

## Restatement (Third) of the Law Governing Lawyers § 15 (2000)

Restatement of the Law - The Law Governing Lawyers | October 2016 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Topic 1. Creating a Client–Lawyer Relationship

### § 15 A Lawyer's Duties to a Prospective Client

Comment:

Reporter's Note

Case Citations - by Jurisdiction

**(1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:**

**(a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61- 67;**

**(b) protect the person's property in the lawyer's custody as stated in §§ 44- 46; and**

**(c) use reasonable care to the extent the lawyer provides the person legal services.**

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

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

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

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**Comment:**

*a. Scope and cross-references.* This Section summarizes the duties of a lawyer to a person seeking legal services. Duties attach even when no client-lawyer relationship ensues. On application of the attorney-client privilege to communications with a prospective client, see §

72. Application of rules parallel to those of § 132(2) on former-client conflicts of interest and those of §§ 123- 124 on imputation of conflicts is considered in Comment *c* hereto. Whether a person who consults a lawyer forms a client-lawyer relationship is determined under § 14. On duties owed by a lawyer to nonclients, see §§ 51 and 56.

*b. Rationale.* Prospective clients are like clients in that they often disclose confidential information to a lawyer, place documents or other property in the lawyer's custody, and rely on the lawyer's advice. But a lawyer's discussions with a prospective client often are limited in time and depth of exploration, do not reflect full consideration of the prospective client's problems, and leave both prospective client and lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients, as indicated in the Section and following Comments.

*c. Confidential information of a prospective client.* It is often necessary for a prospective client to reveal and for the lawyer to learn confidential information (see § 59) during an initial consultation prior to their decision about formation of a client-lawyer relationship. For that reason, the attorney-client privilege attaches to communications of a prospective client (see § 70, Comment *c*). The lawyer must often learn such information to determine whether a conflict of interest exists with an existing client of the lawyer or the lawyer's firm and whether the matter is one that the lawyer is willing to undertake. In all instances, the lawyer must treat that information as confidential in the interest of the prospective client, even if the client or lawyer decides not to proceed with the representation (see Subsection (1)(a); see also § 60(2)). The duty exists regardless of how brief the initial conference may be and regardless of whether screening is instituted under Subsection (2)(a)(ii). The exceptions to the principles of confidentiality and privilege apply to such communications (see §§ 61- 67).

Subsection (2) states rules parallel to those governing former-client conflicts under § 132, but it relaxes two analogous former-client rules. First, personal disqualification of a lawyer who deals with a prospective client occurs only when the subsequent matter presents the opportunity to use information obtained from the former prospective client that would be “significantly harmful.” In contrast, § 132 applies whenever there is a “substantial risk” of adverse use of the former client's confidential information, regardless of the degree of threatened harm. Second, screening is permitted under Subsection (2)(a) so long as the lawyer takes reasonable steps to limit his or her exposure to confidential information during the initial consultation. In contrast, screening under § 124(2)(a) is permissible only when information obtained in the earlier representation would not likely be of significance in the subsequent representation.

In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit the initial interview to such confidential information

as reasonably appears necessary for that purpose. Where that information indicates that a conflict of interest or other reasons for nonrepresentation exists, the lawyer should so inform the prospective client or simply decline the representation. If the prospective client still wishes to retain the lawyer, and if consent is possible under § 122(1), consent from any other affected present or former client should be obtained before further confidential information is elicited. The lawyer may also condition conversations with the prospective client on the person's consent to the lawyer's representation of other clients (see § 122, Comment *d*) or on the prospective client's agreement that any information disclosed during the consultation is not to be treated as confidential (see § 62). The prospective client's informed consent to such an agreement frees the lawyer to represent a client in a matter and to use in that matter, but only if the agreement so provides, confidential information received from the prospective client. A prospective client may also consent to a representation in other ways applicable to a client under § 122.

Even in the absence of such an agreement, when a consultation with a prospective client does not lead to a lawyer's retention the lawyer is not always prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter. A prospective client's assurance of confidentiality through prophylactic prohibition as broad as that required in the case of a former client under § 132 must yield to a reasonable degree to the need of the legal system and to the interests of the lawyer and of other clients, including the need of a lawyer to obtain information needed to determine whether the lawyer may properly accept the representation without undue risk of prohibitions if no representation ensues. Thus, under Subsection (2), prohibition exists only when the lawyer has received from the prospective client information that could be significantly harmful to the prospective client in the matter. In such an instance and absent the prospective client's consent, the lawyer must withdraw from a substantially related representation commenced before the prospective client communicated with the lawyer and must not represent a client in such a matter in the future, including a client the lawyer ordinarily represents on a continuing basis.

When a tribunal is asked to disqualify a lawyer based on prior dealings with a former prospective client, that person bears the burden of persuading the tribunal that the lawyer received such information. The prohibition is imputed to other lawyers as provided in § 123, but may be avoided if all personally prohibited lawyers are screened as stated in § 124(2)(b) and (2)(c) (see Subsection (2)(a)). In that situation, screening avoids imputation even when the requirements of § 124(2)(a) have not been met. In deciding whether to exercise discretion to require disqualification, a tribunal may consider whether the prospective client disclosed confidential information to the lawyer for the purpose of preventing the lawyer or the lawyer's firm from representing an adverse party rather than in a good-faith endeavor to determine whether to retain the lawyer. The tribunal may also consider whether the disclosure

of significantly harmful confidential information resulted from the failure of the lawyer or the prospective client to take precautions reasonable in the circumstances. In addition to screening, Subsection (2)(b) permits representation if both the former prospective client and any affected present client consent.

**Illustrations:**

1. Person makes an appointment with Lawyer to discuss obtaining a divorce from Person's Spouse. During the initial consultation, Lawyer makes no effort to limit the conversation or obtain any agreement on Person's part to nonconfidentiality. During the course of the one-hour discussion, Person discusses his reasons for seeking a divorce and the nature and extent of his and Spouse's property interests. Because Person considers Lawyer's suggested fee too high, Person retains other counsel. Thereafter, Spouse seeks Lawyer's assistance in defending against Person's divorce action. Lawyer may not accept the representation of Spouse. If Lawyer is screened as provided in § 124(2)(b) and (c), Lawyer's disqualification is not imputed to other members of Lawyer's firm (see Subsection (2)(a)).
2. The President of Company A makes an appointment with Lawyer, who had not formerly had dealings with Company A. At the outset of the meeting, Lawyer informs President that it will first be necessary to obtain information about Company A and its affiliates and about the general nature of the legal matter to perform a conflicts check pursuant to procedures followed in Lawyer's firm. President supplies that information in a 15-minute meeting, including the information that the matter involves a contract dispute with Company B. The ensuing conflicts check reveals a conflict of interest with another Client of the firm (other than Company B), and Lawyer accordingly declines the representation. Lawyer and the other firm lawyers may continue representing Client (see Subsection (2)(a)).
3. Same facts as Illustration 2, except that Lawyer is later approached by Company B to represent it in its contract dispute with Company A. Both Lawyer and other firm lawyers may accept the representation unless Company A had disclosed to Lawyer confidential information that could be significantly harmful to Company A in the contract dispute. Even if such a disclosure had been made, if Lawyer is screened as provided in § 124(2)(b) and (c), Lawyer's disqualification is not imputed to other members of Lawyer's firm (see Subsection (2)(a)).
4. Same facts as Illustration 2, except that President wishes their first meeting both to discuss conflicts facts and to review Lawyer's preliminary thoughts on the merits of the contract dispute. Lawyer states willingness to do so only if Company A agrees that Lawyer would not be required to keep confidential information revealed during the preliminary discussion. President agrees, and the preliminary discussion ranges over several aspects of the dispute. Lawyer later

declines the representation because of a conflict involving another firm client. Thereafter, Lawyer is approached by Company B to represent it in its contract dispute with Company A. Lawyer may accept the representation. Because of President's agreement, Lawyer is not required to keep confidential from Company B information learned during the initial consultation.

*d. Protecting a prospective client's property.* When prospective clients confide valuables or papers to a lawyer's care, the lawyer is under a duty to safeguard them in the same way as valuables or papers of any person that are in the lawyer's possession as the result of a professional relationship (see §§ 44- 46). Ordinarily, if no client-lawyer relationship ensues, the lawyer must promptly return all material received from the prospective client.

*e. A lawyer's duty of reasonable care to a prospective client.* When a prospective client and a lawyer discuss the possibility of representation, the lawyer might comment on such matters as whether the person has a promising claim or defense, whether the lawyer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within which action must be taken and, if the representation does not proceed, what other lawyer might represent the prospective client. Prospective clients might rely on such advice, and lawyers therefore must use reasonable care in rendering it. The lawyer must also not harm a prospective client through unreasonable delay after indicating that the lawyer might undertake the representation. What care is reasonable depends on the circumstances, including the lawyer's expertise and the time available for consideration (see § 52).

If a lawyer provides advice that is intended to be only tentative or preliminary, the lawyer should so inform the prospective client. Depending on the circumstances, the burden of removing ambiguities rests with the lawyer, particularly as to disclaiming conclusions that the client reasonably assumed from their discussion, for example whether the client has a good claim.

*f. Other duties to a prospective client.* In addition to duties of confidentiality and care, the lawyer is subject to general law in dealing with a prospective client. The lawyer, for example, may not give the prospective client harmful advice calculated to benefit another client (see §§ 51(2) & 56).

*g. Compensation of a lawyer for consultation with a prospective client.* In the absence of circumstances indicating otherwise, prospective clients would ordinarily not expect to pay for preliminary discussions with a lawyer. When a client-lawyer relationship does not result, a lawyer is not entitled to be compensated unless that has been expressly agreed or it is otherwise clear from the circumstances that payment will be required.

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## Reporter's Note

*Comment c. Confidential information of a prospective client.* See § 72, Comment *d*, and Reporter's Note thereto. The position in the Comment is in most respects consistent with the position in ABA Formal Opin. 90-358 (1990). Few cases address explicitly the question of the later disqualifying effect of having learned the minimum information necessary to decide whether or not the lawyer would have a conflict of interest taking a case. The position taken in the Comment follows from the principles of this section and § 132 on former-client conflicts of interest. See also, e.g., [Poly Software Int'l, Inc. v. Su](#), 880 F.Supp. 1487 (D.Utah.1995) (no disqualification when lawyer avoided learning details of case in half-hour consultation with opposing party); [Bennett Silvershein Assoc. v. Furman](#), 776 F.Supp. 800 (S.D.N.Y.1991) (no disqualification warranted by brief consultation 10 years earlier about tenuously related matter); [B.F. Goodrich Co. v. Formosa Plastics Corp.](#), 638 F.Supp. 1050 (S.D.Tex.1986) (no disqualification where prospective client held one-day discussion of case with lawyer as part of “beauty contest” but client's inside legal counsel regulated disclosures and there was no showing that confidential information disclosed could be detrimental to client); [INA Underwriters Insurance Co. v. Rubin](#), 635 F.Supp. 1 (E.D.Pa.1983) (no disqualification where lawyer held only preliminary discussion with prospective client, and lawyer was screened); [Hughes v. Paine, Webber, Jackson & Curtis, Inc.](#), 565 F.Supp. 663 (N.D.Ill.1983) (similar); [Derrickson v. Derrickson](#), 541 A.2d 149 (D.C.1988) (husband had sought unsuccessfully to retain lawyer in divorce case 8 years earlier; lawyer permitted to take wife's later case arising out of same facts); [Cummin v. Cummin](#), 695 N.Y.S.2d 346 (N.Y.App.Div.1999) (no disqualification when firm lawyer spoke briefly to opposing party 6 years earlier and was screened from present representation); [State ex rel. DeFrances v. Bedell](#), 446 S.E.2d 906 (W.Va.1994). But see [Bridge Prods. Inc. v. Quantum Chemical Corp.](#), 1990 WL 70857 (N.D.Ill.1990) (disqualification required when lawyer did not seek waiver and potential client, in one-hour discussion as part of “beauty contest,” disclosed its settlement terms and strategic advice of its other lawyers, despite screening instituted by lawyer's firm); [Bays v. Theran](#), 639 N.E.2d 720 (Mass.1994) (telephone conversation about possibility of representation, including discussion of merits, created lawyer-client relationship barring representation of adverse party); [Desbiens v. Ford Motor Co.](#), 439 N.Y.S.2d 452 (N.Y.App.Div.1981) (firm reviewed plaintiff's file in auto accident and decided not to represent him; access to plaintiff's information now bars firm from handling defense of products-liability claim arising out of same facts); [Lovell v. Winchester](#), 941 S.W.2d 466 (Ky.1997) (consultation with parties who expected lawyer to represent them bars later representation of opposing party). On the relevance of a prospective client's disclosures allegedly intended to produce disqualification, see [In re American Airlines, Inc.](#), 972 F.2d 605, 613 (5th Cir.1992).

*Comment d. Protecting a prospective client's property.* See § 44, Comment *b*, and Reporter's Note thereto; ABA Model Rules of Professional Conduct, Rule 1.15 (1983) (referring to “property of clients or third persons”).

*Comment e. A lawyer's duty of reasonable care to a prospective client.* [Meighan v. Shore](#), 40 Cal.Rptr.2d 744 (Cal.Ct.App.1995) (lawyer who speaks to wife and injured husband but represents only husband should advise wife of existence of loss-of-consortium claim); [Miller v. Metzinger](#), 154 Cal.Rptr. 22 (Cal.Ct.App.1979) (lawyer who advises potential client must mention statute-of-limitations expiration); [Togstad v. Vesely, Otto, Miller & Keefe](#), 291 N.W.2d 686 (Minn.1980) (lawyer who tells prospective client that client has no claim is liable for negligence in that opinion); [Procanik v. Cillo](#), 543 A.2d 985 (N.J.Super.Ct.App.Div.1988) (lawyer who states reasons for declining case must be professionally reasonable in those reasons, but need not disclose lawyer's opinion on how likely it is that courts will overrule adverse precedent); compare [Flatt v. Superior Court](#), 885 P.2d 950 (Cal.1994) (after initially interviewing prospective client, lawyer determined from conflict check within firm that intended defendant in suit was present firm client; no duty to inform prospective client to file suit within limitations period).

*Comment g. Compensation of a lawyer for consultation with a prospective client.* No authority on point has been found.

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## Case Citations - by Jurisdiction

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[M.D.Ala.](#)  
[Colo.](#)  
[Ill.App.](#)  
[Ind.](#)  
[Mo.App.](#)  
[N.J.](#)  
[N.Y.](#)  
[N.D.](#)  
[Tex.App.](#)  
[Wis.](#)

### **M.D.Ala.**

**M.D.Ala.**2011. Cit. in case quot. in sup. Government, on behalf of alleged victims of sexual harassment by rental agent who managed certain rental housing properties, sued rental agent

and others for housing discrimination under the Fair Housing Act (FHA). This court granted third-party housing advocate's motion to quash defendants' subpoena, holding that notes made by a paralegal of telephone conversations with persons who called in response to a form letter distributed by housing advocate were protected by the attorney-client privilege. The court reasoned that the callers contacted advocate to explore the possibility of raising potential FHA claims, whether or not they were fully knowledgeable about such claims or the particulars of the Act, and whether or not they ultimately agreed to be represented; preliminary consultations of this kind were protected by the attorney-client privilege. [U.S. v. Gumbaytay, 276 F.R.D. 671, 679.](#)

### **Colo.**

**Colo.**2011. Subsec. (1)(c) cit. and quot. but not fol., quot. in case quot. in disc., and cit. in conc. op.; com. (d) cit. in case cit. in disc. Prospective clients brought an action for legal malpractice and negligent misrepresentation against attorney and her law firm, alleging that attorney provided them with incorrect information regarding a statute of limitations, causing them to miss a filing deadline. The trial court granted defendants' motion to dismiss. The court of appeals reversed as to plaintiffs' negligent-misrepresentation claim. Reversing and remanding, this court held, among other things, that the court of appeals erred in relying on Restatement Third of the Law Governing Lawyers § 15(1)(c) as a basis for establishing a duty of care owed by an attorney to a nonclient; under Colorado law, attorneys did not owe a duty of reasonable care to nonclients, and to hold that the tort of negligent misrepresentation might be based on an attorney's duty of reasonable care to prospective clients would diminish the requirement that a plaintiff establish an attorney-client relationship in order to state a claim of malpractice. The concurring opinion maintained that the scope of § 15(1)(c) and its applicability to legal-malpractice actions in Colorado was not before the court. [Allen v. Steele, 252 P.3d 476, 479-481, 484-486.](#)

### **Ill.App.**

**Ill.App.**2015. Cit. in sup. Criminal defendant, who was in custody on charges of aggravated criminal sexual assault, was charged with solicitation of murder for hire, after he allegedly hired a fellow inmate to kill some or all of the witnesses in his sexual-assault case. The trial court granted defendant's motions to suppress certain wire-recorded evidence that the state had allegedly obtained using information from an attorney that defendant had consulted with about his sexual-assault case, but had not yet retained, who also happened to represent the inmate solicited by defendant. Reversing and remanding, this court held, among other things, that the evidence could not be suppressed on the basis that the attorney had violated any duty owed to defendant, as a prospective client, under Restatement Third of the Law

Governing Lawyers § 15. The court reasoned, in part, that defendant failed to establish that the attorney received in his consultations with defendant information that could have been significantly harmful to defendant in either the sexual-assault case or the solicitation case. [People v. Shepherd, 26 N.E.3d 964, 974.](#)

### **Ind.**

**Ind.**2009. Com. (c) quot. in sup. Criminal defendant appealed his convictions for the murders of his father, stepmother, and two stepsisters. Affirming, this court held, inter alia, that the trial court did not err in denying defendant's motion for a special prosecutor. Although the court recognized that the county prosecutor had, while in private practice, met with defendant while defendant was interviewing attorneys to act as his defense counsel regarding the murder of his family, prosecutor was not retained by defendant. The court concluded that, for a prosecutor's previous involvement with a defendant to merit disqualification, there had to be some showing that the prosecutor received confidential information that could assist the prosecution, and here there was none. [Pelley v. State, 901 N.E.2d 494, 507.](#)

### **Mo.App.**

**Mo.App.**2011. Cit. in sup., cit. in ftn., cit. in cases cit. and quot. in sup., com. (c) quot. in sup. Former wife petitioned for a writ of prohibition preventing the trial court from enforcing its order requiring law firm to withdraw from its representation of her in connection with former husband's motion to modify a dissolution decree. This court entered an order in prohibition, holding that husband did not have an attorney-client relationship with law firm. While husband had consulted with law firm prior to filing the dissolution action, he did not hire law firm to represent him, and thus was a former prospective client rather than a former client; in addition, husband did not show that the matter of the consultation and this matter were the same or substantially related and that the information received during the consultation would be significantly harmful if used in this matter. [State ex rel. Thompson v. Dueker, 346 S.W.3d 390, 395, 396.](#)

### **N.J.**

**N.J.**2011. Subsec. (2) and com. (b) quot. in sup., com. (c) quot. in sup. and in ftn. Contractor sued corporate restaurant owner, seeking payment for construction renovation and remodeling work it performed for the restaurant. The trial court denied defendant's motion to disqualify plaintiff's counsel based on defendant's assertion that defendant's principal, 18 months earlier, had consulted with plaintiff's counsel as a prospective client. On interlocutory appeal, the court of appeals affirmed. Affirming, this court held that defendant

failed to demonstrate that the matters disclosed during the consultation were either the same or substantially related to the subject matter of this action, or that the information disclosed during that consultation was significantly harmful to defendant in this action. [O Builders & Associates, Inc. v. Yuna Corp. of NJ](#), 206 N.J. 109, 123-125, 127, 19 A.3d 966, 974, 975, 977.

## **N.Y.**

**N.Y.**2015. Rptr's Note to com. (c) quot. in sup. In a divorce proceeding, husband filed a motion to disqualify wife's attorney on grounds of conflict of interest based on the prospective-client rule, alleging that he spoke with attorney's staff for an intake interview and exchanged information that could be harmful to his position. This court denied plaintiff's motion, holding that attorney did not receive confidential information or information that could be harmful to plaintiff in this matter, and the prospective-client rule did not apply, because plaintiff did not act in good faith. Citing Restatement Third of Law Governing Lawyers § 15, the court explained that the prospective-client rule contained an element of good faith, and concluded that plaintiff contacted attorney only out of motivation to ensure that attorney could not represent defendant. [Bernacki v. Bernacki](#), 47 Misc.3d 316, 320, 1 N.Y.S.3d 761, 764.

## **N.D.**

**N.D.**2015. Cit. in sup.; com. (g) quot. in sup. Father filed a disciplinary complaint against attorney, alleging that attorney agreed to represent him in a proceeding to modify his parenting schedule against his child's mother, even though attorney had previously consulted with the child's maternal grandfather about appealing the initial primary-residential-responsibility determination. The inquiry committee issued an admonition against attorney; the disciplinary board affirmed. This court dismissed the complaint, holding that there was not clear and convincing evidence that the consultation with the grandfather established an attorney-client relationship. Citing Restatement Third of the Law Governing Lawyers § 15, the court explained that usually prospective clients would not expect to pay for a consultation, but, here, the grandfather's payment of an initial consultation fee did not, by itself, establish an attorney-client relationship. [Kuntz v. Disciplinary Bd. of Supreme Court of North Dakota](#), 869 N.W.2d 117, 124.

## **Tex.App.**

**Tex.App.**2010. Com. (b) cit. in ftn. (erron. cit. as Restatement Third of Agency). After former client brought legal-malpractice claims against lawyer, lawyer moved to compel arbitration pursuant to an arbitration clause in the parties' legal services contract. The trial court ruled

that the clause was invalid or unenforceable. Conditionally granting lawyer's petition for a writ of mandamus, this court held, among other things, that the trial court erred if it refused to compel arbitration based on the unconscionability of the clause. The court rejected client's argument that mere consultation between an attorney and a prospective client created a fiduciary relationship, noting that neither Restatement Third, The Law Governing Lawyers § 15, nor Comment *b* of that section, either stated or directly supported that proposition. [In re Pham, 314 S.W.3d 520, 527.](#)

**Wis.**

**Wis.2003.** Cit. in disc. The Office of Lawyer Regulation appealed referee's finding that attorney did not violate disciplinary rule prohibiting disclosure of information related to representation of a client without client consent. Adopting the referee's findings and dismissing the action, the court held that, even though attorney had not been formally retained to represent potential client in a divorce action, his disclosures were impliedly authorized in order for him to carry out his then pending representation of potential client. [In re Disciplinary Proceedings Against Duchemin, 260 Wis.2d 12, 21, 658 N.W.2d 81, 85.](#)

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