



NEW YORK STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 829– 4/29/09

**TOPIC:** Conflicts of interest, consent confirmed in writing.

**DIGEST:** A consent to a conflict of interest that was validly given prior to April 1, 2009, the effective date of the new Rules of Professional Conduct, does not need to be obtained anew solely on account of the adoption of the new Rules.

**RULES:** 1.0(e), 1.0(j), 1.7(b), 1.9.

**QUESTION**

1. Under Rules 1.0(e), 1.0(j), 1.7 and 1.9 of the New York Rules of Professional Conduct, which prescribe new rules for a client's consent to a conflict of interest, including a new requirement that such consents be "confirmed in writing," does a lawyer who obtained a consent to a conflict prior to the effective date of those rules need to obtain a new consent to the conflict?

**OPINION**

2. New York's Rules of Professional Conduct became effective April 1, 2009. Under Rule 1.7(b), where a lawyer has a conflict of interest arising out of the lawyer's representation of two or more clients or out of the lawyer's own financial, business, property or other personal interests, the lawyer may proceed with the representation or representations if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) *each affected client gives informed consent, confirmed in writing.*<sup>1</sup>

Rule 1.0(j) defines “informed consent” as follows:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

Rule 1.0(e) defines “confirmed in writing” as follows:

“Confirmed in writing” denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

3. These provisions are broadly similar to those that applied under the former New York Code of Professional Responsibility (the “Code”), except that the requirement that client consents be confirmed in writing is new. The Code, which was in effect prior to April 1, 2009, did not specify any particular form for such consents.<sup>2</sup>

4. The inquirer has represented a client for a number of years pursuant to a retainer agreement. The retainer agreement includes a waiver of certain conflicts that may arise out of then-existing engagements, or future engagements, on behalf of other clients. The inquirer asks whether it is necessary to obtain a new consent to conflicts otherwise covered by the existing waiver and execute a new retainer agreement reflecting the new consent.

5. In adopting the new Rules, the Appellate Division of the Supreme Court of the State of New York directed that the new Rules would be effective April 1, 2009, but the Court did not provide for any other transitional rules.<sup>3</sup> There is no basis for concluding

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<sup>1</sup> Rule 1.7(b) (emphasis added). Similarly, under Rule 1.9, where a lawyer has a conflict of interest arising out of a representation of a former client, the lawyer may proceed with the representation of the current client if “the former client gives informed consent, confirmed in writing.”

<sup>2</sup> DR 5-101(A) (if “client consents to the representation after full disclosure of the implications of the lawyer’s interest”); DR 5-105(C) (“if each [client] consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved”).

<sup>3</sup> Joint Order of the Appellate Division, December 30, 2008.

that consents given prior to the adoption of the new Rules are impaired or invalid as a consequence of the change in the Rules.<sup>4</sup> Thus, if a consent to a conflict of interest was valid when given, and by its terms continues to apply to ongoing or new representations after April 1, 2009, and the application of the consent to a new matter is otherwise valid, there is no need to re-confirm or re-obtain the consent solely on account of the adoption of the new Rules. (We do not here address the circumstances under which a consent to a waiver may be valid in any other respect.)

6. With respect to the particular inquiry before us, the inquirer states that the consent was contained in a retainer agreement. It thus already satisfied the new requirement that the consent be confirmed in writing, but the same conclusion would apply to oral consents that were validly given prior to the effective date of the new Rules. The new requirement that consent to a conflict be “confirmed in writing” modifies the *giving* of consent. Thus, only consents that are given under the new Rules -- that is, on or after April 1, 2009 -- must be “confirmed in writing.” This conclusion is supported by the second sentence of Rule 1.0(e) (defining “confirmed in writing”), which specifies that the writing must be obtained or transmitted at the time the person gives oral consent or within a reasonable time thereafter. There is no suggestion that consents given much earlier must now meet the formal requirements of the new Rules. We note also that the new Rules do not require that the client actually sign an agreement containing the consent. See Rule 1.0(e)(ii). Moreover, any type of writing, even an e-mail, from the lawyer to the client confirming an oral consent would be sufficient. See Rule 1.0(x) (defining “writing” to include email or any other “tangible or electronic record of a communication or representation”).

## CONCLUSION

7. The requirements in the new Rules of Professional Conduct that govern obtaining consents to conflicts, including the new requirement that consents be “confirmed in writing,” do not apply to consents validly given before the effective date of those Rules. Client consents to conflicts validly given prior to April 1, 2009 do not need to be obtained anew solely on account of the adoption of the new Rules.

(Inquiry 17-09)

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<sup>4</sup> See, e.g., *Hays v Ward*, 179 A.D.2d 427, 429, 578 N.Y.S.2d 168, 169 (1<sup>st</sup> Dep’t 1992) (“Where a statute states in clear and explicit terms, as here, that it takes effect on a certain date, it is to be construed as prospective in application”); *Murphy v. Board of Education*, 104 A.D. 796, 797, 480 N.Y.S.2d 138, 139 (2d Dep’t 1984) (“As a general rule statutes are to be construed as prospective only in the absence of an unequivocal expression of a legislative intent to the contrary, and where a statute directs that it is to take effect immediately, it does not have any retroactive operation or effect . . .”), *aff’d*, 64 N.Y.2d 856, 476 N.E.2d 651, 487 N.Y.S.2d 325 (1985).