

ETHICS OPINION 040809

FACTS:

Attorney is submitting a series of questions about the written consent requirements within Montana's new Rules of Professional Conduct, effective April 1, 2004. Several of the questions implicate the Montana Supreme Court's opinion *In re Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 299 Mont. 321, 2 P.2d 3d 806 (2000), where the Court held that under the Rules of Professional Conduct, the insured is the sole client of defense counsel.

QUESTIONS PRESENTED:

1. Is an attorney retained by an insurer to defend its insured required to obtain written informed consent under Rule 1.8(f) from the insured client?
2. Is an attorney retained by an insurer to defend its insured required to comply with Rule 1.5(b):
 - a. including communicating with the insured client in writing, before or within a reasonable time after commencing the representation, to explain the scope of the attorney's representation of the insured even though this is most often now being accomplished by the insurer?
 - b. Inform the insured the rate of the attorney's fee to the insurer for representing the insured?
 - c. Inform the insured client that the insured has no responsibility for paying the retained attorney's fee and expenses?
3. Is a court-appointed public defender attorney obligated under Rule 1.5(b) and Rule 1.8(f) to:
 - a. obtain written informed consent from the indigent defendant about the public payment for the representation?
 - b. Inform the indigent defendant, in writing, before or within a reasonable time after commencing the representation, about the scope of the attorney's representation of the defendant client?
 - c. Inform the indigent defendant about the rate of the attorney's fee or that the defendant has no responsibility for paying that attorney's fee or expenses unless there is a requirement of reimbursement imposed by the court?
4. Must the consents required in the above questions be obtained or the communication to the insured/indigent defendant be given in matters in progress before the April 1, 2004 effective date of the Rules?

SHORT ANSWER:

1. Yes.
2. a. Yes.
b. Yes.
c. Yes.
3. a. Yes.
b. Yes.
c. Yes.
4. Yes, it is prudent practice to make this effort.

DISCUSSION:

The attorney's inquiries highlight a deliberate departure in the new Montana Rules of Professional Conduct from the ABA Model Rules, requiring some form of writing to confirm a clients' understanding of the scope and terms of the attorney-client relationship. The Montana departures from the Model Rules are noted in italics here:

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives *written* informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
- (3) and information relating to representation of a client is protected as required by Rule 1.6.

Rule 1.5: Fees

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated *in writing*. *This paragraph does not apply in any matter in which it is reasonably foreseeable that total cost to a client, including attorney fees, will be \$500 or less.*

Several of the phrases and words used in these Rules are included in Rule 1.0: Terminology. These and their definitions include:

- (g) "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.

- (p) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostatting, photography, audio or video recording and e-mail. A “signed” writing includes the electronic equivalent of a signature, such as an electronic sound, symbol or process which is attached to a writing and executed or adopted by a person with the intent to sign the writing.

A defined phrase not used in the portions of the Rules cited, but relevant to the inquiry, is “confirmed in writing.” This means:

- (d) “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 (g) 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.

Before submitting the proposed Rules to the Court, the Ethics Committee made a deliberate decision in several instances to include a writing requirement beyond that offered in the Model Rules. Consistent with the Model Rules, the Committee suggested replacing the phrase “consent after consultation” with “informed consent.” The point of the changes was to pay particular attention to the client’s level of understanding about the decision at the time it is made. Whatever the client’s level of understanding about a decision, the Rules require that those decisions be documented by the lawyer not at all or in one of two ways: confirmation in writing by the lawyer or confirmation in a writing signed by the client.

It is notable that the requirement that an agreement be confirmed in writing does not mandate a client signature. Explaining the range of the writing requirement, Donald Lundberg, the Executive Secretary of the Indian Supreme Court Disciplinary Commission, wrote in an article appearing in *The Professional Lawyer*, titled “Documenting Client Decisions: A Critique of the Model Rules Post-Ethics 2000”¹:

¹ Volume 14, Issue No. 4 (2004).

At the lowest range of formality, a confirmation in writing may be as simple as an e-mail message from the lawyer to the client or, arguably, even a message left by the lawyer on the client's voicemail ("audio recording" in 1.0 (p)). Because the definition of a writing is so broad, it would be arguably sufficient if the lawyer telephoned a client's administrative assistant and requested that a message be written down and given to the client. At bottom, the minimum documentation requirements for confirmation in writing are not demanding, but more significantly, they cast the client in the purely passive role of being a recipient.

Mr. Lundberg's explanation of the heightened requirement is helpful in understanding the Ethics Committee's recommendation of that standard:

The enhanced duty to memorialize some decisions in the form of a writing signed by the client adds a new element to documentation of client decisions—it calls for the client to play an active role in the documentation process. Just as the requirement imposed upon the lawyer to confirm certain client decisions in writing is not onerous, the active participation by the client called for by the requirement of a writing signed by the client imposes very little burden on either lawyer or client. As explained above, the definition of a writing is very expansive and incorporates recent advances in the technology of communication. And the signature requirement is satisfied by virtually any reliable means of authenticating that the writing was made or adopted by the client.

Mr. Lundberg further explains:

It comes down to whether such client decisions are sufficiently important that, at a documentation level, some overt act of assent by the client ought to be required. If nothing else, the requirement that the client take an affirmative step is one more safeguard to assure that the client is making a conscious decision under circumstances where the consequences of the decision might ultimately be to the client's disadvantage.

...[T]he client is well served because the client is compelled to actively participate in the documentation process in cases where the interests of others are at play, thereby impressing upon the client the importance of the decision. All client decisions made during the course of a legal representation are important, but the lawyer's duty to be assured that a client's consent is voluntary and fully informed should be calibrated to correspond to the gravity of the decision. A client's willingness or unwillingness to sign a consent is an important gauge of the client's appreciation of the

importance of the rights being given up [or given]. The lawyer is equally well served by having a sound and irrefutable foundation of client consent to support going forward with an agreed course of action. Having the client's signed consent in the file is a prudent, self-protective step that in no way conflicts with the rights of the client.

Communication with a client to the extent emphasized in the attorney's inquiry is helpful overall to the client, and potentially may also be helpful if not vital for the attorney. Particularly in the case of an insured, a clarification of the respective roles of insurer and insured and a statement of the scope of the representation, and who is paying what amount for the service, provides the client refreshingly direct information. For those practicing largely in this area, a standardized form explanation should serve to address this requirement simply and easily.

In the case of indigent defendants relying upon court appointed public defenders, the burden is insubstantial. Indigent defendants must typically complete an indigency questionnaire and specifically request representation. The request is either approved or disapproved by the Court before whom the defendant appears. If the attorney-client relationship breaks down, the Court makes the decision about replacement counsel. The Committee believes a heightened understanding by defendants of the scope, terms and fees involved for the representation benefits the system overall. This is particularly the case with the indigent defendant, who often has the peculiar notion that a court appointed attorney will be somehow less likely to give their all for the client because the client isn't paying the bill. Understanding from the first office meeting that the court appointed attorney's first loyalty is to the defendant should help assuage these concerns and heighten the stability of the relationship, at least as to this point.

We believe that in both instances such informed consent or participation may tend to re-assure the client that the lawyer who may have been selected by the insurer or the Court has the duty of absolute loyalty to the client.

Finally, as to the question about an effective date for the Montana Rules adopted April 1, 2004: It is not in this Committee's purview to establish whether the new Rules are retroactive. The retroactive application of these Rules is an issue that will ultimately be decided by the Montana Supreme Court. However, we note that in many cases the requirement of obtaining informed consent is simply a clarification of the attorney's obligation to obtain "consent after consultation." We also note that a portion of the writing requirement of Rule 1.5(b) was part of the

original language of the Rule, prior to the Rule's amendment. The writing requirement is not new. We recommend that lawyers who have not already communicated in writing with their clients about the scope, terms and fees involved in the particular representation consider making this effort. As was noted above, this could be as simple as a letter or phone message confirming the prior nature of the relationship and that this arrangement should continue as it has previously.

CONCLUSION:

It is the Committee's opinion that the writing and informed consent requirements of the new Rules are not overly burdensome. Rather, these simple requirements contribute to enhanced communications with clients about the scope, terms and fees involved for the representation. These requirements also solidify for the client the nature of the attorney's loyalty. Clients are more likely to work with their attorney when they know that the attorney's duty and responsibility lies with the person being represented, and not to the person or entity paying the bill.

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