

Maine Legal Ethics and Liability Newsletter

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In our first issue we discussed some of the data on the types and frequency of malpractice and ethics complaints and discussed some of the implications of that data. Before starting to write about what you can do to try to avoid problems, we thought it would be helpful to give you a quick summary of some of the new and changed rules of professional conduct.

Effective August 1, 2009, Maine replaced its former Code of Professional Responsibility (commonly referred to as the “Maine Bar Rules”) with the Maine Rules of Professional Conduct (the “New Rules”). The New Rules follow the numbering system, organizational structure and – for the most part – the language used in the ABA Model Rules. However, the Task Force’s Preamble to the New Rules points out that in some respects the New Rules and the ABA Model Rules do not coincide. It is, therefore, “critically important” that the user of the New Rules understand that they “are not identical to the ABA Model Rules.” (Preamble ¶ 2)

The New Rules take up many more pages than did the prior Bar Rules, mostly because the New Rules have been published with Comments and Reporter’s Notes after each section. The Comments are those from the ABA and accompany the ABA Model Rules. The Reporter’s Notes are the notes of the Reporter to the Maine Task Force on Ethics which was created by the Court to prepare the new Rules for the Court’s consideration. In reading the Comments and Reporter’s notes, beware that they were not adopted by the Law Court as part of the New Rules but rather were published to provide “background information and illustration.” It remains to be seen how the Court will use the Comments and Notes, especially because some of that narrative appears to contain substantive requirements. So, it is important that you read both the Comments and Reporter’s Notes in conjunction with each rule’s text in order to understand the rule.

This article will focus on some of the most significant differences between the New Rules and the old Maine Bar Rules, as well as some of the important ways in which the Task Force and the Law Court deviated from the language of the ABA Model Rules.

Rule 1.1: Competence

The New Rules specifically define what “competent representation” as “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” In the Reporter’s Notes, the Task Force considered whether a lawyer’s liability for malpractice would be a per se violation of Rule 1.1. The final result was that a determination of civil liability should not itself be the basis for a Rule violation, and that not every mistake made by a lawyer necessarily suggested incompetence. Similarly, in the Preamble the Task Force recommended that a Rule violation should not itself give rise to a cause of action or presumption of breach of a legal duty, a.k.a. negligence.

Bernstein Shur Legal Ethics and Professionalism Group



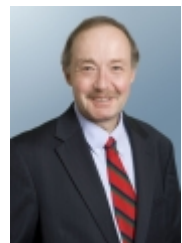
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Rule 1.2: Scope of Representation and Allocation of Responsibility Between Client and Lawyer

New Rule 1.2(a) provides, with limited exceptions, that a lawyer “shall” abide by a client’s decisions concerning the objectives of representation. Comment 2 to that Rule acknowledges that a lawyer and client may disagree about the means to be used to accomplish the client’s objectives, however, the Rule does not “prescribe how such disagreements are to be resolved.” Rule 1.2(b) is new; it provides that your representation of a client, including by court appointment, does not constitute “an endorsement of the client’s political, economic, social or moral views or activities.”

Rule 1.5: Fees

The New Rule does not require, but strongly encourages, the use of engagement letters setting forth the scope of representation and the basis or rate of fees and expenses. Notably, no client signing is required for a non-contingent fee agreement. See Rule 1.5(b); Comment 2. The Rule does not address fixed fees, but Comment 5 says that a lawyer “should not enter into an agreement whereby services are to be provided only up to a stated amount” (e.g. “I will give you \$5000 worth of service and then stop.”). Note that this provision is in the Comments and not the New Rule.

As in the past, Rule 1.5(c) requires that contingent fee agreements must be in writing and signed. The new “referral fee rule,” found in Rule 1.5(e), is similar to the former Maine Bar Rule 3.3(d),—however, the client’s consent now must be “confirmed in writing” as defined in Rule 1.0(b), meaning by a written or electronic confirmation sent to the client by the lawyer.

Rule 1.6: Confidentiality of Information

Rule 1.6 is a very critical Rule for all attorneys to understand. The combined Rule, Comments and Reporter’s Notes narrow the scope of protected information from “information relating to the representation of the client” under the old Maine Bar Rules to “confidences and secrets.” The phrase “confidences and secrets” is intended to protect only information originating from the client. But note that, as stated in the Preamble ¶17, while the New Rules do not determine whether a client-lawyer relationship exists, the duty of confidentiality may attach before the establishment of the actual client-lawyer relationship. This is addressed in detail in Rule 1.18.

New Rule 1.6 also sets out what are permissible—but not mandatory—situations where a lawyer may disclose a client’s confidences or secrets. The Rule also defines “confidence” as information subject to the attorney-client privilege and “secret” as other relevant information for which there is a “reasonable prospect” (whatever that means) that revealing it will (not “possibly”) adversely affect a “material” (not “slight”) interest of the client or the client has instructed you not to reveal it. Those new permissible disclosures include the following:

(1) Rule 1.6(b)(1): Whereas in the past the Rules had permitted disclosure of client confidences that were “likely to result in death or bodily harm to another person,” or to “avoid furthering of a criminal act,” the New Rule provides that information that can be revealed to “to prevent reasonably certain substantial bodily harm or death.”

(2) Rule 1.6(b)(2): The New Rule permits the disclosure of information to prevent the client from committing a crime or “that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.”

(3) Rule 1.6(b)(3): This provision substantially broadens the scope of permissible disclosure of information that would serve to “prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” The notion that a disclosure can be made to mitigate or rectify a harm that has already happened is entirely new to the Rules and significantly alters what had previously been thought of as permissible disclosures to prevent harm from happening in the future.

Rule 1.7: Conflict of Interest: Current Clients

New Rule 1.7(a)(1) clarifies a long misunderstood rule of conflicts that was implicit but not clearly stated in the old Maine Bar Rules. Specifically, a conflict includes any situation in which “the representation of one

client would be directly adverse to another client, even if the representation would not occur in the same or substantially related matters.” For example, if you represent Client A in commercial litigation, and Client B wants your help in a real estate transaction in which Client A is the seller, that would constitute a conflict of interest. And it is a conflict even if Client A gets a different lawyer to handle the real estate transaction, Client A remains a current client of your firm, and you may not undertake the representation of Client B in that deal without the consent of both parties confirmed in writing.

The concept of “informed consent” is defined in the new definitions section, at Rule 1.0(e). All such informed consents must be “confirmed in writing,” which is a new requirement that was not in the Bar Rules. This does not mean that the client must sign the consent. It is sufficient if the lawyer sends a letter or other written (e.g. electronic) communication to the affected parties confirming the facts and the consents agreed to by the parties.

The New Rule does not explicitly address “issue conflicts” (e.g. taking a position in one case that may be inconsistent with the interests of another client in another case), but the Reporter’s Notes do discuss that an issue conflict “can, under certain circumstances, ripen into a true, albeit consentable conflict-of-interest.” When a lawyer recognizes the existence of an issue conflict, she must go through the analysis as set out in Rule 1.7(b) “to determine whether the ‘conflict’ presents a risk to the representation that is significant enough to constitute a true conflict.” Here is the bottom line—as stated in Comment 24:

A conflict-of-interest exists, however, if there is a significant risk that a lawyer’s action behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.

A particular problem is created by Comment 21 to Rule 1.7 which states that a “client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time.” This right of revocation is not found in the text of the New Rules and creates a dilemma for the lawyer, since the Court expressly stated that it was not adopting the Comments when it adopted the New Rules. In light of that reservation by the Court and resulting ambiguity, it is unclear whether a client has in fact a right to revoke consent which the lawyer must honor. Further compounding the ambiguity, the Comment also provides that whether the revocation of consent by a present or former precludes the lawyer’s continuing representation of another party depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the other client’s reasonable expectations, and whether material detriment to the other client or the lawyer would result.

And although the New Rules are again silent on the issue, Comment 22 permits the use of advance waivers of conflicts of interest under certain conditions as set out in that Comment. As above, it is not clear to what extent the Court would deem this to be an enforceable standard given the statement in the Preamble that the Comments were included for “background and illustration.”

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

There are a number of points of substantive departure from the old Maine Bar Rules:

(1) In a business transaction between lawyer and client, the client’s informed consent now must be confirmed in a writing signed by the client; Rule 1.8(a)(3).

(2) Payment of a lawyer’s fee by a third party now requires a client’s informed consent. This was not in the old Maine Bar Rules. Rule 1.8(f). See Comments 11 and 12.

(3) Written consent, signed by each client, to aggregate settlements or plea bargains is now required, not just “consent” as under the old Bar Rules. Rule 1.8(g).

Rule 1.9: Duties to Former Clients

Under New Rule 1.9(b), there only is a conflict if:

(1) The new representation is in connection with the same or a substantially related matter in which the lawyer's previous firm had represented the former client, and

(2) The lawyer in question personally acquired confidences or secrets of the former client that are material to the matter (there is no imputation of knowledge of confidences or secrets to the departing lawyer).

This requirement of both a substantial relationship and the actual acquisition of material confidences or secrets as a prerequisite to a conflict is a material change from the former Bar Rules standard. The Reporter's Notes point out that the "substantially related" standard is an "objective test", and further that "this rule reflects the reality, particularly in large law firms, that a lawyer may not be aware that a certain client was represented by his or her former firm, much less gained confidential information about that client . . ." Further, matters are "substantially related" even if they involve different proceedings, if there is a "substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

The New Rule also somewhat relaxes the form of curative consent that is required from the former client. Previously the former client had to give written informed consent; now that informed consent need only be "confirmed in writing."

In the next issue we will continue this review of the New Rules.

The *Maine Professional Ethics and Liability Report* is published by the Legal Ethics and Professionalism Group at Bernstein Shur and is intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the information in the *Report* is generic, it should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at jpaterson@bernsteinshur.com.