

Rule 1.0: Terminology

1. Current Kentucky Rule with Official Comments:

TERMINOLOGY

[1] "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

[2] "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

[3] "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.

[4] "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

[5] "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

[6] "Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

[7] "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

[8] "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

[9] "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

[10] "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

2. Proposed Kentucky Rule with Official Comments:

[1] (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

~~[2] "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.~~

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

~~[3] (c) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization and lawyers employed in a legal services organization.~~

[4] (d) "Fraud" or "fraudulent" denotes conduct having that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

[5] (f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

[6] (g) "Partner" denotes a member of a partnership, ~~and~~ a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

[7] (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

[8] (i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

[9] (j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

[10] (l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency, disciplinary or admissions entity created by the Supreme Court, or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer

may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the

applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations when screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

The proposed KRPC 1.0 Terminology adopts all MR 1.0 Terminology changes and new Comments. The Committee added “disciplinary or admissions entity created by the Supreme Court” to the definition of “Tribunal” in paragraph (m) and a cross-reference to Rule 1.10 in Comment [8] on screening. The ABA Ethics 2000 Commission’s Reporter’s Explanation of Changes expresses the Committee’s view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- **ABA Reporter's Explanation of Changes -- Model Rule 1.0**

The Commission recommends removing the Terminology section from the introductory sections of the Rules and putting it in a new Rule 1.0. The purpose of this change is to give the defined terms greater prominence and to permit the use of Comments to further explicate some of the provisions.

TEXT:

1. Delete "consult" or "consultation"

The Commission recommends deletion of the term "consent after consultation" in favor of "informed consent," which is defined in paragraph (e). This change is being made throughout the Rules. No change in substance is intended.

2. Paragraph (b): "Confirmed in writing"

The Commission has proposed requiring a lawyer to obtain the informed consent of a client or other person, "confirmed in writing," in some circumstances. See, e.g., Rule 1.7. The term "writing" is defined in paragraph (n).

3. Paragraph (c): "Firm" or "law firm"

These changes conform the definition to the changes made in the Comment to Rule 1.10. The Commission is also recommending that the material presently in the Rule 1.10 Comment be moved to the Comment under this Rule. See Comments [2]-[4]. The phrase "including the government" has been added to Comment [3] to clarify that legal departments of government entities are included within the definition of "firm." The

reference to "other association authorized to practice law" was added to encompass lawyers practicing in limited liability entities. No change in substance is intended.

4. Paragraph (d): Clarify that "fraud" refers to conduct characterized as fraudulent under other applicable law

The present definition is ambiguous because it does not clearly state whether, in addition to the intent to deceive, the conduct must be fraudulent under applicable substantive or procedural law. In other words, it is possible that conduct might be considered "fraudulent" merely because it involves an intention to deceive, even if it does not violate any other law. The Commission recommends clarifying that the conduct must be fraudulent under applicable substantive or procedural law.

5. Paragraph (e): "Informed consent"

The Commission recommends that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent." The Commission believes that "consultation" is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions. The term "informed consent," which is familiar from its use in other contexts, is more likely to convey to lawyers what is required under the Rules. No change in substance is intended.

6. Paragraph (g): "Partner": Added reference to "member of an association authorized to practice law"

As with the change to paragraph (c), this reference was added to encompass lawyers practicing in limited liability entities.

7. Paragraph (k): "Screened"

The current Model Rules do not impute conflicts of interest in certain situations when the personally disqualified lawyer is screened from any participation in the matter. See Rules 1.11(b) (former government lawyers) and 1.12(c)(1) (former judges). The Commission is proposing similar treatment of other situations involving a conflict of interest on the part of one lawyer in a firm. See Rules 1.12(c)(1) (former third party neutrals) and 1.18(d)(1) (discussions with prospective clients). The Commission is recommending that the

requirements of an effective screen be set forth in this paragraph and in the accompanying Comments.

8. Paragraph (m): "Tribunal"

This term was not previously defined. The Commission recommends including a definition and including not only courts but also binding arbitration and legislative bodies, administrative agencies or other bodies acting in an adjudicative capacity.

9. Paragraph (n): "Writing" or "written"

Given the Commission's recommendation that writings be required in more circumstances, it also recommends that the term be defined and that the definition include tangible or electronic records. With respect to electronic records, the paragraph provides a definition of "signed" that includes methods intended as the equivalent of a traditional signature. The electronic signature provisions are modeled on the Uniform Electronic Transactions Act.

COMMENT:

[1] This new Comment was added to clarify that if it is not feasible to obtain or transmit a writing at the time a person gives informed consent, a lawyer may undertake or continue representation based on the oral informed consent, so long as the writing is obtained or transmitted within a reasonable time thereafter.

[2] This paragraph was taken from the Comment to Rule 1.10. It is unchanged, except for the addition of a reference to paragraph (c).

[3] This paragraph was taken from the Comment to Rule 1.10. The only change is stylistic, and no substantive change is intended.

[4] This paragraph was taken from the Comment to Rule 1.10. The Commission concluded that the current Comment is confusing. The revision is intended to clarify that organizational structure will determine whether the entire organization or different components will constitute a firm or firms for purposes of these Rules.

[5] Under applicable substantive law, "fraud" may not be actionable unless someone relied on a misrepresentation or failure to inform and consequently suffered damages. This paragraph makes it clear that reliance is not required for purposes of the disciplinary

Rules, which focus entirely on the nature of the conduct in question.

[6] This new Comment provides cross references to Rules requiring the lawyer to obtain the informed consent of the client or another person within the meaning of this Rule. It also explains the requirements of lawyer communication under the Rule.

[7] This new Comment explains what is required in order to constitute a manifestation of consent by the client.

[8]-[10] These new Comments provide cross references to Rules that provide for screening and explain in more detail what measures may be adequate to assure an effective screen.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There are two minor variances in the proposed KRPC 1.0 from MR 1.0 as noted above - one in paragraph (m) Tribunal and the other in Comment [8] on screening. Additional language is inserted to make clear that disciplinary and admissions entities are tribunals for purposes of the KRPC and that Rule 1.10 is included in the Rules involving screening.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.