

KBA Convention 2009

**Changes to the
Rules of Professional Conduct
SCR 3.130**

Overview of Changes

- New Rules
- Changes to existing Rules
- More Comments
- More details in Comments

Preamble and Scope to Rules

- New provision
- No Preamble and Scope in current Rules
- Areas covered in Preamble and Scope
 - Aspirational language
 - Preamble:
 - “general orientation” to the Rules
 - Rules:
 - “authoritative”
 - “provide a framework for the ethical practice of law”
 - Comments:
 - “explains and illustrates the meaning and purpose of the Rule
 - “intended as guides to interpretation” to the Rules

Violation of Rule v. Private Cause of Action

Section XXI of Scope to Rules

- “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”
- “Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.”

Terminology Additions

- Informed Consent Rule 1.0(e)
- Confirmed in Writing Rule 1.0(b)
- Writing or Written Rule 1.0(n)
- Screened Rule 1.0(k)
- Tribunal Rule 1.0(m)

“Informed Consent” Defined

Rule 1.0(e)

- Proposed course of conduct
- Agreement by person, (e.g., client)
- Communication by lawyer
- Adequate information and explanation about:
 - Material risks of proposed conduct, and
 - Reasonably available alternatives to the proposed conduct

Rules Requiring Informed Consent

- Rule 1.2(c) Scope of representation
- Rule 1.4(a)(1) Communication
- Rule 1.5(f) Non-refundable retainer
- Rule 1.6(a)(1) Confidentiality
- Rule 1.7(b)(4) Conflict of interest: current clients
- Rule 1.8(a)(3) Business transactions with client
- Rule 1.8(b) Using information to disadvantage of client
- Rule 1.8(f) Payment by third party
- Rule 1.8(g) Aggregate settlement
- Rule 1.9(a) Duties to former clients
- Rule 1.11 Special conflicts of interest for former and current government officers and employees
- Rule 1.12 Judge, arbitrator, mediator or other third-party neutral
- Rule 1.18 Duties to prospective client
- Rule 2.3 Evaluation for use by third persons

“Confirmed in writing” Defined

Rule 1.0(b)

- “Confirmed in writing,”
 - Regarding informed consent
 - Denotes informed consent given in:
 - writing by the person or
 - a writing that a lawyer promptly transmits to the person confirming oral informed consent.
- Timing of obtaining or transmitting writing:
 - At time informed consent given, or
 - If not feasible, within a reasonable time

Rules Requiring “Confirmed in Writing”

- Rule 1.5 Fee division
- Rule 1.8(a) Business transaction with client
- Rule 1.8(g) Aggregate settlement
- Rule 1.7 Conflict of interest: current clients
- Rule 1.9 Duties to former clients
- Rule 1.11 Special conflicts of interest for former and current government officers and employees
- Rule 1.12(a) Judge, arbitrator, mediator or other third-party neutral
- Rule 1.18 Duties to prospective client

"Writing" or "Written" Defined

Rule 1.0(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.
- Electronic signature expressly recognized as a form of "signing"

“Screened” Defined

Rule 1.0(k)

- “Screened” denotes
 - Isolation of a lawyer
 - From any participation in a matter
 - By timely imposition of law firm
 - Procedures reasonably adequate under the circumstances
 - Procedures protect information from isolated lawyer

“Tribunal” defined

Rule 1.0(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.
- **“Adjudicative capacity”** defined:
 - 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.

Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule 1.2

- Good example of how Rules have been made more functional
- Settlement decision is the client's
- Limited scope representations guidance improved
- Noisy withdrawal

Contingent Fee Agreements

Rule 1.5(c)

- “A contingent fee agreement shall be in a writing **signed by the client**”

Fee Division

Based on Joint Responsibility

Rule 1.5(e)(2)

- Division of a fee between lawyers who are not in the same firm may be made only if:
 - Each lawyer assumes joint responsibility for the representation;
 - Client agrees to the arrangement and
 - Agreement is confirmed in writing

Joint Responsibility

Comment 7 to Rule 1.5(e)

- New Comment
 - “Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership”

- Note: See Rule 5.1 for duties regarding partners

Non-Refundable Retainers

Rule 1.5(f) and Rule 1.15(e)

- **Rule 1.5(f)**
- Fee may be designated as a non-refundable retainer if the non-refundable fee agreement:
 - Is in a writing signed by the client
 - Evidencing client's informed consent
 - States dollar amount of the retainer,
 - Retainer's application to the scope of the representation, and
 - Time frame in which the agreement will exist
- **Rule 1.15(e)**
- (e) All legal fees paid in advance, except for non refundable fees, shall be deposited into a client trust account
- Note: Pursuant to Rule 1.5(a), as with all fees, a non-refundable fee must be reasonable

Confidential Information

Rule 1.6(b)(1)

- To prevent ~~the client from committing a criminal act that the lawyer believes is likely to result in imminent~~ reasonably certain death or substantial bodily harm
- ABA Model Rule exceptions not adopted:
 - “To prevent the client from committing a crime or fraud 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.”
 - “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.”

Conflicts of Interest

Rule 1.7

- Client waiver must be confirmed in writing
- Rule easier to understand
- 35 Comments, covering, for example:
 - Personal interests (11 and 12)
 - Consent to future conflicts (22)
 - Positional conflicts (24)
 - Attorney / Client privilege (30-31)

“Noisy Withdrawals”

Rule 4.1

- If a lawyer, in representing client, makes a false statement of material fact or law
- Lawyer shall take reasonable remedial measures to avoid assisting a fraudulent or criminal act by a client.
- Reasonable remedial measures may include, if necessary, disclosure of a material fact, unless prohibited by Rule 1.6.
- Comment 3:
 - “In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted in the client’s crime or fraud.”

“Noisy Withdrawals”

Comment 10 to Rule 1.2(d)

- Lawyer may not continue assisting client in conduct lawyer originally supposed was legally proper but then discovers is criminal or fraudulent.
- Lawyer must withdraw.
- In some cases, withdrawal not sufficient.
- May be necessary for lawyer to:
 - Give notice of the fact of withdrawal and
 - Disaffirm any opinion, document, affirmation or the like.
- Note: Comment refers to Rule 1.16(a) and Rule 4.1
- Rule 1.16(a) Mandatory Withdrawal
- Rule 4.1

“Noisy Withdrawals”

Comment 3 to Rule 1.16(a)

- If withdrawal based on the client's demand that the lawyer engage in unprofessional conduct
- Court may request explanation for withdrawal
- Lawyer may be bound to keep explanation confidential
- Lawyer's statement that professional considerations require termination ordinarily sufficient.
- Lawyer should be mindful of obligations to both client and the Court under Rules 1.6 and 3.3.

Aggregate Settlements

Rule 1.8(g)

- Lawyer:
 - Who represents two or more clients
 - Shall not participate in making:
 - Aggregate settlement of the claims of or against the clients, or
 - In criminal case, an aggregated agreement as to guilty or nolo contendere pleas of clients
- Unless each client gives:
 - Informed consent
 - In writing signed by client.
- Lawyer's disclosure shall include:
 - Existence and nature of all the claims or pleas involved and
 - Participation of each person in the settlement.

Sexual Relations with a Client

Rule 1.8(j)

- No sexual relations with client
- Unless consensual sexual relationship existed before client-lawyer relationship began.
- Limitation on imputed conflict of interest
 - Rule 1.8(k)
 - Conflict of interest arising from prohibited sexual relationship not apply to other lawyers in law firm

Client as Organization

Rule 1.13

- Expansion of lawyer's duties
- Refined reporting requirements
- Exception to Rule 1.6 confidentiality
- Lawyer withdrawal

Return of Client's File

Comments 9 and 10 to Rule 1.16

- Lawyer may require the client to pay for copying if the client is able to pay.
- **But**, lawyer may not condition return of client's file on payment of a fee
- Client is entitled to a copy of whatever the client needs in order to pursue his claim.

What is the Client's "File"?

Comment 10 to Rule 1.16

- Documents which may be withheld:
 - Uncompensated work product from the client's returned files
 - unless the client's interests will be substantially prejudiced without uncompensated work product.
- Documents to be returned in original form:
 - Documents that may be required
 - For trial preparation or
 - As evidence for trial or in other legal proceedings

Sale of a Practice

Rule 1.17

- New rule
- Attorney ceasing to practice:
 - 1. As a result of termination of practice, e.g., retirement,
 - 2. In the geographic area, or
 - 3. In a certain field of practice
- Notice/presumed consent
- No increase in fees
- Circuit court order if active client cannot be notified

Duty to Prospective Client

Rule 1.18

- New rule
- Lawyer's firm not disqualified by conflict if:
 - Interviewing counsel takes care not to learn more than necessary to see if conflict exists,
 - Interviewing counsel is screened, and
 - Prospective client is given written notice.
- Lawyer may obtain conflict waiver as a precondition of prospective client interview
- Unilateral inquiry by person does not trigger Rule

Lawyer as Third-Party Neutral

Rule 2.4

- New rule
- Lawyers as mediators
- Lawyer must avoid unrepresented parties' confusion as to role of lawyer
- Lawyer shall:
 - Inform unrepresented parties that lawyer is not representing them.
 - If such persons are confused as to lawyer's role, explain the difference between lawyer's role as third party neutral and as representing a client

Disclosing Adverse Authority to the Tribunal Rule 3.3(a)(2)

- New Rule provision
- Must disclose:
 - Controlling adverse legal authority
 - In the jurisdiction, and
 - Not disclosed by the opponent

Client Perjury

Rule 3.3(b)

- Lawyer:
 - Represents client in adjudicative proceeding
 - Knows that a person:
 - Intends, is, or has
 - Engaged in criminal or fraudulent conduct related to the proceeding
- Lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- Note:
 - Comment 10 regarding remedial measures
 - Brown v. Comm, 226 S.W.3d 74 (Ky 2007)

Requesting Non-cooperation

Rule 3.4(g)

- New rule
- Lawyer shall not request a non-client to decline to communicate with another party unless non-client is:
 - Relative, or
 - Certain kind of employee, and
- Lawyer reasonably believes non-client won't be harmed by non-cooperation

Who are Employee/Agents Under Rule 3.4(g)

- “Speaking agents”
 - Persons who:
 - Supervise, direct or regularly consult with the client concerning the matter or
 - Have authority to obligate the client with respect to the matter
- Other agents/employees cannot be directed (by a lawyer) to decline to communicate with another party
- Note: Comment 7 to Rule 4.2

Contacting Represented Persons

Comment 7 to Rule 4.2

- Employees of a represented entity who are off limits are those who supervise, direct or regularly consult with the entity's lawyer or have authority to obligate the entity and
- Those whose acts may be imputed to the entity for purposes of liability

Documents Inadvertently Sent

Rule 4.4(b)

- Duties on recipient lawyer:
 - If you know or should know document was mistakenly sent
 - Don't read document
 - Notify the sender
 - Do as the sender requests

Short-term limited legal services

Rule 6.5

- New Rule
- Through Nonprofit or Court-annexed Limited Legal Services Programs
- No expectation of continuing representation
- Limited application of conflict of interest rules
- Example of services:
 - Lawyer participating clinic at firehouse to provide Fireman with limited services, e.g., free Wills

Advertising Changes

Rule 7.01 et seq.

- Advertising Commission no longer required to review all advertisements
- Increase in fees
- Ads seeking clients for the purpose of referring clients to other firms must disclose that purpose prominently in the advertisement.
- All ads must say “This is an advertisement.”

Reporting Professional Misconduct

Rule 8.3

- (a) Lawyer reporting on another lawyer
- (b) Lawyer reporting on a judge
- (c) No reporting if information:
 - Confidential
 - Information received in KYLAP, or
 - Ethics Hotline participation
- (d) Immunity from any civil, criminal or disciplinary action for good-faith reporting
- (e) Self-reporting of reciprocal discipline per SCR 3.435
- (f) Self-reporting of felony plea or conviction for SCR 3.166(2)

When Does Duty to Report Arise?

Rule 8.3

- Lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct
- Violation raises a substantial question as to the lawyer's:
 - Honesty,
 - Trustworthiness or
 - Fitness as a lawyer in other respects

When Does Duty to Report Arise?

Comment 2 to Rule 8.3

- Lawyer should exercise “measure of judgment”
- “Substantial” refers to the:
 - seriousness of the possible offense
 - not the quantum of evidence of which the lawyer is aware.
- Request Ethics Hotline Opinion if lawyer requires assistance in determining need to report a violation
 - Pursuant to SCR 3.530(7), lawyer’s communications with Hotline member are confidential.

Lawyer reporting on a Judge

Rule 8.3(b)

- Duty:
 - Lawyer knows
 - Judge has committed a violation of the applicable rules of judicial conduct
 - Violation raises a substantial question as to judge's fitness for office
- Lawyer shall report violation to the Judicial Conduct Commission

Exceptions to Duty to Report

Rule 8.3(c)

- Information protected by Rule 1.6 or other law
- Information received while participating in KYLAP or Ethics Hotline

Immunity Provision

Rule 8.3(d)

- Lawyers who in good faith report misconduct are immune from civil, criminal or disciplinary liability
- Except for reports of misconduct solely to obtain an advantage in a civil or criminal case – 3.4(f)

Reporting Requirements

Rule 8.3 (e) and (f)

- Lawyers must self-report to the KBA disciplinary actions against them in other jurisdictions per SCR 3.435.
- Prosecutors must report felony convictions, guilty pleas, etc. to the KBA and the Supreme Court immediately on entry of the conviction per SCR 3.166(2).

Multi-Jurisdictional Practice

- Rule 5.5
 - New Rule
 - 19 new comments
 - Compliance with SCR 3.030(2) for court appearances
 - “Administrative tribunals”
 - Related to matters in a state in which the lawyer is licensed
- Rule 8.5
 - Lawyer may be subject to jurisdiction of multiple disciplinary authorities
 - Choice of which jurisdiction’s disciplinary rules will apply

Conclusion

- Significant changes to Rules
- All lawyers' practices affected
- Rules more specific
- Comments more detailed