all parties, Client A withdraws consent to the joint representation for reasons not justified by the conduct of Lawyer or Client B and insists that Lawyer cease representing Client B. At this point it would be difficult and expensive for Client B to find separate representation for the impending trial. Client A's withdrawal of consent is ineffective to prevent the continuing representation of B in the absence of compelling considerations such as harmful disloyalty by Lawyer.
  7. Client A, who consulted Lawyer about a tax question, gave informed advance consent to Lawyer's representing any of Lawyer's other clients against Client A in matters unrelated to Client A's tax question. Client B, who had not theretofore been a client of Lawyer, wishes to retain Lawyer to file suit against Client A for personal injuries suffered in an automobile accident. After Lawyer informs Client B of the nature of Lawyer's work for Client A, and the nature and risks presented by any conflict that might be produced, Client B consents to the conflict of interest. After Lawyer has undertaken substantial work in preparation of Client B's case, Client A seeks to withdraw the advance consent for reasons not justified by the conduct of Lawyer or Client B. Even though Client A was Lawyer's client before Client B was a client, the material detriment to both Lawyer and Client B would render Client A's attempt to withdraw consent ineffective.

The terms of the consent itself can control the effects of revocation of consent. A client's consent could state that it is conditioned on the client's right to revoke consent at any time for any reason. If so conditioned, the consent would cease to be effective if the client exercised that right.

g. Nonconsentable conflicts. Some conflicts of interest preclude adverse representation even if informed consent is obtained.

g(i). Representations prohibited by law. As stated in Subsection (2)(a), informed consent is unavailing when prohibited by applicable law. In some states, for example, the law provides that the same lawyer may not represent more than one defendant in a capital case and that informed consent does not cure the conflict (see § 129, Comment c). Under federal criminal statutes, certain representations by a former government lawyer (cf. § 133) are prohibited, and informed consent by the former client is not recognized as a defense.

g(ii). Consent by governmental clients. Decisional law in a minority of states has limited the extent to which a governmental client may consent to a conflict of interest. Subject to local law on the powers of governmental bodies and the requirement that any consenting governmental officer must be disinterested in the issues giving rise to the question of conflict (see Comment c(ii) hereto), such questions should otherwise be decided under the customary rules governing conflicts of interest.

g(iii). Conflicts between adversaries in litigation. When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable (see § 128, Comment c, & § 129). The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences (see § 130, Comment d), the joint representation may not continue if the parties become opposed to each other in litigation.

#### Illustration:

8. A and B wish to obtain an amicable dissolution of their marriage. State law treats marriage dissolution as a contested judicial proceeding. Lawyer is asked to represent both A and B in negotiation of the property settlement to be submitted to the court in the proceeding. Informed consent can authorize Lawyer to represent both parties in the property-settlement negotiations (subject to exceptions in some jurisdictions, where interests of children are involved, for example), but consent does not authorize Lawyer to represent both A and B if litigation is necessary to obtain the final decree. The parties may agree that Lawyer will represent only one of them in the judicial proceeding. The other party would either be represented by another lawyer or appear *pro se* (see § 128 & 130).

Whether clients are aligned directly against each other within the meaning of this Comment requires examination of the context of the litigation. In multi-party litigation, a single lawyer might, for example, represent members of a class in a class action, multiple creditors or debtors in a bankruptcy proceeding, or multiple interested parties in environmental clean-up litigation (see § 128). Joint representation is appropriate following effective client consent, together with compliance with applicable statutory or rule requirements, which may require court approval of the representation after disclosure of the conflict. Such joint representation is appropriate, notwithstanding that the co-clients may have conflicting claims against each other in other matters as to which the lawyer is not providing representation. The clients may also give informed consent to joint representation while they negotiate any differences they may have in the matter in litigation, perhaps



employing the lawyer as appropriate in such negotiations (see § 130, Comments c & d), or prior agreement on such negotiated matters may be a condition of the clients' consent (see Comment e hereto). Where the alignment of parties, clients, and claims is such that the lawyer will not oppose another client with respect to the matters of dispute between them, as indicated in § 122(2)(b), there is no conflict. Thus, in complex litigation, the same lawyer may represent two defendants with largely congruent positions with respect to their defense, if other counsel are representing the two clients with respect to a dispute between them.

g(iv). Other circumstances rendering a lawyer incapable of providing adequate representation. Concern for client autonomy generally warrants respecting a client's informed consent. In some situations, however, joint representation would be objectively inadequate despite a client's voluntary and informed consent. In criminal cases, for example, joint representation of co-defendants with irreconcilable or unreconciled interests might render their representation constitutionally inadequate and thus require a court to prohibit the joint representation (see § 129, Comment c). Similarly, a conflict of interest among class members might render a lawyer's representation in a class action inadequate despite informed consent by the class representatives (see § 128, Comment d; see also, e.g., § 131, Comment f, Illustration 5).

The general standard stated in Subsection (2)(c) assesses the likelihood that the lawyer will, following consent, be able to provide adequate representation to the clients. The standard includes the requirements both that the consented-to conflict not adversely affect the lawyer's relationship with either client and that it not adversely affect the representation of either client. In general, if a reasonable and disinterested lawyer would conclude that one or more of the affected clients could not consent to the conflicted representation because the representation would likely fall short in either respect, the conflict is nonconsentable.

Decisions holding that a conflict is nonconsentable often involve facts suggesting that the client, who is often unsophisticated in retaining lawyers, was not adequately informed or was incapable of adequately appreciating the risks of the conflict (compare Comments c(i) & c(ii) hereto). Decisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel, such as by inside legal counsel, rarely hold that a conflict is nonconsentable.

The nature of the conflict is also important. The professional rules and court decisions indicate that informed consent will always suffice with respect to a former-client conflict of interest (§ 132). With respect to simultaneous-representation conflicts (Topic 3), when the matters are unrelated it would only be in unusual circumstances that a lawyer could not provide adequate representation with consent of all affected clients. On the other hand, when the representation involves the same matter or the matters are significantly related, it may be more difficult for the lawyer to provide adequate legal assistance to multiple clients (see, e.g., § 131, Comment e, Illustration 4).

#### **Illustrations:**

9. Lawyer occasionally represents Bank in collection matters and is doing so currently in one lawsuit. Employee requests Lawyer to file an employment-discrimination charge against Bank. Bank, acting through its inside legal counsel, gives informed consent to Lawyer's representation of Employee against Bank with respect to the matter. Employee, following discussion with Lawyer concerning the nature of Lawyer's collection representations of Bank, freely gives informed consent as well. The circumstances indicate no basis for concluding that Lawyer would be unable to provide adequate representation to Bank in the collection matters and to Employee in the discrimination claim against Bank.
10. Lawyer has been asked by Buyer and Seller to represent both of them in negotiating and documenting a complex real-estate transaction. The parties are in sharp disagreement on several important terms of the transaction. Given such differences, Lawyer would be unable to provide adequate representation to both clients.
11. The facts being otherwise as stated in Illustration 10, the parties are both in agreement on terms and possess comparable knowledge and experience in such transactions, but, viewed objectively, the transaction is such that both parties should receive extensive counseling concerning their rights in the transaction and possible optional arrangements, including security interests, guarantees, and other rights against each other and in resisting the claims of the other party for such rights. Given the scope of legal representation that each prospective client should receive, Lawyer would be unable to provide adequate representation to both clients.

A conflict can be rendered nonconsentable because of personal circumstances affecting the lawyer's ability in fact to provide adequate representation. For example, if the lawyer has such strong feelings of friendship toward one of two prospective joint clients that the lawyer could not provide adequate representation to the other client (compare Comment h hereto), the lawyer may not proceed with the joint representation.

- h. Duties of a lawyer representing a client subject to a conflict consent. When a lawyer undertakes representation despite a conflict and after required disclosure and informed consent, the lawyer must represent all affected clients diligently and competently (see § 16) and must not regard informed consent as a basis for limiting the scope of the representation or favoring the interests of one client over the interests of another, except as expressly agreed under the informed consent. The lawyer must protect the confidential information of all affected clients (see § 60), subject to whatever modifications are warranted pursuant to the informed consent. On communicating information with each client in the absence of a different agreement among co-clients, see § 60, Comment l, and § 75, Comment d.*

## **§ 123. Imputation of a Conflict of Interest to an Affiliated Lawyer**

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122 or unless imputation hereunder is removed as provided in § 124, the restrictions upon a lawyer imposed by §§ 125-135 also restrict other affiliated lawyers who:

- (1) are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association;
- (2) are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests or objectives of the organization; or
- (3) share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.

## **§ 124. Removing Imputation**

- (1) Imputation specified in § 123 does not restrict an affiliated lawyer when the affiliation between the affiliated lawyer and the personally prohibited lawyer that required the imputation has been terminated, and no material confidential information of the client, relevant to the matter, has been communicated by the personally prohibited lawyer to the affiliated lawyer or that lawyer's firm.
- (2) Imputation specified in § 123 does not restrict an affiliated lawyer with respect to a former-client conflict under § 132, when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because:
  - (a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter;
  - (b) the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and
  - (c) timely and adequate notice of the screening has been provided to all affected clients.
- (3) Imputation specified in § 123 does not restrict a lawyer affiliated with a former government lawyer with respect to a conflict under § 133 if:
  - (a) the personally prohibited lawyer is subject to screening measures adequate to eliminate involvement by that lawyer in the representation; and
  - (b) timely and adequate notice of the screening has been provided to the appropriate government agency and to affected clients.

**Comment:***c. Imputation after the termination of an affiliation.*

*c(i).* Personally prohibited lawyer terminates the affiliation. During the time that a personally prohibited lawyer is associated with another lawyer, law firm, or other organization to which prohibition is imputed under § 123, the lawyer could reveal confidential information to any other lawyer within the organization. Accordingly, imputed prohibition of all lawyers in the firm is appropriately required by § 123. However, after the personally prohibited lawyer has left the firm, an irrebuttable presumption of continued sharing of client confidences or continued disloyalty induced by the affiliation is no longer justified.

The lawyers remaining in the affiliation may rebut the presumption that confidential information was shared during the period of actual affiliation. They have the burden of persuasion concerning three facts: (1) that no material confidential client information relevant to the matter was revealed to any lawyer remaining in the firm; (2) that the firm does not now possess or have access to sources of client confidential information, particularly client documents or files; and (3) that the personally prohibited lawyer will not share fees in the matter so as to have an interest in the representation.

A personally prohibited lawyer who enters a new law firm or other affiliation causes imputed prohibition of all affiliated lawyers as stated in § 123. Such imputation is subject to removal under

Subsection (2) or (3).

*c(ii).* A non-personally-prohibited lawyer terminates the affiliation. When a lawyer leaves a firm or other organization whose lawyers were subject to imputed prohibition owing to presence in the firm of another lawyer, the departed lawyer becomes free of imputation so long as that lawyer obtained no material confidential client information relevant to the matter. Similarly, lawyers in the new affiliation are free of imputed prohibition if they can carry the burden of persuading the finder of fact that the arriving lawyer did not obtain confidential client information about a questioned representation by another lawyer in the former affiliation.

*d(i). Screening—in general.*

Lawyer codes generally recognize the screening remedy in cases involving former government lawyers who have returned to private practice (see Comment *e* hereto). Screening to prevent imputation from former private-client representations has similar justification, giving clients wider choice of counsel and making it easier for lawyers to change employers. The rule in Subsection (2) thus permits screening as a remedy in situations in which the information possessed by a personally prohibited lawyer is not likely to be significant. The lawyer or firm seeking to remove imputation has the burden of persuasion that there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client.

Significance of the information is determined by its probable utility in the later representation, including such factors as the following: (1) whether the value of the information as proof or for tactical purposes is peripheral or tenuous; (2) whether the information in most material respects is now publicly known; (3) whether the information was of only temporary significance; (4) the scope of the second representation; and (5) the duration and degree of responsibility of the personally prohibited lawyer in the earlier representation.

The lawyer codes in most states impose disciplinary responsibility in a wider range of circumstances of former private-client representations. Specifically, most codes do not recognize that screening can preclude disqualification of a law firm by imputation from a personally prohibited lawyer, even if the screening is timely and effective and the client information involved is innocuous. The issue typically arises under motions to disqualify, not in disciplinary proceedings. A tribunal has discretion whether or not to require disqualification. Subsection (2) states a rule to guide exercise of that discretion.

**Illustrations:**

3. As can readily be shown from contemporaneous time records, when Lawyer was an associate in Law Firm ABC, Lawyer spent one-half hour in conversation with another associate about research strategies involving a narrow issue of venue in federal court in the case of *Developer v. Bank*, in which the firm represented Bank. The conversation was based entirely on facts pleaded in the complaint and answer, and Lawyer learned no confidential information about the matter. Lawyer then left Firm ABC and became an associate in Firm DEF. Two years later, Lawyer was asked to represent Developer against Bank in a matter substantially related to the matter in which Firm ABC represented Bank. In the circumstances, due to the proven lack of exposure of Lawyer to confidential information of Bank, Bank should not be regarded as the former client of Lawyer for the purpose of applying § 132 (see § 132, Comment *h*). Alternatively, a tribunal may require that Lawyer be screened from participation in the matter as provided in this Section and, on that basis, permit other lawyers affiliated with Lawyer in Firm DEF to represent the client against Bank.

4. *The same facts as Illustration 3, except that Lawyer while representing Bank in Firm ABC was principally in charge of developing factual information about the underlying dispute. The dispute involved a loan Bank made to Developer on Tract A in the city in which both conduct business. The dispute was resolved after extensive discovery and a full trial before Lawyer left Firm ABC. An affiliated lawyer in Lawyer's new firm, Firm DEF, has been asked to represent Developer in a dispute with Bank over a loan on Tract B. Because of the similarity of facts in the two disputes—involving both tracts, both loans, and both parties to them—a tribunal finds the matters are substantially related and accordingly that Lawyer is personally prohibited from representing Developer against Bank with respect to Tract B (see § 132). However, the tribunal also finds that, despite that factual overlap, the information Lawyer might have acquired about Bank would have little significance in the later dispute because it concerned only an earlier period of time so that any importance it might have had was significantly diminished by the time of the second dispute, because it mainly involves information already a matter of public record in the earlier trial, and because all factual information will be largely irrelevant in view of the fact that the pleadings indicate that the only contested issue in the second dispute involves a matter of contract interpretation. In the circumstances, the tribunal should further find that Firm DEF may represent Developer against Bank if Lawyer has been screened as provided in Subsection (2).*
5. *The same facts as Illustration 4, except that the earlier dispute was settled after Lawyer had conducted extensive examination of Bank's files but without any discovery by Developer's then counsel or trial. Little time has passed since Lawyer acquired the information from Bank, and the information remains highly relevant in the later dispute. The pleadings in the second dispute indicate that a large number of important factual issues similar to those in the earlier dispute remain open. In the circumstances, the likelihood that the information possessed by Lawyer will be significant in the second matter renders screening under this Section inappropriate.*

*d(ii). Screening—adequacy of measures. Screening must assure that confidential client information will not pass from the personally prohibited lawyer to any other lawyer in the firm. The screened lawyer should be prohibited from talking to other persons in the firm about the matter as to which the lawyer is prohibited, and from sharing documents about the matter and the like. Further, the screened lawyer should receive no direct financial benefit from the firm's representation, based upon the outcome of the matter, such as a financial bonus or a larger share of firm income directly attributable to the matter. However, it is not impermissible that the lawyer receives compensation and benefits under standing arrangements established prior to the representation. An adequate showing of screening ordinarily requires affidavits by the personally prohibited lawyer and by a lawyer responsible for the screening measures. A tribunal can require that other appropriate steps be taken.*

*If a lawyer in a law firm assertedly observing screening measures in fact breaches the screen and shares confidential information with lawyers proceeding adversely to the former client, the tribunal should take appropriate corrective measures. The screen should no longer be considered adequate to prevent disqualification of affiliated lawyers. Contempt might be an appropriate remedy to the extent that breach of the screen was knowing and deliberate and in violation of direct undertakings to the tribunal. In circumstances involving lesser culpability, lesser sanctions within the court's inherent power may be appropriate.*

*d(iii). Screening—timely and adequate notice of screening to all affected clients. An affected client will usually have difficulty demonstrating whether screening measures have been honored. Timely and adequate notice of the screening must therefore be given to the affected clients, including description of the screening measures reasonably sufficient to inform the affected client of their adequacy. Notice will give opportunity to protest and to allow arrangements to be made for monitoring compliance.*

*Notice should ordinarily be given as soon as practical after the lawyer or firm realizes or should realize the need for screening. Obligations of confidentiality to a current client, however, might justify reasonable delay. A firm advising about a possible takeover of a former client of a lawyer now in the firm, for example, need not provide notice until the attempt becomes known to the target client.*

## Topic 2. Conflicts of Interest Between a Lawyer and a Client

### § 125. A Lawyer's Personal Interest Affecting the Representation of a Client

Unless the affected client consents to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.

**Comment:**

*f. Initiation and settlement of class actions and other multiple-client representations. Class actions and similar proceedings can raise a number of personal-interest conflict-of-interest questions. A class action can transform a modest claim into a set of claims of large consequence and often has potential for magnifying attorney's fees. An individual plaintiff usually begins with a concern about an individual wrong, and prompt and complete redress of that wrong is often the client's goal. A class action might be the only practical means of vindicating the client interest. However, a class action can substitute a longer, more complex proceeding for one more beneficial for the client's individual interests. Where bringing a claim as a class action might materially and adversely affect the interests of the individual client, that possibility must be disclosed to that client. On the determination of client-lawyer relationships in class actions, see § 14, Comment f.*

*Settlement of a class action or similar suit can also create a conflict concerning the lawyer's fee. The defendant, for example, might offer to settle the matter for an amount or kind of relief that is relatively generous to the lawyer's client if the lawyer will agree to accept a low fee award. Conversely, the defendant might acquiesce in a generous award of attorney's fees in exchange for relatively modest relief for the client's substantive claim. The latter arrangement must be rejected by the class lawyer as subordinating the interests of the lawyer's client to the lawyer's own interest.*

*The lawyer should make reasonable effort to separate settlement of the substantive claim from determination of the amount of attorney's fees. Some decisions have attempted to effectuate that requirement by forbidding settlement discussions to address the fee that the lawyer is to receive. Some commentators have urged that a court refuse to approve a settlement unless award of reasonable attorney's fees is to be judicially determined rather than negotiated. Neither of those suggestions gives adequate effect to the interests of the client in all cases.*

*A more appropriate arrangement, where possible, is for the lawyer's fee to be negotiated initially by the client and lawyer at the outset of the relationship, it being understood and disclosed to the client that the ultimate award may be scrutinized by the opposing party and approved by the court (compare § 22, Comment c). On interpretation of agreements between client and lawyer concerning fee awards, see § 38, Comment f. On aggregate settlement of claims involving multiple clients who are not class members, see § 128, Comment d(i).*

### § 126. Business Transactions Between a Lawyer and a Client

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

- (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
- (2) the terms and circumstances of the transaction are fair and reasonable to the client; and
- (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.



## § 127. A Client Gift to a Lawyer

- (1) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object

of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.

- (2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:
  - (a) the lawyer is a relative or other natural object of the client's generosity;
  - (b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or
  - (c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

### Comment:

- a. *Scope and cross-references.* The law of undue influence treats client gifts as presumptively fraudulent, so that the lawyer-donee bears a heavy burden of persuasion that the gift is fair and not the product of overreaching or otherwise an imposition upon the client. See Restatement Second, Trusts § 343, Comments l and m (voidability of gifts from beneficiary to trustee); cf. Restatement Second, Contracts § 177 (contracts voidable on ground of undue influence). This Section assumes, but does not restate fully, the law of undue influence. The Section is stricter than the general law of undue influence in some jurisdictions. For example, the Section prohibits a lawyer from accepting a gift from a client (apart from the three stated exceptions) even if the lawyer has not engaged in undue influence.

## Topic 3. Conflicts of Interest Among Current Clients

### § 128. Representing Clients with Conflicting Interests in Civil Litigation

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in civil litigation may not:

- (1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter; or
- (2) represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related.

### Comment:

- d. *Clients nominally aligned on the same side in the litigation.* Multiple representation is precluded when the clients, although nominally on the same side of a lawsuit, in fact have such different interests that representation of one will have a material and adverse effect on the lawyer's representation of the other. Such conflicts can occur whether the clients are aligned as co-plaintiffs or co-defendants, as well as in complex and multiparty litigation.
- d(i). *Clients aligned as co-plaintiffs.* No conflict of interest is ordinarily presented when two or more of a lawyer's clients assert claims against a defendant. However, sometimes two parties aligned on the same side of a case as co-claimants might wish to characterize the facts differently. The client-claimants might also have a potential lawsuit against each other. For example, a passenger in an automobile damage action might be a co-plaintiff with the driver of the car in a suit alleging

negligence of the driver of the other car, but also be able to contend that the driver of the passenger's car was negligent as well, a conclusion that the driver would be motivated to deny. Where there are such possible claims, the lawyer must warn clients about the possibilities of such differences and obtain the consent of each before agreeing to represent them as co-claimants (see § 122).

When multiple claimants assert claims against a defendant who lacks sufficient assets to meet all of the damage claims, a conflict of interest might also be presented. Indeed, whether or not the defendant has assets sufficient to pay all claims, a proposed settlement might create conflicts because the plaintiffs differ in their willingness to accept the settlement. Before any settlement is accepted on behalf of multiple clients, their lawyer must inform each of them about all of the terms of the settlement, including the amounts that each of the other claimants will receive if the settlement is accepted. A similar conflict of interest can arise for a lawyer representing multiple defending parties.

#### **Illustrations:**

1. Lawyer represents A and B, pedestrians struck by an automobile as they stood at a street corner.

Each has sued C, the owner-driver, for \$150,000. C has \$100,000 in liability insurance coverage and no other assets with which to satisfy a judgment. Neither A nor B can be paid the full amount of their claims and any sum recovered by one will reduce the assets available to pay the other's claim. Because of the conflict of interest, Lawyer can continue to represent both A and B only with the informed consent of each (see § 122).

2. The same facts as in Illustration 1, except that C offers to settle A's claim for \$60,000 and B's claim for \$40,000. Lawyer must inform both A and B of all of the terms of the proposed settlement, including the amounts offered to each client. If one client wishes to accept and the other wishes to reject the proposed settlement, Lawyer may continue to represent both A and B only after a renewal of informed consent by each.

d(ii). Clients aligned as co-defendants in civil case. Clients aligned as co-defendants also can have conflicting interests. Each would usually prefer to see the plaintiff defeated altogether, but if the plaintiff succeeds, each will often prefer to see liability deflected mainly or entirely upon other defendants. Indeed, a plaintiff often sues multiple defendants in the hope that each of the defendants will take the position that another of them is responsible, thus enhancing the likelihood of the plaintiff's recovering. Such conflicts preclude joint representation, absent each co-defendant's informed consent (see § 122).

A contract between the parties can eliminate the conflict. When an employee injures someone in an incident arising out of the employment, for example, an employer that is capable of paying the judgment might agree in advance to hold the employee harmless in the matter so that only the employer will bear any judgment ultimately entered. If only one of the parties will ultimately be liable to the plaintiff, there is little reason to incur the expense of separate counsel. However, the initial conflict must be understood by both defendants and each must consent, particularly if the clients must negotiate an agreement governing who will bear ultimate liability (see § 130).

d(iii). Complex and multiparty litigation. Not all possibly differing interests of co-clients in complex and multiparty litigation involve material interests creating conflict. Determination whether a conflict of material interests exists requires careful attention to the context and other circumstances of the representation and in general should be based on whether (1) issues common to the clients' interests predominate, (2) circumstances such as the size of each client's interest make separate representation impracticable, and (3) the extent of active judicial supervision of the representation. For example, a lawyer might represent several unsecured creditors in a bankruptcy proceeding. In addition to general conflict-of-interest rules that may apply, a lawyer representing such multiple clients must also comply with statutory regulations if more stringent.

Similar considerations apply in representing multiple co-parties in class-action proceedings, due to the possible existence of different objectives or other interests of class members (see also § 125 on creation and settlement of class actions). A plaintiff class might agree, for example, that the local school system discriminates against a racial or ethnic minority, but there might be important differences within the class over what remedy is appropriate (see § 14, Comment f). As one possible corrective, under procedural law a class may be subdivided. Through that process objecting members of the class may be heard. However, such differences within the class do not necessarily produce conflicts requiring that the lawyer for the class not represent some or all members of the class or necessitate creation of subclasses. The tasks of a lawyer for a class may include monitoring and mediating such differences. In instances of intractable difference, the lawyer may proceed in what the lawyer reasonably concludes to be the best interests of the class as a whole, for example urging the tribunal to accept an appropriate settlement even if it is not accepted by class representatives or members of the class. In such instances, of course, the lawyer must inform the tribunal of the differing views within the class or on the part of a class representative.

- e. Suing a present client in an unrelated matter. A lawyer's representation of Client A might require the lawyer to file a lawsuit against Client B whom the lawyer represents in an unrelated matter. Because the matters are unrelated, no confidential information is likely to be used improperly, nor will the lawyer take both sides in a single proceeding. However, the lawyer has a duty of loyalty to the client being sued. Moreover, the client on whose behalf suit is filed might

*fear that the lawyer would pursue that client's case less effectively out of deference to the other client. Thus, a lawyer may not sue a current client on behalf of another client, even in an unrelated matter, unless consent is obtained under the conditions and limitations of § 122. On identifying who is a present client, see § 14 and § 121, Comment d. On the possibility of*

*informed consent in advance to such suits in certain cases, see § 122, Comment d.*

**Illustrations:**

3. Lawyer represents Client B in seeking a tax refund. Client A wishes to file suit against Client B in a contract action unrelated to the tax claim. Lawyer may not represent Client A in the suit against Client B as long as Lawyer represents Client B in the tax case, unless both clients give informed consent. On withdrawal, see § 121, Comment e.
4. The same facts as in Illustration 3, except that Client A's contract action is against corporation C, which is not Lawyer's client. After A's suit has been filed, C is acquired by and merged into Lawyer's client B, thus creating the conflict. Unauthorized use of confidential information would not be an issue in such a case, and any remedy imposed by a tribunal should minimize adverse impact on the parties. Because the action of B created the conflict, Lawyer might be permitted to withdraw from pursuing the tax claim on behalf of B, for example, but continue to pursue the contract action. Compare the discussion at § 132, Comment e.
- f. Concurrently taking adverse legal positions on behalf of different clients. A lawyer ordinarily may take inconsistent legal positions in different courts at different times. While each client is entitled to the lawyer's effective advocacy of that client's position, if the rule were otherwise law firms would have to specialize in a single side of legal issues.

However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. Factors relevant in determining the risk of such an effect include whether the issue is before a trial court or an appellate court; whether the issue is substantive or procedural; the temporal relationship between the matters; the practical significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If a conflict of interest exists, absent informed consent of the affected clients under § 122, the lawyer must withdraw from one or both of the matters. Informed client consent is provided for in § 122. On circumstances in which informed client consent would not allow the lawyer to proceed with representation of both clients, see § 122(2)(c) and Comment g(iv) thereto.

**Illustrations:**

5. Lawyer represents two clients in damage actions pending in different United States District Courts. In one case, representing the plaintiff, Lawyer will attempt to introduce certain evidence at trial and argue there for its admissibility. In the other case, representing a defendant, Lawyer will object to an anticipated attempt by the plaintiff to introduce similar evidence. Even if there is some possibility that one court's ruling might be published and cited as authority in the other proceeding, Lawyer may proceed with both representations without obtaining the consent of the clients involved.
6. The same facts as in Illustration 5, except that the cases have proceeded to the point where certiorari has been granted in each by the United States Supreme Court to consider the common evidentiary question. Any position that Lawyer would assert on behalf of either client on the legal issue common to each case would have a material and adverse impact on the interests of the other client. Thus, a conflict of interest is presented. Even the informed consent of both Client A and Client B would be insufficient to permit Lawyer to represent each before the Supreme Court.

## § 129. Conflicts of Interest in Criminal Litigation

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in a criminal matter may not represent:

- (1) two or more defendants or potential defendants in the same matter; or
- (2) a single defendant, if the representation would involve a conflict of interest as defined in § 121.

**Comment:**

c. *Multiple criminal-defense representations.* Subsection (1) recognizes that the representation of co-defendants in criminal cases involves at least the potential for conflicts of interest. For example, if one defendant is offered favorable treatment in return for testimony against a co-defendant, a single lawyer could not give advice favorable to one defendant's interests while adhering to the duty of loyalty to the other. Similarly, individual defendants might have had different motives for and understandings of events, so that establishing a common position among them is difficult. Witnesses who would be favorable to one

defendant might be subject to cross-examination that would be unfavorable to another defendant. In closing argument, counsel must choose which facts to stress. For example, stressing the minor role of one defendant might imply the major role of another.

Because of such potential conflicts and the constitutional significance of the issues they raise, joint

representation in criminal cases often has a material and adverse effect on the representation of each defendant and thus cannot be undertaken in the absence of client consent under the limitations and conditions stated in § 122.

Criminal defendants might nonetheless consider it in their interest to be represented by a single lawyer even when the financial cost of separate counsel is not a factor. A single lawyer can help assure a common position and increase the likelihood that none of the co-defendants will cooperate with the prosecution against the others. For such reasons, a criminal conviction involving joint representation ordinarily is not impeachable absent a showing of timely objection and actual prejudice. Were the rule otherwise, defendants could avoid raising a conflict issue before trial so as to create an issue for later appeal.

On the other hand, both the prosecutor and the trial judge have a responsibility to assure a fair trial for each defendant. When a defense lawyer would be required to assume an adverse position with respect to one or more of the clients, the conflict is nonconsentable (see § 122(2)(b) & Comment g(iii) thereto). Efficient operation of the judicial system requires that a verdict not be vulnerable to contentions that a defendant was disadvantaged by an undisclosed conflict of interest. A prosecutor might object to joint-representation arrangements to assure that a conflict possibility is resolved before trial. Even without objection by the prosecutor or defendant, the tribunal may raise the issue on its own initiative and refuse to permit joint representation where there is a significant threat to the interest in the finality of judgments.

**Illustrations:**

1. A and B are co-defendants charged with a felony offense of armed robbery. They are both represented by Lawyer. The prosecutor believes that A planned the crime and was the only one carrying a weapon. The prosecutor offers to accept B's plea of gu to a misdemeanor if B will testify against A. Lawyer's loyalty to A causes Lawyer to persuade B that the prosecutor's proposal should be rejected. Following a trial, both A and B are convicted of the felony. When plea negotiations involving B's separate interests began, B should have received independent counsel. In the circumstances, Lawyer could not properly represent A and B even with the informed consent of both clients (see § 122, Comment g(iii)).
2. The same facts as in Illustration 1, except that the evidence at trial is highly damaging to Defendant A but less so to Defendant B. Both defendants were represented by Lawyer, who did not consult with A and B concerning their conflicting interests. Lawyer spent most of the closing argument explaining away A's guilt and did not mention the weak case against B, because doing so would invite the jury to consider the greater likelihood of A's guilt. Lawyer could represent B only with the informed consent of B (see § 122).
- d. A criminal-defense lawyer with conflicting duties to other clients. As required in Subsection (2), a conflict exists when a defense lawyer in a criminal matter has duties to clients in other matters that might conflict. A conflict exists, for example, if the lawyer also represents either a prosecutor or a prosecution witness in an unrelated matter. The conflict could lead the lawyer to be less vigorous in defending the criminal case in order to avoid offending the other client, or the lawyer might be constrained in cross-examining the other client (see § 60(1)). A lawyer who represents a criminal defendant may not represent the state in unrelated civil matters when such representation would have a material and adverse effect on the lawyer's handling of the criminal case.

Ordinarily, these conflicts may be waived by client consent under the limitations and conditions in § 122. Because the defendant's constitutional rights are implicated, court procedures often require that consent be made part of the formal record in the criminal case (see Comment c hereto).

## § 130. Multiple Representation in a Nonlitigated Matter

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent two or more clients in a matter not involving litigation if there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients.

### Comment:

- b. *Rationale.* Whether a lawyer can function in a situation of conflict (see § 121) depends on whether the conflict is consentable (see § 122(2)), which in turn depends on whether it is "reasonably likely that the lawyer will be able to provide adequate representation" to all affected clients (see § 122(2)).

Conflicted but unconsented representation of multiple clients, for example of the buyer and seller of property, is sometimes defended with the argument that the lawyer was performing the role of mere "scrivener" or a similarly mechanical role. The characterization is usually inappropriate. A lawyer must accept responsibility to give customary advice and customary range of legal services, unless the clients have given their informed consent to a narrower range of the lawyer's responsibilities. On limitations of a lawyer's responsibilities, see § 19(1).

- c. *Assisting multiple clients with common objectives, but conflicting interests.* When multiple clients have generally common interests, the role of the lawyer is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and draft instruments necessary to accomplish the desired results. Multiple representations do not always present a conflict of interest requiring client consent (see § 121). For example, in representing spouses jointly in the purchase of property as co-owners, the lawyer would reasonably assume that such a representation does not involve a conflict of interest. A conflict could be involved, however, if the lawyer knew that one spouse's objectives in the acquisition were materially at variance with those of the other spouse.

### Illustrations:

1. Husband and Wife consult Lawyer for estate-planning advice about a will for each of them. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer may represent both clients in the matter without obtaining consent (see § 121). While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances.
2. The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse B, who owns significantly more property than Spouse A, appears to disagree with important positions of Spouse A but to be uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest. Lawyer may proceed to provide the requested legal assistance only with consent given under the limitations and conditions provided in § 122.
3. The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent (see § 122).

Clients might not fully understand the potential for conflict in their interests as the result of ignorance about their legal rights, about possible alternatives to those that the clients have considered prior to retaining the lawyer, or about the uncommunicated plans or objectives of another client. In other situations, prospective clients might agree on objectives when they first approach the common lawyer, but it should be reasonably apparent that a conflict is likely to develop as the representation proceeds. A client's right to communicate in confidence with the attorney should not be constrained by concern that discord might result (cf. § 75). A lawyer is not required to suggest or assume discord where none exists, but when a conflict is reasonably apparent or foreseeable, the lawyer may proceed with multiple representation only after all affected clients have consented as provided in § 122.

### Illustration:



4. A, B, and C are interested in forming a partnership in which A is to provide the capital, B the basic patent, and C the management skill. Only C will spend significant amounts of time operating the business. A, B, and C jointly request Lawyer to represent them in creating the partnership. The different contributions to be made to the partnership alone indicate that the prospective partners have conflicts of interest with respect to the structure and governance of the partnership (see § 121). With

the informed consent of each (see § 122), Lawyer may represent all three clients in forming the business. Lawyer may assist the clients in valuing their respective contributions and suggest arrangements to protect their respective interests. With respect to conflicts and informed consent in representing the partnership as well as the partners once the business is established, see § 131, Comment c.

- d. Clients with known differences to be resolved. Multiple prospective clients might already be aware that their interests and objectives are antagonistic to some degree. The lawyer must ascertain at the outset what kind of assistance the clients require. Service by the lawyer or another person as an arbitrator or mediator (and not as a lawyer representing clients), for example, might well serve the clients' interests.

When circumstances reasonably indicate that the prospective clients might be able to reach a reasonable reconciliation of their differences by agreement and with the lawyer's assistance, the lawyer may represent them after obtaining informed consent (see § 122). In particular, the lawyer should explain the effect of joint representation on the lawyer's ability to protect each client's confidential information (see § 75). If the joint representation is undertaken, the lawyer should help the clients reach agreement on outstanding issues but should not advance the interests of one of the clients to the detriment of another (see § 122, Comment h).

Relations among multiple clients can develop into adversarial, even litigated, matters. Even if the possibility of litigation is substantial and even though the consent does not permit the lawyer to represent one client against the other if litigation does ensue (see § 122(2)(b) & § 128), with informed consent a lawyer could accept multiple representation in an effort to reconcile the differences of the clients short of litigation. The lawyer should inform the clients that the effort to overcome differences might ultimately fail and require the lawyer's complete withdrawal from the matter, unless the clients agreed that the lawyer thereafter could continue to represent less than all clients (see § 121, Comment c(i)). The lawyer is not required to encourage each client to obtain independent advice about being jointly represented, but the lawyer should honor any client request for such an opportunity.

#### Illustrations:

5. The same facts as in Illustration 4, except that the partnership of A, B, and C is formed and commences business. The business encounters difficulty in securing customers and controlling costs, and it shortly appears that the business will fail unless additional funding is obtained. No outside funds are available, and A announces unwillingness to provide additional capital unless B and C agree to increase A's interest in the business. B and C believe that A is requesting an unreasonably large additional share. A, B, and C seek Lawyer's assistance in resolving their disagreements. A conflict clearly exists between the clients (§ 121). Lawyer may agree to represent the three clients in seeking to arrive at a mutually satisfactory resolution, but only after Lawyer obtains the informed consent of each client and there is a clear definition of the services that Lawyer will provide. In representing the clients, Lawyer may not favor the position of any client over the others (see § 122, Comment h).
6. Husband and Wife have agreed to obtain an uncontested dissolution of their marriage. They have consulted Lawyer to help them reach an agreement on disposition of their property. A conflict of interest clearly exists between the prospective clients (§ 121). If reasonable prospects of an agreement exist, Lawyer may accept the joint representation with the effective consent of both (see § 122). However, in the later dissolution proceeding, Lawyer may represent only one of the parties (see § 128, Comment c), and Lawyer must withdraw from representing both clients if their efforts to reach an agreement fail (see § 121, Comment c(i)).

## § 131. Conflicts of Interest in Representing an Organization

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.

**Comment:**

- c. *A challenge to the policy of a client organization. Individuals having responsible roles in an organization can disagree about the definition of its interests. However, that does not by itself indicate that a lawyer representing the organization has a conflict of interest within the meaning of § 121. If conduct of the organization is challenged as unlawful, the lawyer for the organization generally may defend at least until it is ruled upon by the tribunal or changed pursuant to the procedures of the organization. Such a change can occur, for example, because the lawyer is directed to settle the controversy as instructed by the agent (see § 21).*

*On the lawyer's duty if the responsible agent is acting in violation of a duty to the organization, see § 96(2). On the lawyer's duty if the organization engages in a crime or fraud, see § 67. On the lawyer's right to withdraw from representation because of disagreement with the organizational policy, see § 32. On the lawyer's right to take public positions inconsistent with those of the lawyer's client, see § 125, Comment e.*

- d. *Conflicting interests of affiliated organizations. Whether a lawyer represents affiliated organizations as clients is a question of fact determined under § 14 (see Comment f thereto). When a lawyer represents two or more organizations with some common ownership or membership, whether a conflict exists is determined primarily on the basis of formal organizational distinctions. If a single business corporation has established two divisions within the corporate structure, for example, conflicting interests or objectives of those divisions do not create a conflict of interest for a lawyer representing the corporation. Differences within the organization are to be resolved through the organization's decisionmaking procedures.*

**Illustration:**

2. *A Corporation owns 60 percent of the stock of B Corporation. All of the stock of A Corporation is publicly owned, as is the remainder of the stock in B Corporation. Lawyer has been asked by the President of A Corporation to act as attorney for B in causing B to make a proposed transfer of certain real property to A at a price whose fairness cannot readily be determined by reference to the general real-estate market. Lawyer may do so only with effective informed consent of the management of B (as well as that of A). The ownership of A and B is not identical and their interests materially differ in the proposed transaction.*
- e. *Representation of an organization and an individual constituent. Representation of a client organization often is facilitated by a close working relationship between the lawyer and the organization's officers, directors, and employees. However, unless the lawyer and such an individual person enter into a client-lawyer relationship (see § 14, Comment f), the individual is not a client of the lawyer (see § 121, Comment d). With respect to the attorney-client privilege attaching to communications with a person affiliated with an organization, see § 73, Comment j.*

*When a lawyer proposes to represent both an organization and a person associated with it, such as an officer, director, or employee, whether a conflict exists is determined by an analysis of the interests of the organization as an entity and those of the individuals involved. That is true whether the multiple representation involves civil (see § 128) or criminal (see § 129) litigation or a nonlitigated matter (see § 130). The interests of the organization are those defined by its agents authorized to act in the matter (see § 96, Comment d). For example, when an organization is accused of wrongdoing, an individual such as a director, officer, or other agent will sometimes be charged as well, and the lawyer representing the organization might be asked also to represent the individual. Such representation would constitute a conflict of interest when the individual's interests are materially adverse to the interests of the organization (see § 121). When there is no material adversity of interest, such as when the individual owns all of the equity in the organization or played a routine role in the underlying transaction, no conflict exists. In instances of adversity, concurrent representation would be permissible with the consent of all affected clients under the limitations and conditions stated in § 122.*

*Consent by an organization can be given in any manner consistent with the organization's lawful decisionmaking procedures. Applicable corporate law may provide that an officer who is personally interested in the matter may not provide consent in the matter. In deciding whether to consent to multiple representation by outside counsel, the organization might rely upon the advice of inside legal counsel. Issues concerning informed consent by public organizations to otherwise conflicted representations are discussed in § 122, Comment c.*

**Illustrations:**

3. *President, the chief executive officer of Corporation, has been charged with discussing prices with the president of a competing firm. If found guilty, both President and Corporation will be subject to civil and criminal penalties. Lawyer, who is representing Corporation, has concluded after a thorough investigation that no such pricing discussions occurred. Both Corporation and President plan to defend on that ground. President has asked Lawyer to represent President as well as Corporation in the proceedings. Although the factual and legal defenses of President and Corporation appear to be consistent at the outset, the likelihood of conflicting positions in such matters as plea bargaining requires Lawyer to obtain the informed consent of both clients before proceeding with the representation (see § 129, Comment c).*
4. *The same facts as in Illustration 3, except that after further factual investigation both President and Corporation now concede that the pricing discussions took place. One of President's defenses will be that the former general counsel of Corporation told President that discussion of general pricing practices with a competitor was not illegal. Corporation denies that such was the advice given and asserts that President acted without authority. The conflict between President and Corporation is so great that the same lawyer could not provide adequate legal services to both in the matter. Thus, continued representation of both is not subject to consent (see § 122, Comment g(iii), & §§ 128 & 129).*

*If a person affiliated with an organization makes an unsolicited disclosure of information to a lawyer who represents only the organization, indicating the person's erroneous expectation that the lawyer will keep the information confidential from the organization, the lawyer must inform the person that the lawyer does not represent the person (see § 103, Comment e). The lawyer generally is not prohibited from sharing the communication with the organization. However, the requirements stated in § 15, Comment c, with respect to safeguarding confidential information of a prospective client may apply. That would occur when the person reasonably appeared to be consulting the lawyer as present or prospective client with respect to the person's individual interests, and the lawyer failed to warn the associated person that the lawyer represents only the organization and could act against the person's interests as a result (see § 103, Comment e). With respect to a lawyer's duties when a person associated with the organization expressed an intent to act wrongfully and thereby threatens harm to the organization client, see § 96(2) and Comment f thereto.*

*Issues considered in this Comment may be particularly acute in the case of close corporations, small partnerships, and similar organizations in which, for example, one person with substantial ownership interests also manages. Such a manager may have a corresponding tendency to treat corporate and similar entity distinctions as mere formalities. In such instances, when ownership is so concentrated that no nonmanaging owner exists and in the absence of material impact on the interests of other nonclients (such as creditors in the case of an insolvent corporation), a lawyer acts reasonably in accepting in good faith a controlling manager's position that the interests of all controlling persons and the entity should be treated as if they were the same. Similar considerations apply when a close corporation or similar organization is owned and managed by a small number of owner-managers whose interests are not materially in conflict.*

- f. *A challenge by a client organization to the action of an associated person. Both Subsections of this Section can be applicable when the organization challenges the action of one or more of its associated persons, such as an officer, director, or employee. The policy of the organization in the matter will be that established according to the organization's decisionmaking procedures (see § 96(1)(a)). Because the interests of the organization and the associated person are necessarily adverse, the conflict of interest ordinarily will not be subject to consent (see § 122(2)(c)). On the lawyer's dealing with threatened wrongdoing by a person associated with an organizational client, see § 96(2); see also §§ 66-67.*

#### **Illustration:**

5. *Treasurer, the chief financial officer of Club, a private investment trust, has been accused of converting \$25,000 of Club's assets for personal use. Responsible other officers of Club, acting on Club's behalf, retain Lawyer to recover the money from Treasurer. They direct Lawyer not to reveal the loss or file suit until other collection efforts have been exhausted. Lawyer may properly represent Club and in doing so must proceed in the manner directed. Further, although the matter is not yet in litigation, the interests of Club and Treasurer are so adverse that even informed consent of both would not permit their common representation by Lawyer in the matter (see § 122, Comment g).*
- g. *Derivative action. When an organization such as a business corporation is sued in a derivative action, the organization is ordinarily aligned as an involuntary plaintiff. Persons associated with the organization who are accused of breaching a duty to the organization, typically officers and directors of the organization, are ordinarily named as defendants. The theory of a derivative action is that relief is sought from the individuals for the benefit of the organization. Even with informed consent of all affected clients,*

*the lawyer for the organization ordinarily may not represent an individual defendant as well (see § 128, Comment c). If, however, the disinterested directors conclude that no basis exists for the claim that the defending officers and directors have acted against the interests of the organization, the lawyer may, with the effective consent of all clients, represent both the organization and the officers and directors in defending the suit (see § 122).*

*In a derivative action, if the advice of the lawyer acting for the organization was an important factor in the action of the officers and directors that gave rise to the suit, it is appropriate for the lawyer to represent, if anyone, the officers and directors and for the organization to obtain new counsel. Because the lawyer would be representing clients with interests adverse to the corporation, consent of the corporation would be required. That would be true even if the lawyer withdrew from representing the corporation in order to represent the individuals (see § 132, Comment c). Whom the lawyer should represent in the matter, if anyone, should be determined by responsible agents of the organization. Ordinarily, those will be persons who are not named and are not likely to be named parties in the case.*

*If an action challenging an act of an organization is not a derivative action, whether a conflict exists is determined under § 128, Comment d(ii).*

- h. Proxy fights and takeover attempts. Outsiders or insiders might challenge incumbent management for control of organizations. Incumbent management, shareholders, creditors, and employees will all be affected by such a contest in various ways. When the challenge to incumbent management comes from outside the management group, the role of the lawyer representing the organization must be to follow policies adopted by the organization, in accordance with the organization's decisionmaking procedures. Persons authorized to act on behalf of the organization determine the organization's interest in responding to the challenge (see § 96(1)).*

*When all or part of incumbent management seeks to obtain control of the organization, typically by restructuring ownership of and authority in the organization, a conflict of interest is presented between the individual interests of those members of management and the holders of ownership and authority. Because of their personal interests, those members of management ordinarily would not be appropriate agents to direct the work of a lawyer for the organization with respect to the takeover attempt. Whether a lawyer's personal interests, for example, those based on longtime association with incumbent management, preclude the lawyer from representing the organization or the managers seeking control depends on whether the lawyer's personal interests create a substantial risk of material and adverse effect on the representation (see § 125).*

*Similar considerations apply when a contest over ownership or control arises within a closely held corporation or similar small organization such as a two-person partnership. If the lawyer also represents a principal in such an enterprise personally, the possibility of conflict is increased if the lawyer undertakes to represent that person in such a contest. When it reasonably appears that the lawyer can serve effectively in the role of conciliator between contending factions, the lawyer may undertake to do so with effective consent of all affected clients (see § 130, Comment d). In other cases, however, the lawyer will be required to withdraw from representing all of the individual interests (see § 132).*

## **Topic 4. Conflicts of Interest with a Former Client**

### **§ 132. A Representation Adverse to the Interests of a Former Client**

Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 122, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:

- (1) the current matter involves the work the lawyer performed for the former client; or
- (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

#### **Comment:**

- b. Rationale. The rule described in this Section accommodates four policies. First, absent the rule, a lawyer's incentive to serve a present client might cause the lawyer to compromise the lawyer's continuing duties to the former client (see § 33). Specifically, the lawyer might use confidential information of the former client contrary to that client's interest and in violation of § 60. The second policy consideration is the converse of the first. The lawyer's obligations to the former client might constrain the lawyer in representing the present client effectively, for example, by limiting the questions the lawyer could ask the former client in testimony. Third, at the time the lawyer represented the former client, the lawyer*

should have no incentive to lay the basis for subsequent representation against that client, such as by drafting provisions in a contract that could later be construed against the former client. Fourth, and pointing the other way, because much law practice is transactional, clients often retain lawyers for service only on specific cases or issues. A rule that would transform each engagement into a lifetime commitment would make lawyers reluctant to take new, relatively modest matters.

- c. *The relationship between current-client and former-client conflicts rules. The difference between a former-client conflict under this Section and a present-client conflict considered in Topic 3 (§§ 128-130) is that this Section applies only to representation in the same or a substantially related matter. The present-client conflict rules prohibit adverse representation regardless of the lack of any other relationship between them. If the two representations overlap in time, the rules of §§ 128-130 apply.*

Withdrawal is effective to render a representation “former” for the purposes of this Section if it occurs at a point that the client and lawyer had contemplated as the end of the representation (see § 32, Comment c). The representation will also be at an end for purposes of this Section if the existing client discharges the lawyer (other than for cause arising from the improper representation) or if other grounds for mandatory or permissive withdrawal by the lawyer exist (see § 32), and the lawyer is not motivated primarily by a desire to represent the new client.

If a lawyer is approached by a prospective client seeking representation in a matter adverse to an existing client, the present-client conflict may not be transformed into a former-client conflict by the lawyer’s withdrawal from the representation of the existing client. A premature withdrawal violates the lawyer’s obligation of loyalty to the existing client and can constitute a breach of the client-lawyer contract of employment (see § 32, Comment c). On withdrawal when a dispute arises between two or more of the lawyer’s clients, see § 121, Comment c(i). On advance consent, see *id.* and § 122, especially Comment d.

- d. *The same or a substantially related matter. As indicated in the Section, three types of former-client conflicts are prohibited.*

d(i). *Switching sides in the same matter. Representing one side and then switching to represent the other in the same matter clearly implicates loyalty to the first client and protection of that client’s confidences. Similar considerations apply in nonlitigated matters. For example, a lawyer negotiating a complex agreement on behalf of Seller could not withdraw and represent Buyer against the interests of Seller in the same transaction. Switching sides in a litigated matter can also risk confusing the trier of fact. Just as a lawyer may not represent both sides concurrently in the same case (see §§ 128-130), the lawyer also may not represent them consecutively.*

d(ii). *Attacking a lawyer’s own former work. Beyond switching sides in the same matter, the concept of substantial relationship applies to later developments out of the original matter. A matter is substantially related if it involves the work the lawyer performed for the former client. For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor.*

#### **Illustration:**

1. *Lawyer has represented Husband in a successful effort to have Wife removed as beneficiary of his life insurance policy. After Husband’s death, Wife seeks to retain Lawyer to negotiate with the insurance company to set aside the change of beneficiary and obtain the proceeds of the policy for Wife. The subsequent representation would require that Lawyer attack the work Lawyer performed for Husband. Accordingly, Lawyer may not accept Wife as a client in the matter.*

d(iii). *The substantial-relationship test and the protection of confidential information of a former client. The substantial-relationship standard is employed most frequently to protect the confidential information of the former client obtained in the course of the representation. A subsequent matter is substantially related to an earlier matter within the meaning of Subsection (2) if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client obtained in the course of the representation in violation of § 60. “Confidential information” is defined in § 59. Substantial risk exists where it is reasonable to conclude that it would materially advance the client’s position in the subsequent matter to use confidential information obtained in the prior representation.*

A concern to protect a former client’s confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation. The interests of subsequent clients also militate against extensive inquiry into the precise nature of the lawyer’s representation of the subsequent client and the nature of exchanges between them.



The substantial-relationship test avoids requiring disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation. The inquiry into the issues involved in the prior representation should be as specific as possible without thereby revealing the confidential client information itself or confidential information concerning the second client. When the prior matter involved litigation, it will be conclusively presumed that the lawyer obtained confidential information about the issues involved in the litigation. When the prior matter did not involve litigation, its scope is assessed by reference to the work that the lawyer undertook and the array of information that a lawyer ordinarily would have obtained to carry out that work. The information obtained by the lawyer might also be proved by inferences from redacted documents, for example. On the use of in camera procedures to disclose confidential material to the tribunal but not to an opposing party, see § 86, Comment f.

#### Illustrations:

2. Lawyer represented Client A for a period of five years lobbying on environmental issues relating to uranium production. In the course of the representation in one matter, Lawyer learned the basis for Client A's uranium-production decisions. Lawyer now has been asked to represent Client B, a purchaser of uranium, in an antitrust action against A and others alleging a conspiracy to impose limits on production. It is likely that Client B's claims against A would include addressing the same production decisions about which Lawyer earlier learned. Use of confidential information concerning A's production decisions learned in the earlier representation would materially advance the position of Client B in the antitrust matter. The matters are substantially related, and Lawyer may not represent Client B without effective consent of both A and B (see § 122).
3. Lawyer was general inside legal counsel to Company A for many years, dealing with all aspects of corporate affairs and management. Lawyer was dismissed from that position when Company A hired a new president. Company B has asked Lawyer to represent it in an antitrust suit against Company A based on facts arising after Lawyer left Company A's employ but involving broad charges of anti-competitive practices of Company A that, if true, were occurring at the time that Lawyer represented Company A. Lawyer may not represent Company B in the antitrust action. Because of the breadth of confidential client information of Company A to which Lawyer is likely to have had access during the earlier representation and the breadth of issues open in the antitrust claim of Company B, a substantial risk exists that use of that information would materially advance Company B's position in the later representation.
4. Lawyer represented Client A, a home builder, at the closings of the sales of several homes Client A had built in Tract X. Lawyers performing such work normally might encounter issues relating to marketability of title. A is now represented by other counsel. Client B has asked Lawyer to represent him in a suit against A in connection with B's sale to A of Tract Y, a parcel of land owned by Client B on which A plans to build homes. The present suit involves the marketability of the title to Tract Y. Although both representations involve marketability of title, it is unlikely that Lawyer's knowledge of marketability of Tract X would be relevant to the litigation involving the marketability of title to Tract Y. Accordingly, the matters are not substantially related. Lawyer may represent Client B against A without informed consent of A.

As used in this Section, the term "matter" includes not only representation in a litigated case, but also any representation involving a contract, claim, charge, or other subject of legal advice (compare § 133, Comment c). The term "matter" ordinarily does not include a legal position taken on behalf of a former client unless the underlying facts are also related. For example, a lawyer who successfully argued that a statute is constitutional on behalf of a former client may later argue that the statute is unconstitutional on behalf of a present client in a case not involving the former client, even though the lawyer's success on behalf of the present client might adversely affect the former client (compare § 128, Comment f).

Information that is confidential for some purposes under § 59 (so that, for example, a lawyer would not be free to discuss it publicly (see § 60)) might nonetheless be so general, readily observable, or of little value in the subsequent representation that it should not by itself result in a substantial relationship. Thus, a lawyer may master a particular substantive area of the law while representing a client, but that does not preclude the lawyer from later representing another client adversely to the first in a matter involving the same legal issues, if the matters factually are not substantially related. A lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.

- e. A subsequent client with interests "materially adverse" to the interests of a former client. A later representation is prohibited if the second client's interests are materially adverse to those of the former client (see § 121, Comments c(i) (adverseness) & c(ii) (materiality)). The scope of a client's interests is normally determined by the scope of work that the lawyer undertook in the former representation. Thus, a lawyer who undertakes to represent a corporation with respect to

the defense of a personal-injury claim involving only issues of causation and damages does not represent the corporation with respect to other interests. The lawyer may limit the scope of representation specifically for the purpose of avoiding a future conflict (see § 16). Similarly, the lawyer may limit the scope of representation of a later client so as to avoid representation substantially related to that undertaken for a previous client.

**Illustration:**

5. Lawyer formerly represented Client A in obtaining FDA approval to market prescription drug X for treating diseases of the eye. Client B has now asked Lawyer for legal assistance to obtain FDA approval for sale of prescription drug Y for treating diseases of the skin. Client B is also interested in possibly later application for FDA approval to market a different form of drug Y to treat diseases of the eye, thus significantly reducing the profitability of Client A's drug X. Confidential information that Lawyer gained in representing Client A in the earlier matter would be substantially related to work that Lawyer would do with respect to any future application by Client B for use of drug Y for eye diseases (although the information would not relate to the use of drug Y for treating diseases of the skin). Client B and Lawyer agree that Lawyer's work will relate only to FDA approval for use of drug Y to treat diseases of the skin. Thus limited, Lawyer's work for Client B does not involve representation adverse to former Client A on a substantially related matter.
- f. A lawyer's subsequent use of confidential information. Even if a subsequent representation does not involve the same or a substantially related matter, a lawyer may not disclose or use confidential information of a former client in violation of § 60.

**Illustration:**

6. Lawyer, now a prosecutor, had formerly represented Client in defending against a felony charge. During the course of a confidential interview, Client related to Lawyer a willingness to commit perjury. Lawyer is now prosecuting another person, Defendant, for a matter not substantially related to the former prosecution. In the jurisdiction, a defendant is not required to serve notice of defense witnesses that will be called. During the defense case, Defendant's lawyer calls Client as an alibi witness. Lawyer could not reasonably have known previously that Client would be called. Because of the lack of substantial relationship between the matters, Lawyer was not prohibited from undertaking the prosecution. Because Lawyer's knowledge of Client's statement about willingness to lie is confidential client information under § 59, Lawyer may not use that information in cross-examining Client, but otherwise Lawyer may cross-examine Client vigorously.
- g. A lawyer's duties of confidentiality other than to a former client. The principles in this Section presuppose that the lawyer in question has previously represented the person adversely affected by the present representation. Whether a client-lawyer relationship exists is considered in § 14 and § 121, Comment d. Two situations present analogous problems—communications with a prospective client and confidential information about a nonclient learned in representing a former client.
  - g(i). Duties to a prospective client. A lawyer's obligation of confidentiality with respect to information revealed during an initial consultation prior to the decision about formation of a lawyer-client relationship is considered in § 15, Comment c.
  - g(ii). Duties to a person about whom a lawyer learned confidential information while representing a former client. A lawyer might have obligations to persons who were not the lawyer's clients but about whom information was revealed to the lawyer under circumstances obligating the lawyer not to use or disclose the information. Those obligations arise under other law, particularly under the law of agency. For example, a lawyer might incur obligations of confidentiality as the subagent of a principal whom the lawyer's client serves as an agent (see Restatement Second, Agency §§ 5, 241, & 396). An important difference between general agency law and the law governing lawyers is that general agency law does not normally impute a restriction to other persons. Thus, when a lawyer's relationship to a nonclient is not that of lawyer-client but that, for example, of subagent-principal, imputation might not be required under the law governing subagents.

**Illustrations:**

7. Lawyer has represented Hospital in several medical-malpractice cases. In the course of preparing to defend one such case, Lawyer reviewed the confidential medical file of Patient who was not a party in the action. From the file, Lawyer learned that Patient had been convicted of a narcotics offense in another jurisdiction. Patient is now a material witness for the defense in an unrelated case that Lawyer has filed on behalf of Plaintiff. Adequate representation of Plaintiff would require Lawyer to cross-examine Patient about the narcotics conviction in an effort to undermine Patient's credibility. Lawyer may not reveal information about Patient that Hospital has an obligation to keep confidential. That limitation in turn may preclude effective representation of Plaintiff in the pending case. However if, without violating the obligation to Patient, Lawyer can adequately reveal to Plaintiff the nature of the conflict of interest and the likely effect of restricted cross-examination, Lawyer may represent Plaintiff with Plaintiff's informed consent (see § 122, Comment c).

8. *Lawyer represents Underwriter in preparing to sell an issue of Company's bonds; Lawyer does not represent Company. Several questions concerning facts have arisen in drafting disclosure documents pertaining to the issue. Under applicable law, Underwriter must be satisfied that the facts are not material. Lawyer obtains confidential information from Company in the course of preparing*

*Lawyer's opinion for Underwriter. Among the information learned is that Company might be liable to A for breach of contract. Unless the information has become generally known (see § 59), Lawyer may not represent A in a breach of contract action against Company because the information was learned from Company in confidence.*

*In the circumstances described in Illustration 8, standards of agency law or other law might permit the underwriter to provide services to another customer in a subsequent transaction so long as the underwriter takes appropriate steps to screen its employees. A lawyer affiliated with the disqualified lawyer could represent the underwriter in the second transaction after appropriate screening of the disqualified lawyer (compare § 124).*

*A lawyer's duties as fiduciary to nonclient third persons might create a conflict of interest with clients of the lawyer (see § 135).*

*A lawyer who learns confidential information from a person represented by another lawyer pursuant to a common-interest sharing arrangement (see § 76) is precluded from a later representation adverse to the former sharing person when information actually shared by that person with the lawyer or the lawyer's client is material and relevant to the later matter (see Illustration 8, above). Such a threatened use of shared information is inconsistent with the undertaking of confidentiality that is part of such an arrangement.*

- h. *A lawyer with only a minor role in a prior representation. The specific tasks in which a lawyer was engaged might make the access to confidential client information insignificant. The lawyer bears the burden of persuasion as to that issue and as to the absence of opportunity to acquire confidential information. When such a burden has been met, the lawyer is not precluded from proceeding adversely to the former client (see § 124, Comment d, Illustration 3).*
- i. *Withdrawal from representing an "accommodation" client. With the informed consent of each client as provided in § 122, a lawyer might undertake representation of another client as an accommodation to the lawyer's regular client, typically for a limited purpose in order to avoid duplication of services and consequent higher fees. If adverse interests later develop between the clients, even if the adversity relates to the matter involved in the common representation, circumstances might warrant the inference that the "accommodation" client understood and impliedly consented to the lawyer's continuing to represent the regular client in the matter. Circumstances most likely to evidence such an understanding are that the lawyer has represented the regular client for a long period of time before undertaking representation of the other client, that the representation was to be of limited scope and duration, and that the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client. On obtaining express consent in advance to later representation of the regular client in such circumstances, see § 122, Comment d. The lawyer bears the burden of showing that circumstances exist to*
- warrant an inference of understanding and implied consent. On other situations of withdrawal, see § 121, Comment e.*
- j. *Cure of conflicts created by transactions of a client. A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients. An example is a client's acquisition of an interest in an enterprise against which the lawyer is proceeding on behalf of another client. However, if the client's acquisition of the other enterprise was reasonably foreseeable by the lawyer when the lawyer undertook representation of the client, withdrawal will not cure the conflict. In any event, continuing the representation must be otherwise consistent with the former-client conflict rules.*

### **§ 133. A Former Government Lawyer or Officer**

- (1) A lawyer may not act on behalf of a client with respect to a matter in which the lawyer participated personally and substantially while acting as a government lawyer or officer unless both the government and the client consent to the representation under the limitations and conditions provided in § 122.
- (2) A lawyer who acquires confidential information while acting as a government lawyer or officer may not:

- (a) if the information concerns a person, represent a client whose interests are materially adverse to that person in a matter in which the information could be used to the material disadvantage of that person; or
- (b) if the information concerns the governmental client or employer, represent another public or private client in circumstances described in § 132(2).

**Comment:**

- b. Rationale. Prohibitions on the activities of former government lawyers are based on concerns similar to those protecting former private clients. Because those concerns apply somewhat differently to government clients, however, the rule of this Section is both broader and narrower than that of § 132.*

*First, the protection accorded government confidential information is parallel to that for confidential information of private clients. As discussed in § 74, however, statutes requiring openness in government operations might limit the government information that is given protection. Second, since government agencies have special powers to allocate public benefits and burdens, it is reasonable to prohibit a lawyer while in government from taking action designed to improve the lawyer's opportunities upon leaving government service.*

*On the other hand, government agencies must be able to recruit able lawyers. If the experience gained could not be used after lawyers left government service, recruiting lawyers would be more difficult. There is also a public interest in having lawyers in private practice who have served in government and understand both the substance and rationale of government policy. The experience of such lawyers might sometimes enable clients to achieve higher levels of compliance with law. Thus, this Section protects three government functions, those of client, recruiter of able employees, and law enforcer.*

- c. Personal and substantial involvement. This Section forbids former government lawyers or officers from taking on matters on which they worked personally and substantially while in government. Former government lawyers are not forbidden to work on matters solely because the matters were pending in the agency during the period of their employment.*

*The standard of "substantiality" is both formal and functional. A lawyer who signed a complaint on behalf of the government is substantially involved in the matter even if the lawyer knew few of the underlying facts. An action undertaken by a lawyer in the name of a superior is also within the rule.*

- e. Definition of a "matter." The term "matter," as applied to former government employees, is often defined as a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties. Drafting of a statute or regulation of general applicability is not included under that definition, nor is work on a case of the same type (but not the same parties) as the one in which the lawyer seeks to be involved. The definition is narrower than that governing former-client conflicts of interest under § 132 (see id., Comment d(iii)).*

**Illustrations:**

- 4. While serving in the general counsel's office of the state revenue department, Lawyer was involved in the drafting of regulations to implement new amendments to the state tax law. The regulations affected a large number of taxpayers. When Lawyer returns to private practice, Lawyer may advise taxpayers seeking to determine how the regulations apply, suing to have the regulations construed or challenging the constitutionality of the statute or regulations.*
- 5. In the capacity of city corporation counsel, Lawyer participated in drafting and negotiating the terms of an ordinance to rezone a specific tract of land of a major developer. Now that Lawyer has returned to private practice, the developer has sought to retain Lawyer in a lawsuit to construe the ordinance to permit more housing density than the city asserts the ordinance permits. Lawyer may not accept the case. The work by Lawyer on behalf of city was not of general application and was analogous to representation of the city in a case involving a particular party and parcel of land.*

## Topic 5. Conflicts of Interest Due to a Lawyer's Obligation to a Third Person

### § 134. Compensation or Direction of a Lawyer by a Third Person

- (1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 122 and knows of the circumstances and conditions of the payment.
- (2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if:
  - (a) the direction does not interfere with the lawyer's independence of professional judgment;
  - (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
  - (c) the client consents to the direction under the limitations and conditions provided in § 122.

**Comment:**

- c. *Third-person fee payment.* This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the third-person source of payment. The lawyer's duty of loyalty is to the client alone, although it may also extend to any co-client when that relationship is either consistent with the duty owing to each co-client or is consented to in accordance with § 122. Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability-insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (see also Comment f hereto). Lawyers paid by civil-rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance. Similarly, lawyers in private practice or in a legal-services organization may be appointed or otherwise come to represent indigent persons pursuant to arrangements under which their fees will be paid by a governmental body (see Comment g).
- d. *Third-person direction of a representation.* The principle that a lawyer must exercise independent professional judgment on behalf of the client (Subsection (2)(a)) is reflected in the requirement of the lawyer codes that no third person control or direct a lawyer's professional judgment on behalf of a client. Consistent with that requirement, a third person may, with the client's consent and otherwise in the circumstances and to the extent stated in Subsection (2), direct the lawyer's representation of the client. When the conditions of the Subsection are satisfied, the client has, in effect, transferred to the designated third person the client's prerogatives of directing the lawyer's activities (see § 21(2)). The third person's directions must allow for effective representation of the client, and the client must give informed consent to the exercise of the power of direction by the third person. The direction must be reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer. Such directions are reasonable in scope and character if, for example, the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome. Informed client consent may be effective with respect to many forms of direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction (see Comment f).

**Illustration:**

1. Resettle, a nonprofit organization, works to secure better living conditions for refugees. Resettle's board of directors believes that a case should be filed to test whether a federal policy of detaining certain refugees is legally justified. Client is a refugee who has recently been detained under the federal policy, and Resettle has offered to pay Lawyer to seek Client's release from detention. With the informed consent of Client, Lawyer may accept payment by Resettle and may agree to make contentions that Resettle wishes to have tested by the litigation.

Just as there are limits to client consent in § 122, there are limits to the restrictions on scope of the representation permitted under this Section. See § 122, Comment g (nonconsentable conflicts).

**Illustrations:**



2. Client is charged with the crime of illegally selling securities. Client's employer, Brokerage, has offered to pay Lawyer to defend Client on the condition that Client agree not to implicate Brokerage or any of its other employees in the crimes charged against Client. Lawyer may not accept the representation on those terms. Whether to accept a plea bargain, for example, and whether to implicate others in the wrongdoing are matters about which the client, not the person paying for the defense, must have the authority to make decisions (see § 22).
3. Same facts as stated in Illustration 2, except that there is no substantial factual or legal basis for implicating Brokerage or any of its other employees and Client consents to accept Lawyer's representation on the condition stated by Brokerage under the limitations and conditions provided in § 122, including knowledge that Brokerage has stated the condition. Under such circumstances, Client's consent authorizes Lawyer to accept payment from Brokerage and adhere to the described conditions.
- e. Preserving confidential client information. Although a legal fee may be paid or direction given by a third person, a lawyer must protect the confidential information of the client. Informed client consent to the third-person payment or direction does not by itself constitute informed consent to the lawyer's revealing such information to that person. Consent to reveal confidential client information must meet the separate requirements of § 62.

**Illustration:**

4. Employer has agreed to pay for representation of Employee in defending a claim involving facts arguably arising out of pursuit of Employer's business. Employer asks Lawyer what Employee intends to testify about the circumstances of Employee's actions. Without consent of Employee as provided in § 62, Lawyer may not give Employer that information.

On a lawyer's discretion to disclose confidential information of a client to a co-client in the representation, see § 60, Comment l.

- f. Representing an insured. A lawyer might be designated by an insurer to represent the insured under a liability-insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment a, beyond the scope of the Restatement. Certain practices of designated insurance-defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, communications between counsel retained by an insurer to coordinate the efforts of multiple counsel for insureds in multiple suits and such coordinating counsel are subject to the privilege. Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. Compare § 51, Comment g.

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment d hereto. With respect to client consent (see Comment b hereto) in insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent in the form of the acquiescence of the client-insured to an informative letter to the client-insured at the outset of the representation should be all that is required. The lawyer should either withdraw or consult with the client-insured (see § 122) when a substantial risk that the client-insured will not be fully covered becomes apparent (see § 121, Comment c(iii)).

**Illustration:**

5. Insurer, a liability-insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of \$5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so

*informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder (see § 52), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.*

*Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent (see § 122(2)(c)), the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 122.*

*When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see § 60) without explicit informed consent of the insured (see § 62). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (compare § 60, Comment l (confidentiality in representation of co-clients in general)).*

*With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (see § 94) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (see § 60, Comment l). If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 32 (see also § 60, Comment l). The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement (see Comment a hereto).*

*g. Legal service and similarly funded representations. Lawyers who provide representation to indigent persons may do so pursuant to various arrangements under which their fees or other compensation will be paid by a governmental agency or similar funding organization. For example, a lawyer may represent clients as a staff attorney of a legal aid, military legal assistance, or similar organization, with compensation in the form of a salary paid by the organization. Lawyers in private practice may be appointed by a court, defender or legal-service organization, or bar association to represent a person accused of crime or a person involved in a civil matter (see § 14, Comment g), with the lawyer's fee to be paid by the government or*

*organization, often pursuant to a schedule of fees. Certain for-profit legal-service arrangements have also been approved, under which individual private practitioners provide assistance to participants who pay a flat charge to the legal-service organization for limited legal services. Regardless of the method of appointment, the form of compensation, or the nature of the paying organization (for example, whether governmental or private or whether nonprofit or for-profit), the lawyer's representation of and relationship with the individual client must proceed as provided for in this Section.*

## **§ 135. A Lawyer with a Fiduciary or Other Legal Obligation to a Nonclient**

Unless the affected client consents to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client in any matter with respect to which the lawyer has a fiduciary or other legal obligation to another if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's obligation.