By A.J. Singleton

When I used to ask a mentor of mine what to do in a particular situation, he was fond of reminding me – "What do the Rules say? If you don't know the Rules, you can't play the game." Effective July 15, 2009, the "Rules" – specifically the Kentucky Rules of Professional Conduct – changed drastically. Just how drastically is illustrated by the fact that Kentucky Supreme Court Order No. 2009-05, which revised the Rules and their corresponding Comments, is 134 single-spaced pages long.[1] Necessarily then, this article cannot and will not address all of the changes to the Rules and Comments, and is no substitute for reading the revised Rules yourself. Instead, the article will highlight some of the more important, but perhaps less visible, Rule changes that may affect your everyday practice.[2]

Informed Consent Confirmed in Writing; Advance Waivers; and Duties to Prospective Clients

Though some of the "Conflict" Rules were reworded, the basic concepts behind them remain largely unchanged. With current client conflicts, the key concerns are still "direct adversity" and "material limitations," and with former client conflicts, one still must be concerned with "the same or a substantially related" matter. One important change, however, is the Kentucky Supreme Court's emphasis on documenting a client's consent to waive a conflict, and ensuring that such consent is an informed one.

A new "Terminology" Rule, Rule 1.0, its Comments, and new Comments to Rule 1.7 address what makes the client's consent an "informed" one. Adequate information must be shared with the client, and that discussion should address the relevant circumstances, material risks, and reasonable alternatives.[3] Sometimes, it may be advisable to have the client consult with another attorney about the waiver; at the same time, the discussion with a sophisticated client experienced in legal matters may require less information in order to make that client's consent an informed one.[4] In addition, if the lawyer will be representing more than one client in the same matter, the discussion must address issues inherent in multiple representations, especially the inability to provide legal advice to one client against the interests of the other, the effect on the attorney-client privilege among the jointly represented clients, and the status of confidential information, relevant to the matter, that one client may share with the lawyer.[5]

As for documenting the client's informed consent, what was previously "good practice" is now required: the informed consent to waive a conflict *must* be confirmed in writing. This "confirmed in writing" requirement applies to both current client conflicts of interest and former client conflicts of interest.[6] With respect to client consent to certain undertakings, such as a client's agreement to a non-refundable retainer, the writing must be signed by the client.[7] But at least with respect to documenting a client's consent to waive a conflict of interest, the lawyer does not need to have the client actually sign the document. "Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent,"[8] and should be sent to the consenting client as soon as practicable after the consent is given. At the same time, a client's silence will not typically be deemed to mean that the client has consented; some affirmative response to a request to waive the conflict must ordinarily be present.[9]

From a practical standpoint, the lawyer should consider documenting at least some of the discussion with the client to evidence that the consent was an informed one. In explaining the requirement of the written confirmation, Comment 20 to Rule 1.7 states:

> The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Thus, to eliminate any ambiguity as to what was discussed or what the client agreed to waive, the lawyer should consider adding to the written confirmation a paragraph or two about the discussions she had with the client regarding the conflict and the waiver. Likewise, if the lawyer is at all concerned that the consent may be challenged in the future, the lawyer should also consider having the client sign the writing. This will further impress upon the client the importance of the waiver and will evidence that the

client actually agreed with what the writing says.

The new Comments, specifically Comment 22 to Rule 1.7, recognize advance conflict waivers. The enforceability of an advance waiver will likely be judged by whether the client reasonably understood the risks of agreeing to waive a conflict that had not yet materialized, i.e., whether the consent to waive future conflicts was an "informed" one. Therefore, the more specific an advance waiver is, the more likely it will be upheld if challenged. For example, an advance waiver is more likely to be upheld if it specifies the types of representation involved (such as transactional, litigation, etc.), and/or specifies the clients, or types of clients, whom the lawyer will represent in future matters adverse to the consenting party. In addition, Comment 22 specifically recognizes that an advance waiver is also more likely to be upheld if the consenting client is a sophisticated user of legal services and/or is independently represented by another lawyer regarding whether to agree to the advance waiver. At the same time, if the conflict that actually materializes in the future would be nonconsentable under any circumstances, the advance waiver will not be effective – no matter how sophisticated the waiving client or how specific the advance waiver.

New Rule 1.18 imposes certain duties

on lawyers regarding persons who consult with them about potential representations, although the protections afforded prospective clients by Rule 1.18 do not rise to the levels afforded current or former clients. Under Rule 1.18, if a prospective client discusses with a lawyer the possibility of forming an attorney-client relationship and the lawyer learns during that discussion relevant information that could be "significantly harmful" to the prospective client in the same or a substantially related matter, the lawyer will not be able to represent another client against the prospective client in that matter.[10] The key inquiry appears to be whether the information obtained during the discussion would be "significantly harmful" to the prospective client as the Comments stress that "the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter."[11]

Granted, not everyone who talks with a lawyer about a potential representation will be afforded such protections: if the person unilaterally provides information to the lawyer, or there is no reasonable expectation that the lawyer is interested in forming an attorney-client relationship, the person is not entitled to Rule 1.18's protections.[12] And though it may never happen, the Comments to Rule 1.18 even recognize that a lawyer may condition her discussions with the prospective client on the person's agreement that, regardless of what the person may share with the lawyer during the discussion, the lawyer may undertake representation adverse to that prospective client.[13] Such consent must be an informed one, and though the Comment does not specifically address it, such informed consent should probably be confirmed in writing and probably even signed by the prospective client given the nature of what the prospective client would have consented to allow.

Under Rule 1.18, if the lawyer involved in the discussion would be disqualified from being adverse to the prospective client, that disqualification will also be imputed to all other lawyers in the "tainted" lawyer's law firm, unless the law firm takes prompt action. The law firm can avoid imputation by (a) obtaining informed consent, confirmed in writing; or (b) screening the "tainted" lawyer from the matter, apportioning that lawyer no part of the fee, and promptly providing written notice of the screen to the prospective client.[14] If the prospective client has retained other counsel at that point, the written notice of the screen should be sent to the prospective client's attorney. (And, importantly, to avail oneself of the "screening and notice" protections against imputation found in Rule 1.18(d)(2), the "tainted" lawyer must first have taken "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client.")

Because of the danger of disqualification and the possible imputation of that disqualification to the entire law firm absent prompt action, it remains good practice for the lawyer to obtain from potential clients only enough information from which to determine whether the lawyer would have a conflict of interest and whether, generally, the representation is the type that the lawyer is interested in undertaking.

Candor toward the Tribunal; Fairness to Opposing Party and Counsel; and Respect for the Rights of Third Persons

New Rule 3.3 regarding candor toward the tribunal has resurrected a duty not seen in Kentucky since the days of the Code of Professional Responsibility – the lawyer's duty to disclose contrary authority to the tribunal. Under the old Code of Professional Responsibility (1971-1990), a lawyer was required to disclose to the tribunal "[l]egal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel."[15] The Kentucky Supreme Court chose not to include the requirement when it originally adopted the Rules of Professional Conduct in 1990.

New Rule 3.3(a)(2) is a return to the days of required disclosure of contrary authority: "A lawyer shall not knowingly: … fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Even before this recent change, the Comments noted that "[a] lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities."[16] But now, the Kentucky Rules of Professional Conduct stress the "special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process."[17] It is understandable, then, that the Comments further justify the disclosure of contrary authority requirement by explaining that "legal argument is a discussion seeking to determine the legal premises properly applicable to the case."[18]

Another new obligation under the revised Rules is the prohibition against requesting that certain non-clients refrain from voluntarily communicating with an opposing party, including that opposing party's counsel. Specifically, new Rule 3.4(g) requires that "A lawyer shall not: … request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or agent who supervises, directs or regularly consults with the client concerning the matter or has authority to obligate the client with respect to the matter; [and][19] (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." The Comments explain that "[t]he lawyer must reasonably believe that the person's interests will not be adversely affected by compliance with the request" that the person not voluntarily provide information to opposing counsel;[20] however, they also caution that "[a] request that a person refrain from giving information to prosecutors or law enforcement and

regulatory officials will almost never be proper, because that person could violate the law or otherwise be adversely affected by a lack of cooperation with such persons, and such a request might involve the lawyer's violations of other provisions of these Rules and other law."[21] The Comments also address civil matters: "A request in a civil matter may or may not be proper under the Rule, depending upon the person's interests in the matter, if any, and upon what a lawyer would reasonably believe in the circumstances."[22] These Comments demonstrate just how difficult it may be for a practicing attorney to determine, in a particular situation, whether she will be challenged for having asked a non-client not to answer opposing counsel's requests for information.

Inadvertent disclosure is also a "hot topic" of the revised Rules: specifically, the responsibilities of the lawyer who receives a document she knows, or has reason to know, was not meant for her to receive. Under Kentucky's new Rule 4.4(b), "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall: (1) refrain from reading the document, (2) promptly notify the sender, and (3) abide by the instructions of the sender regarding its disposition." This obligation to refrain from reading, notify the sender, and abide by the sender's instructions is not a new concept in Kentucky. KBA E-374 (Nov. 1995) previously took the position that the unintended recipient lawyer should refrain from reading the document, notify its sender, and abide by the sender's instructions. Now, Rule 4.4(b)'s use of the word "shall" makes such course of action mandatory.

Interestingly though, the Kentucky Supreme Court's stance on the unintended recipient's responsibilities contrasts sharply with the ABA Model Rules' position on the issue. Under ABA Model Rule 4.4(b), revised in 2002, the unintended recipient lawyer's duty is limited simply to that of notifying the sender. In fact, following the ABA's adoption of its revised Model Rule 4.4(b), the ABA's Standing Committee on Ethics and Professional Responsibility confirmed, in no uncertain terms, that the ABA Model Rules do not require the recipient lawyer to refrain from reading the document, nor do they require the recipient lawyer to abide by the sender's instructions.[23] Therefore, a Kentucky lawyer whose practice involves other jurisdictions, or whose opposing counsel may be subject to another jurisdiction's ethics rules, needs to be conscious of this distinction between the Kentucky Rule and rules in states that may have adopted the 2002 version of ABA Model Rule 4.4(b). To that Kentucky lawyer's dismay, the opposing lawyer who receives the inadvertently sent fax or email may have a duty to notify the sender, but he may not have a duty to refrain from reading the document and he may not have a duty to follow the sender's instructions for the document's return or destruction.

Direct Solicitation of Former Clients

Rule 7.09 regarding "Direct Contact with Potential Clients" contains a subtle change that could have a huge effect on the ability of Kentucky lawyers to solicit new legal work from their *former* clients. Under the previous version of Kentucky's Rule 7.09, a lawyer *could not*, in person or by telephone, initiate contact or solicit professional employment from a prospective client *unless* the person was either (a) a family member or (b) someone with whom the lawyer had a "direct *prior* professional relationship." New Rule 7.09(1), set forth in part below, further limits the categories of potential clients whom the lawyer can contact directly:

> No lawyer shall directly or through another person, by in person, live telephone, or real-time electronic means, initiate contact or solicit professional employment from a potential client unless:
> (a) the lawyer has an immediate family relationship with the potential client; or
> (b) the lawyer has a *current* attorney-client relationship with the potential client.[24]

By comparing the exceptions in the old version of Rule 7.09 and those in the new version, one can see how the new Rule has further limited the types of permissible real-time or in person solicitations. According to the Rule as written, no longer may an attorney simply call up a former client about a new

potential representation. Comment 1 to Rule 7.09 bolsters this interpretation of the change, recognizing that: "Communications to prior clients are not prohibited *if* the lawyer *is required by the circumstances of the representation* to communicate with a prior client to advise the client of changes in the law that would result in additional legal work."[25] Read together, new Rule 7.09 and Comment 1 to the Rule suggest that only in limited situations may a Kentucky-licensed attorney initiate contact, in person or by telephone, with a former client about possible representation on a new matter.

Conclusion

These are simply a few of the new Rules of Professional Conduct, and new Comments to those Rules, that may affect your practice. While you may find this article and others on the new Rules helpful, there is simply no substitute for taking the time to review the Rules and Comments yourself.

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ENDNOTES

1. *In re: Order Amending Rules of the Supreme Court (SCR)*, Order 2009-05, found online through the Kentucky Bar Association's website: www.kybar.org.
2. *See also* D. O'Roark, "A Quick Reference Guide to the 2009 Kentucky Rules of Professional Conduct," *Kentucky Bar Association Bench & Bar*, September 2009, at 29-35, as another resource identifying significant Rule changes effective July 15, 2009.
3. Kentucky Supreme Court Rule ("SCR") 3.130 (Rule 1.0(e)).
4. SCR 3.130 (Rule 1.0), Comment 6.
5. SCR 3.130 (Rule 1.7), Comments 18, 30 and 31. Comment 30 explains: "With regard to the attorney-client privilege, the prevailing Rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised." Likewise, Comment 31 explains: "As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation….The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential." *See also An Unnamed Attorney v. Kentucky Bar Association*, 186 S.W.3d 741 (Ky. 2006).
6. SCR 3.130 (Rule 1.7(b)(4) and Rule 1.9(a)).
7. *See*, *e.g.*, SCR 3.130 (Rule 1.5(f)).
8. SCR 3.130 (Rule 1.7), Comment 20.
9. SCR 3.130 (Rule 1.0), Comment 7.
10. SCR 3.130 (Rule 1.18(a) and (c)).
11. SCR 3.130 (Rule 1.18), Comment 6.
12. SCR 3.130 (Rule 1.18(a)) and Comment 2.
13. SCR 3.130 (Rule 1.18), Comment 5.
14. SCR 3.130 (Rule 1.18(d)(1) and (2)).
15. Kentucky Code of Professional Responsibility, DR 7-106(B)(1).
16. SCR 3.130 (Rule 3.3), Comment 4; also found in Comment 3 to the previous version of SCR 3.130 (Rule 3.3).
17. SCR 3.130 (Rule 3.3), Comment 2.
18. SCR 3.130 (Rule 3.3), Comment 4.
19. Neither "and" nor "or" appear in Kentucky Supreme Court Order 2009-05; however, both the ABA Model Rule version of this Rule and the KBA Ethics 2000 Committee Report include "and" to connect the two conditions.
20. SCR 3.130 (Rule 3.4), Comment 4.
21. *Id*.
22. *Id*.
23. *See* ABA Formal Op. 05-437 (Oct. 1, 2005). In proposing the Kentucky Rule, the KBA Ethics 2000 Committee recognized the danger that modern technology poses for lawyers. The Committee noted the growing problem of misdirected faxes and emails, and the ease with which such misdirection could occur. As a result, the Committee believed that more stringent requirements on the unintended recipient were warranted. The Committee's Report explains that "[b]ecause electronic communication is so prone to this kind of error, the Committee concluded that principles of fairness should govern attorney behavior in these circumstances which, in turn, will promote both just ends and civility in the means of achieving them." *See* The KBA Ethics 2000 Committee Report (Nov. 16, 2006), at 4-17 and 4-18.
24. SCR 3.130 (Rule 7.09(1))(emphasis added).
25. SCR 3.130 (Rule 7.09), Comment 1 (emphasis added).