

## A CHECKLIST TO OBTAIN CLIENT INFORMED CONSENT UNDER SCR 3.130(1.7)<sup>1</sup>

This checklist is intended to serve as a guide to assist a lawyer in complying with SCR 3.130(1.7)(b)(4)'s requirement that a lawyer obtain a client's informed consent, confirmed in writing, for the lawyer to represent multiple clients whose individual interests may be in conflict. Before approaching the client, the lawyer must determine that she reasonably believes that she will be able to provide competent and diligent representation to more than one client; the representation is not prohibited by law; and the representation does not involve the assertion of a claim by one client against another in the same litigation or other proceeding before a tribunal. Once the lawyer determines they may proceed then they may find the following checklist helpful. The lawyer should know that there is nothing in the Rules of Professional Conduct that prohibits a lawyer from explaining to each client that the lawyer is pleased to undertake a joint representation and that the lawyer's disclosure is for each client's protection and is required by Kentucky's Rules of Professional Conduct. The following checklist is intended as a guide and is not a substitute for the lawyer's careful compliance with SCR 3.130(1.7).

- Have a separate verbal communication with each client and clearly identify each client to the other and advise each client of your relationships with the other.
- Include in your communication a discussion that is in simple terms to assure that the potential client understands all of the issues discussed in this checklist.
- During your separate communications with each client you should:
  - Ask them if they have any questions about any of these matters;
  - Answer all their questions; and
  - Advise them that you will be sending them a letter containing all the information contained in your verbal explanation and that you will not be able to proceed without receiving their verbal consent, to be followed up by their informed written consent.
- Describe the types of events that would create a professional conflict of interest and advise them that if such event occurs then it is possible that you will be required to withdraw, unless:
  - You believe you can continue with the representation in accordance with the Rules of Professional Conduct; and

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<sup>1</sup> The requirements of SCR 3.130(1.7) are as follows.

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

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

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:

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

- The client then understands the ramifications, and risks of your continued representation and you again obtain their informed consent – in writing.
- Assure that each client is aware of the relevant circumstances of the material and reasonably foreseeable ways that a conflict could have both beneficial and adverse effects. Your explanation should include an explanation of the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege.
- Advise each of your clients that all information material to the common representation will be shared with all clients and you may have to withdraw if one client decides that a matter material to the representation should be kept secret from the other clients.
- Advise each of your clients that communications between you and the clients relevant to the common representation will not be privileged if offered in a subsequent action between or among any of the clients.
- Advise each of your clients that you must have the option to withdraw depending on the circumstances of your multiple representation and you may need to obtain court approval to do so.
- Advise each of your clients of the disadvantages of your withdrawal, for example, any additional costs, delay in the handling of their case, etc.
- Advise each of your clients that there might be circumstances that could cause you to limit your responsibilities to a client and describe such circumstances.
- Advise each of your clients regarding the terms of your compensation and each client’s individual obligation to pay your fees and costs, and whether any of your fees or costs will be paid by a third party. Further, explain whether your fees will be higher or lower because of the joint representation.
- The letter to each client which seeks to obtain their “informed consent” should:
  - Be written in simple, non-lawyer terms;
  - Confirm that you had a verbal communication with them about the points mentioned in the checklist;
  - Confirm the seriousness of the decision your client is being asked to make so as to avoid disputes or ambiguities that might later occur.
- Advise each client that once they give their consent, they may later revoke it, and, like any other client, they may terminate your representation at any time. As one client’s withdrawal might have an adverse effect on the other clients you should advise each of your clients of this risk and its implications if a client’s revocation will have a material adverse effect on your other clients.
- Consider suggesting to each that they seek the advice of an independent lawyer and you should give each client the opportunity to seek such advice.