

## Conflict Consents Under Code Do Not Need Written Confirmation Under New Rules

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In its first opinion dealing with the transition from the Code to the new Rules of Professional Conduct, the NYSBA Committee on Professional Ethics has decided that a conflicts consent which satisfied the requirement of the Code prior to April 1, 2009, the effective date of the new Rules, does not have to be renewed and reconfirmed in writing to comply with the new Rules. Opinion 829, 4/21/09.

Under the Code, (DR 5-101(A) and DR 5-105(C)), the applicable provisions required that a client's consent to representation in a conflict with the lawyer's own interests, or with the interests of another client, be premised upon the lawyer's "full disclosure" of the implications of [the conflict] and the advantages and risks involved in the representation. No provision of the Code required that the client's consent be in writing.

In the new Rules, on the other hand, Rule 1.7(b) imposes four conditions to an effective conflicts consent. One of these – the fourth – requires that the consent be "informed" and that it be "confirmed in writing." The requirement of written confirmation did not exist under the Code.

To understand the meaning of "informed consent" and of "confirmed in writing," we need to review the definitions in new Rule 1.0, *Terminology*.

Rule 1.0(j) defines "informed consent":

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

And Rule 1.0(e) defines the term "confirmed in writing":

"Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

As we see, Rule 1.0(e) is expressed as a series of three alternatives. None of them requires that the consent be signed by both client and lawyer. [Author's Note: In my judgment, client and lawyer would have been better served by a joint signature requirement. Joint signature would guarantee a fuller discussion of the terms of retainer and of the details of the conflict and would dispel ambiguity.]

## **Construing Existing Retainer**

In Opinion 829, the Committee was asked to construe the terms of a retainer agreement which had remained in place for a number of years. The agreement anticipated that conflicts of interest might arise in the course of the relationship between lawyer and client, and contained a waiver by the client of some of these conflicts. The retainer agreement was signed by both parties.

The lawyer asked the Committee whether he was required to obtain a new consent and a new retainer agreement conforming to the provisions of new Rule 1.0(e).

The Committee advised that he was not.

In adopting the new Rules, the Appellate Divisions ... directed that the new Rules would be effective April 1, 2009, but the Court did not provide for any other transitional rules. There is no basis for concluding that consents given prior to the adoption of the new Rules are impaired or invalid as a consequence of the change in the Rules. ...

With respect to the particular inquiry before us, the inquirer states that the consent was contained in a retainer agreement. It thus already satisfied the new requirement that the consent be confirmed in writing, but the same conclusion would apply to oral consents that were validly given prior to the effective date of the Rules. The new requirement that consent to a conflict be "confirmed in writing" modifies the giving of consent. Thus, only consents that are given under the new Rules – that is, on or after April 1, 2009 – must be "confirmed in writing." This conclusion is supported by the second sentence of Rule 1.0(e) (defining "confirmed in writing"), which specifies that the writing must be obtained or transmitted at the time the person gives oral consent or within a reasonable time thereafter. There is no suggestion that consents given much earlier must now meet the formal requirements of the new Rules. We note also that the new rules do not require that the client actually sign an agreement containing the consent. See Rule 1.0(e)(ii). Moreover, any type of writing, even an email, from the lawyer to the client confirming an oral consent would be sufficient. *See* rule 1.0(x) (defining "writing" to include email or any other "tangible or electronic record of a communication or representation.").

Opinion 829 is only the first of many in our unguided transition to the new Rules.

[Author's Opinion: I disagree with the Committee's conclusion that the Courts did not intend to give retroactive effect to new Rule 1.7(b), or that the Rule should not be given that effect. Of course, without any statement as to their intent, it's impossible to know precisely what the Courts meant to do.

It seems obvious to me, however burdensome it may be to lawyers, that both client and lawyer would be better off if the Rule were interpreted retroactively. This would force us to review conflict consents in effect on April 15 and to determine whether they conform to the new Rule 1.7.

One of the conditions to client consent to conflict with another client of the lawyer in Rule 1.7(b) is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." This is a new standard which conforms more closely to the ABA

Model Rules than to the provisions of DR 5-101 and DR 5-105 in the old Code. (*See*, Roy Simon, NYPRR, May 2009, page 4.)

Presumably, the Courts would not have set a new standard for assessing conflicts if they had meant to apply that standard only prospectively. If the new standard were applied prospectively, then two standards would exist side-by-side – the old standard requiring the inscrutable opinion of a “disinterested lawyer,” and the new standard requiring that the lawyer himself reasonably believe that he is able to provide competent and diligent representation to each affected client.

In his May article, Roy Simon describes the changes in Rule 1.7(b) as “perhaps the biggest change in the rules governing day-to-day law practice...” A change of that importance should not be limited in its application by imposing an arbitrary start date.

Rule 1.7(b) should be interpreted to require that every conflict consent existing at April 15 be amended to comply with Rule 1.7(b), including the requirement that the consent be confirmed in writing.

I also believe, as I said above, that – to avoid disagreement and ambiguity – all consents should require the signature of client and lawyer.]