



CONFLICT RESOLUTION:
Informed Consent to Conflicts of Interest under the Mass. R. Prof. C. as
Amended

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The revisions to the Massachusetts Rules of Professional Conduct in effect as of July 1, 2015 include important changes to the requirements for obtaining conflict waivers and consent to other types of mandated disclosures that require careful attention from any attorney seeking client consent. In particular, although some rules in effect before July did require written confirmation of the client's agreement to the conflict, lawyers will need to watch out for new situations in which written confirmation is now mandatory where oral confirmation was previously permissible.

In general, however, there are three variations on the types of consent that lawyers may be required to obtain from clients: consent where the client's agreement has to be confirmed in a writing signed by the client, consent where the client's agreement can be confirmed in a writing from the lawyer to the client, and (in very limited circumstances) oral consent that does not have to be confirmed in writing. This article will highlight which conflict rules require which type of consent and will end with a brief discussion of a unique quasi-conflict issue that mandates "written notice," rather than consent.

Definitions

Informed consent: As a preliminary matter, the term "consent after full disclosure" in the rules in effect prior to July 2015 has now, consistent with the ABA model rules, been renamed "informed consent." Although the change in terminology is not intended as a substantive change, there is a definition of "informed consent" in the terminology section, Rule 1.0(f), that provides a useful starting point.

Informed consent is defined very simply as the "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanations about the materials risks of and reasonably available alternatives to

the course of conduct.” Comment 6 to Rule 1.0 explains that the communication to the client necessary to obtain such consent will vary depending on the rule involved and the circumstances giving rise to the conflict and describes some of the considerations that lawyers need to take into account in obtaining consent. Comment 7 then makes explicit that obtaining informed consent generally requires an affirmative response from the client or other person whose consent is being obtained and that consent generally cannot be assumed from silence.

Confirmed in writing: The much bigger change, however, is that there are now more rules that require that consent to a conflict of interest be confirmed in writing. Again, there is a definition in Rule 1.0(c) of “confirmed in writing” that provides that this term, when used in connection with obtaining informed consent, denotes informed consent that is given in writing by the client or other person whose consent is being obtained or a writing that is promptly sent by the lawyer to confirm an oral consent. “Writing,” a term defined in Rule 1.0(q), includes any tangible or electronic record of the communication and a “signed” writing includes an electronic signature or other process intended as a signature. An email from the lawyer to the client can thus be a written confirmation.

It is of course true that not every conflict is waivable. For example, under Rule 1.7, before seeking a waiver, the lawyer has to reasonably believe that he or she can provide competent and diligent representation to each affected client. A lawyer cannot obtain informed consent to a nonwaivable conflict.

Assuming, however, that the conflict is in theory “consentable” (the term used in the rules), the net result of the rule amendments is that for most conflicts of interest, a client’s oral waiver of the conflict is no longer adequate. It has always been true in disciplinary proceedings that, if the conflict is proved, the lawyer has had the burden of proof to show that there was client consent, oral or otherwise. If the client’s consent is now required by the rules to be confirmed in writing and the lawyer can only claim oral consent, the absence of written confirmation is itself a disciplinary

violation even if the fact finder were to credit the oral consent. It also seems likely that the absence of written confirmation when required by the rules will be a factor when a conflict waiver is an issue in a civil matter.

The next sections of this article specify which rules require the client to sign the confirmation of informed consent, which permit the confirmation to be a communication from the lawyer to the client, and which rules still permit oral consent.

Confirmation of Consent Signed by the Client

Some of the rules of professional conduct (and this isn't necessarily new) require that a client's consent to a conflict be in a writing that is signed by the client. For example, Rule 1.8(a) on business transactions with clients requires the client to sign a consent to the terms of a business transaction with the lawyer; that rule has been slightly rewritten and its meaning clarified, but it has always stated that the client has to sign the consent to the transaction. Another important rule that has, both before and after July 2015, required the client's signature to a disclosure is the fee sharing rule, Rule 1.5(e), which mandates the client's written consent to a division of fees between lawyers who are not in the same firm. Rule 1.8(g), however, on aggregate settlements for multiple clients, used to permit oral consent from the clients, albeit with some specification of what the consent should entail; it now requires informed consent signed by the client.

Consent Confirmed in Writing

Rules expressly requiring consent confirmation in writing

Another group of rules for the first time requires that the informed consent be confirmed in writing, whether a writing from the lawyer to the client or a writing signed by the client.

The two most commonly referenced rules that this change will affect are Rule 1.7, which is the rule on conflicts between current clients or between the client and the lawyer personally, and Rule 1.9, former client conflicts. To the extent a

conflict under those rules is consentable, there must be informed consent and the consent must be confirmed in writing.

The lawyer therefore must put the confirmation of the conflict waiver in the fee agreement or in a letter or an email. The confirmation cannot just say “lawyer advised client that there may be conflict of interest and the client consents to the conflict.” The confirmation instead must spell out what the client was told, using Comment 6 to Rule 1.0 as a guide to what should be included. If the confirmation does not include some synopsis of the discussion, then “informed” consent has not been confirmed in writing.

Other rules now requiring informed consent confirmed in writing are Rule 1.11 (lawyers going from government service to private practice and vice versa) and Rule 1.12 (lawyers going from the judiciary to private practice and vice versa). The revisions also include an entirely new rule, Rule 1.18, on duties to prospective clients. This rule requires that any waiver of a disqualification from representing a party adverse to former prospective client has to be the result of informed consent confirmed in writing from both the new client and the prospective client

Rules incorporating the written consent requirement by reference

Other rules effectively incorporate the requirement of informed consent confirmed in writing by reference to Rule 1.7 or Rule 1.9. Rule 1.10, the imputed or vicarious disqualification rule, is a good example. Rules 1.10(a) and (b) deal with the circumstances in which an entire law firm is disqualified because one lawyer in the firm has a conflict or because the representation is adverse to a client who was represented by a lawyer formerly associated with the firm. But Rule 1.10(c) then says that the disqualification can be waived as provided in Rule 1.7, i.e., if it is a consentable conflict and the client give informed consent confirmed in writing.

Another rule that incorporates the requirement of written confirmation by reference in the comments to Rule 1.7 is Rule 7.2(b)(4), a new rule on reciprocal arrangements between lawyers for client referrals. Comment 8 to the rule specifies

that these reciprocal arrangements are governed by Rule 1.7 and that the client's informed consent to the referral arrangement must therefore be confirmed in writing.

Oral Consent

There remain a few rules in which informed consent is required but does not have to be in writing. Thus, Rule 1.6 on confidentiality has always permitted disclosure of confidential information with client consent and still does, but there is no requirement that the consent be confirmed in writing. Similarly, Rule 1.2(c) provides that the client has to give informed consent to a limited representation. Comment 8 to the rule then clarifies that the consent does not have to be confirmed in writing, but, under Rule 1.5(b) requiring fee agreements to be in writing, the scope of the representation and basis or rate of the fee must be set forth in a writing.

Related issue: written “notice” as to law-related services

Finally, another slightly different type of required client notification that must be in writing as of July 2015 is described in Rule 5.7, the rule on law-related services. The rule deals with the application of the rules of professional conduct to a situation in which the lawyer has an outside business providing services performed in conjunction with or related to the practice of law, such as real estate broker, mediator, or investment advisor. The lawyer is subject to the rules of professional conduct if the services are provided in circumstances that are not distinct from his or her law practice or if the lawyer fails to take reasonable measures to advise the client or customer that the services are not legal services and that the protections of the attorney-client relationship, such as attorney-client privilege, do not exist.

As of July 1, 2015, this rule states that the “reasonable measures” that have to be taken to advise the client include “notice in writing.” Rule 5.7 is not exactly a conflict rules and therefore does not compel “informed consent” as such, but it does at least require communication of the necessary information in writing.

Takeaways

The key point to take away from this article is that any conflict rule must be read carefully to determine whether informed consent can be oral or must be in writing and, if the latter, whether a (reasonably detailed) written communication from the lawyer to the client confirming consent is sufficient or whether the client must sign the consent. An important secondary point is that the requirement of written confirmation of consent to a conflict may well be contained in a citation to Rule 1.7, Rule 1.9 or another rule, so make sure not to skip over these types of references.

Any lawyers with questions about any of these issues, or the application of the rules to particular facts, are encouraged to call bar counsel's helpline, 671-728-8750, on Monday, Wednesday, and Friday afternoons from 2:00 p.m. to 4:00 p.m.