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“Informed Consent”

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In several key parts of the Rules of Professional Conduct, lawyers and their law firms are only permitted to proceed if their clients give “informed consent.” In some instances like conflict waivers, informed consent must also be “confirmed in writing.” In this column, we’ll survey three interwoven phrases: “informed consent,” “confirmed in writing,” and “writing.” Each is specifically defined in Oregon RPC 1.0, which addresses terminology. While Oregon’s definitions are based generally on their ABA Model Rule counterparts, they have also been etched by a unique Oregon history.

Informed Consent

Oregon RPC 1.0(g) defines “informed consent”:

"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. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

The first sentence is patterned on the corresponding ABA Model Rule definition found in ABA Model Rule 1.0(e). Comment 6 to ABA Model Rule 1.0 elaborates on the text of the definition:

Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation

reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.

Although Oregon does not have comments to our RPCs, many Oregon State Bar ethics opinions have similar discussions of the necessary predicate for truly "informed consent," including OSB Formal Opinions 2005-17 (rev. 2016) and 2005-157 (rev. 2016).

Oregon's version of "informed consent," however includes an important qualifier: if the particular rule requires that consent either be "confirmed in writing" (such current client conflict waivers under RPC 1.7) or "signed by the client" (such as business transaction waivers under RPC 1.8(a)), then the predicate discussion for informed consent must include a recommendation that the client seek independent counsel on whether consent should be granted.

ABA Model Rule 1.8(a) addressing lawyer-client business transactions and Model Rule 1.8(h)(2) governing settlement of malpractice claims with unrepresented clients have independent counsel recommendation requirements. The ABA Model Rules, however, do not include a more general independent counsel recommendation requirement like Oregon. Oregon's requirement was added to the then-analogous phrase "full disclosure" in former DR 10-101(B). The change occurred in the late 1980s against the backdrop of a broader

movement at the time to define Oregon’s conflict rules—including waivers—with greater precision for the benefit of lawyers and clients alike. In the wake of those changes, Oregon lawyers have been disciplined for failing to include required independent counsel recommendations and resulting waivers were found to be ineffective. The Supreme Court surveyed the history of Oregon’s independent counsel recommendation requirement in *In re Cobb*, 345 Or. 106, 135, 190 P.3d 1217 (2008), and summarized its approach pointedly: “[C]ompliance with the letter of the rule is required.” That said, the requirement is simply to recommend independent counsel—not necessarily that the client actually obtain independent counsel. Therefore, many conflict waiver templates, for example, include something along the following lines: “Although I am required to recommend that you seek independent counsel to assist you in determining whether to grant consent, whether you do so is up to you.”

Confirmed in Writing

Some rules that require informed consent do not require that it be confirmed in writing—for example, a limitation on the scope of representation under Oregon RPC 1.2(b). In those circumstances, it remains prudent to confirm a client’s consent in writing so that the client’s instructions—and the record of those instructions—are clear if there are any questions later.

Others, such as the current and former client conflict rules—respectively, RPCs 1.7 and 1.9—require that a client’s informed consent be confirmed in writing. Although a few rules—such as RPC 1.8(a) addressing lawyer-client business transactions—require that the client’s consent be reflected in a writing signed by the client, written confirmation of the client’s consent in most circumstances can come from the lawyer. Nonetheless, it remains prudent to have an acknowledgment from the client—whether a countersigned document or a reply email.

RPC 1.0(b) defines the general standard:

“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.

Because the written confirmation is effectively the record of what the lawyer told the client preceding the latter’s consent, prudent practice also suggests incorporating a summary of the lawyer’s conversations with the client into the document confirming consent. As discussed above, when a recommendation to seek independent counsel is required, that must also be reflected in writing.

Writing

RPC 1.0(q) defines “writing” broadly to include both paper and electronic communications. The same rule, in turn, includes both newer forms of electronic signatures and reply emails within the definition of a “signed” writing—in addition to the traditional “pen and ink” form.

ABOUT THE AUTHOR

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