

Informed Consent Under the Rules of Professional Conduct

by David C. Little

Lawyers have a duty to communicate with clients as part of their basic professional and fiduciary obligations.¹ The duty derives in large part from the principal and agent characteristics of the lawyer–client relationship as described in the *Restatement (Second) of Agency* § 381. A lawyer is obliged to keep a client reasonably informed about the status of a matter and to share with the client information about the progress, prospects, problems, and costs of the representation.² As a general proposition, the lawyer should tell the client about important case developments in a timely fashion as the case continues so that the client is aware of the progress of the matter.³ These general principles are specifically addressed in Rule 1.4 of the Colorado Rules of Professional Conduct (Rules or Colorado Rules).⁴

The current Colorado Rules, which became effective on January 1, 2008, introduced concepts to improve communications between lawyers and clients. In addition to the traditional concept of consent after consultation, the Rules now address the concept of informed consent. This is more than just a change in nomenclature; it is a modification in the process by which a client consents to a proposal recommended by the lawyer to pursue the client's objective.

The American Bar Association's (ABA) Ethics 2000 Commission (Commission) formally addressed the concept of informed consent when it drafted revisions to the ABA Model Rules of Professional Conduct (Model Rules) that included the process by which informed consent is acquired.⁵ The new language, which was finalized in 2007, was then incorporated into the 2008 version of the Colorado Rules.

When the ABA Commission began reviewing it, the concept of informed consent was not a new one in Colorado. It was suggested as a part of lawyer–client communications as early as 1991 in an article by Craig Fleishman published in *The Colorado Lawyer*.⁶

The ABA Commission modified the Model Rules after concluding that the directive for “consent after consultation” did not sufficiently define the lawyer's obligation. The Commission was careful to point out that the changes in wording were not intended to modify the substantive concept, but only to give more definitive guidance to the practitioner. Consent is and always has been the client's concurrence with or acquiescence in another's proposition.

It is an intelligent choice to do something proposed by another. This has not changed. What has changed is the process by which the client's acquiescence is obtained and given. This article is intended to help practitioners understand this process to ensure compliance with the Colorado Rules.

Colorado Rule 1.4—Then and Now

Colorado Rule 1.4 as modified is more elaborate and more specific than the previous Rule and addresses both the timing and quality of lawyer–client communications. It encompasses every aspect of the representation, from scope of engagement to termination of the relationship.⁷

Rule 1.4 has always required the lawyer to keep the client reasonably informed about the status of a matter and to comply with the client's requests for information. The lawyer was directed to explain the matter to the extent necessary to permit the client to make an informed decision about how to continue. The Comment to Rule 1.4 in the 1993 Rules instructed lawyers to provide clients enough information so that clients could participate intelligently in decisions concerning the objectives of the representation and the means to accomplish those objectives to the extent a client could and wanted to do so.

With this general background in mind, it is worth analyzing how Rule 1.4 both remained the same and changed with respect to certain communications. The duty to keep the client reasonably informed about the status of the matter and to promptly comply with requests for information is the same as it was before 2008.⁸ The duty to explain the matter so that the client can make informed decisions also is the same. However, the current Rule contains more specific directives.⁹

The Informed Consent Directive

One directive is to reasonably consult with the client about the means by which the client's objectives are to be accomplished.¹⁰ Another is to consult with the client about limitations on the lawyer's conduct as controlled by the Colorado Rules or other law.¹¹ Most important, however, is the new requirement to “inform

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the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules."¹²

With this change, the style and extent of certain client communications is somewhat different and a little more comprehensive. The attorney's duty to inform the client of situations when the client's informed consent is necessary is a new process. The lawyer now must tell the client more than what the lawyer may have been accustomed to telling the client in the past. The lawyer will have to tell the client to consent (or not) to the lawyer proceeding as the lawyer recommends. In some cases, this consent will have to be confirmed in writing; in others, it will require the client's signature.

This is a fundamental enhancement to the basic process of communication. The essence of the previous Rule was to keep the client reasonably informed, to comply with reasonable requests for information, and to explain things so that the client could make informed decisions. The current Rule 1.4 implements the concept of informed consent described in Rule 1.0(e). Rule 1.0(e), added to the Colorado Rules in 2008, defines "informed consent" and adds specific qualities to the notion of "reasonably adequate" information as follows:

"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.

Rule 1.4 requires lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules."¹³ This directive has both temporal and qualitative components. Informed consent, as defined by Rule 1.0(e), requires the attorney to promptly relay information to the client without waiting for the client to request that information. Informed consent is the client's agreement to a proposed course of conduct. It is given after the lawyer has communicated sufficient information to explain both the risks involved and the alternatives available. The client should not have to ask for information. It includes any decision or circumstance to which the client should give informed consent.

Reasons for the Modification

According to the ABA Commission, the concept of informed consent was introduced to clarify the means by which the client becomes more knowledgeable about and instrumental in the scope of the engagement, as well as the means by which objectives are to be pursued.¹⁴ This clarification suggests that the client should not simply turn over a matter to the lawyer to be managed and then simply wait for periodic updates or final results. Instead, the client should take an active participation in what actions the lawyer takes during the course of representation, and why the lawyer takes them.

It is reasonable to assume that the Colorado courts also wanted to give more definition to the affirmative duty to provide information sufficient for the client to make an informed decision. Thus, the test for informed consent depends on the lawyer's conveying to the client information reasonably adequate to enable the client to make an intelligent decision. The sufficiency of the information depends on whether it adequately describes the material advantages and disadvantages of the proposed conduct, the options and alternatives available to the client, and the risks associated with both the proposed conduct and the alternatives.¹⁵

The ABA Commission did not intend any change in the substance of lawyer-client communications.¹⁶ It intended only a substitution in terminology—replacing "consent after consultation" with "informed consent." The Commission believed that the phrase "consent after consultation" was not well understood, and that the term "informed consent" more likely conveyed to lawyers what the Rules require.¹⁷

Still, informed consent is a relatively novel concept in the lawyer-client relationship. Informed consent is literally the client's agreement for the lawyer to begin or continue on a proposed course of conduct after receiving reasonably adequate information and explanation about the risks and the proposed alternatives.¹⁸ The client's agreement is fundamentally an acquiescence to the lawyer's suggestion or advice as to the steps to be taken to pursue an objective or to respond to a situation. It is a consensual accord whereby the client authorizes the lawyer to conduct the matter as the lawyer recommends.

Meeting the Informed Consent Obligation

Consensual accord encompasses a variety of circumstances that give rise to the need to be informed and give consent.¹⁹ Generally, two conditions must be satisfied to attain informed consent: (1) the lawyer must relay the necessary information to the client; and (2) the lawyer must get the client's consent regarding the lawyer's next course of action. How much information is relayed, and when the information is relayed, can vary according to the sophistication and experience the client has in legal matters and in making important decisions.²⁰ The new Colorado Rules provide some clarification on what information the lawyer generally is required to share with the client, as well as what constitutes an affirmative response by the client.

Type and Quality of Information

A Comment to the Rule includes helpful guidance on the type and quality of information the lawyer must provide the client.²¹ The lawyer should reasonably ensure that the client receives enough information to make an informed decision; this will vary depending on the circumstances. In general, this will require communication that includes a disclosure of how the situation arose (facts and circumstances); a discussion of how to proceed; the advantages and risks of the suggested course; and an explanation of other available choices.²²

At first blush, this may not seem to be much different than "consent after consultation," and this was the thinking of the ABA Commission.²³ Although neither the Rule nor the Comment defines the adequacy of the information, it could well be measured by the type of information a reasonably prudent lawyer exercising due care would disclose to the client, so that the client would appreciate all of the advantages, risks, and available choices.

Client Consent

One of the more significant attributes of this new informed consent is the requirement for an affirmative response by the client. The lawyer should not assume consent where the client remains silent.²⁴ To be sure, there will be situations in which the lawyer can infer from the client's conduct that the client consents to the proposed course of action. However, there is a significant risk in acting on any such inference and some confirmation of the client's con-

sent based on the lawyer's information would be much preferred. Moreover, although written confirmation is not necessary in all situations, it is required in others.²⁵ To this end, Rule 1.0(b) defines the term "confirmed in writing."

"Confirmed in writing" refers to the client's consent being physically stated in a written document that either expresses the consent or confirms that consent was orally given by the client.²⁶ This would include an electronic communication memorializing the client's oral acquiescence in the course of action proposed by the lawyer.²⁷ The writing should be transmitted to the client giving the consent at the time the consent is given or within a reasonable time thereafter.²⁸ It can be generated by either the client or by the lawyer in the form of an affirmation.²⁹

There are two aspects to the timing. Rule 1.0(b) addresses prompt transmission of the confirmatory writing. Comment 1 suggests that the transmission be within a reasonable time after the consent is given. Whether there is any significant distinction between these concepts remains to be seen; in any event, it should be done without delay and as soon as possible.

The types of writings that would satisfy the documentation required by the new Rules is of import. Rule 1.0 describes what is meant by "writing" or "written." It is any form of tangible or electronic record of a communication and includes handwriting, type-writing, printing, similar methodology, and also can include audio or video recording and e-mail. In situations where the writing must be signed by the client, any electronic or physical sound, symbol, or process that is adopted by a person with the intent to sign it will suffice.³⁰

Informed Consent and Other Rules

Another significant feature of Rule 1.4 is the reference to other Rules where informed consent is required. The Rule specifically directs the lawyer to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules."³¹ Thus, compliance with Rule 1.4 requires a working understanding of many other Rules. Rule 1.4 not only mandates fulfillment of informed consent, but also initial-

ly tells the lawyer that he or she must advise the client any time a circumstance is present that will require the client to give informed consent.

For example, when the client wants to limit the scope of the representation, Rule 1.2 is implicated. Rule 1.2(c) allows limitation of the scope of representation, but requires the client's informed consent to the limitation. This means that the lawyer must first tell the client that to proceed with a limited scope representation, the client will have to give informed consent. Next, the lawyer must discuss with the client the risks, advantages, disadvantages, and alternatives to the limited scope. It will no longer be sufficient just to get the client's consent. Lawyers also will have to advise the client why informed consent is necessary. This means the lawyer should discuss with the client what the legal service would be if the scope were not limited, and what risks may be present if the excluded services are not provided. It also could mean that the lawyer might have to have a more thorough understanding of the totality of the client's situation. Is there, for instance, a third-party action as an adjunct to a workers' compensation claim, or a title policy that should be examined along with the review of a real estate purchase contract?

Informed consent, whether verbal, in writing, or "in writing signed by the client," is involved in the following Rules:

- Rule 1.0, Definitions
- Rule 1.2, Scope of Representation
- Rule 1.4, Communication
- Rule 1.6, Confidentiality of Information
- Rule 1.7, Conflict of Interest
- Rule 1.8, Conflict of Interest: Specific Rules
- Rule 1.9, Duties to Former Clients
- Rule 1.10, Imputation of Conflicts
- Rule 1.11, Special Conflicts, Public Officers, and Employees
- Rule 1.12, Duties With Respect to Former Judges, Arbitrators, etc.
- Rule 1.13, Organization as Client
- Rule 1.14, Diminished Capacity
- Rule 1.17, Sale of a Law Practice
- Rule 1.18, Prospective Clients