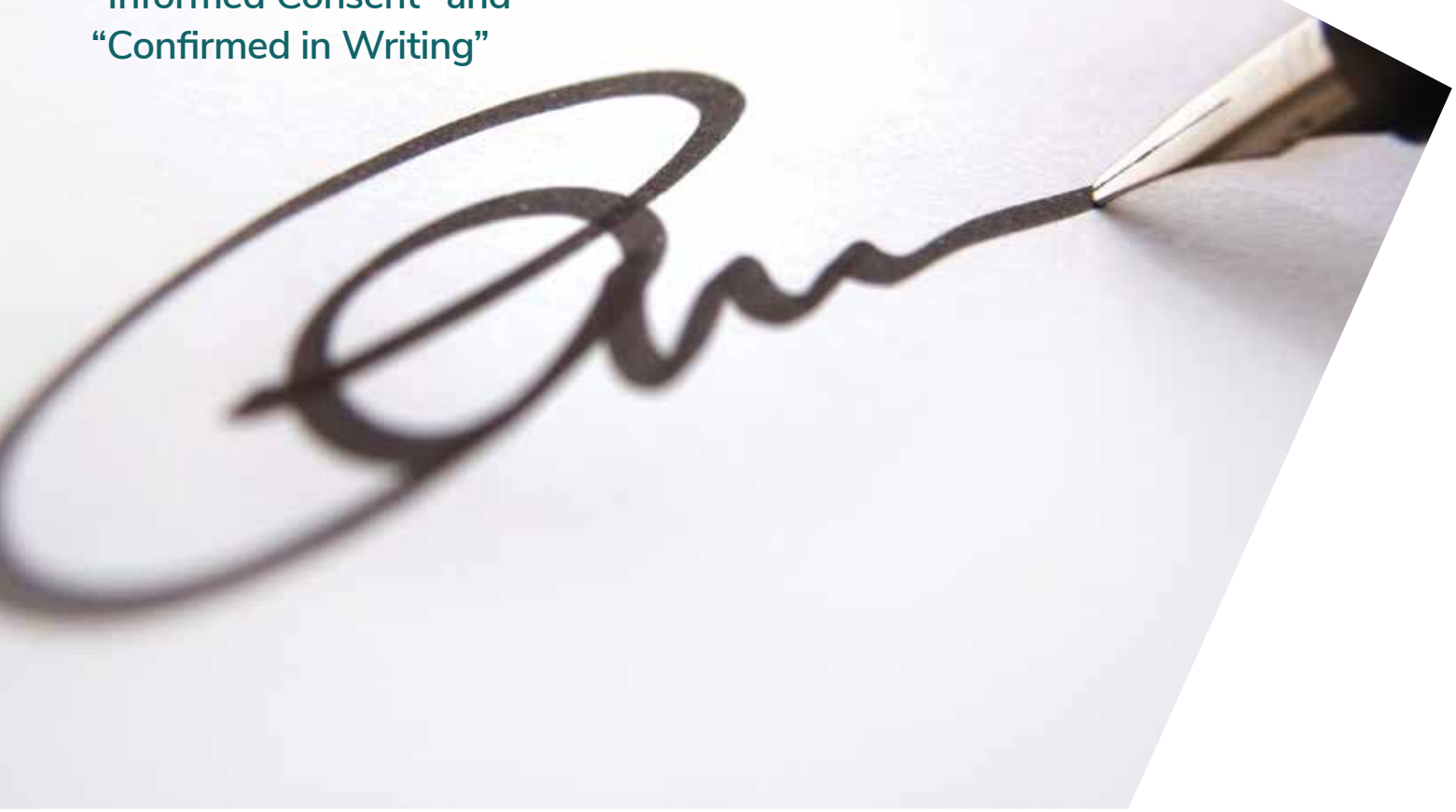
The New Uncertainties of ADM 2016-41

"Informed Consent" and "Confirmed in Writing"



By John W. Allen

On September 20, 2017, the Michigan Supreme Court issued its order amending Rules 1.0, 1.2, 4.2, and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules (effective January 1, 2018) regarding limited scope representations.[1] While likely intended to benefit clients with limited resources, these amendments also create several uncertainties and may require a different approach to limited scope engagements and conflict waivers for all clients and lawyers.

The most sweeping changes are to MRPC 1.0, the preamble and terminology governing the meaning of terms used throughout the MRPC:

> Rule 1.0 Scope and Applicability of Rules and Commentary
>
> (a)–(c) [Unchanged.]
>
> Preamble: A Lawyer's Responsibilities [Unchanged until section entitled "Terminology."]

Terminology.

"*Confirmed in writing*," when used in reference to the informed consent of a person, denotes *informed consent that is given in writing confirming an oral informed consent*. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. [To be inserted after term "Belief" and before term "Consult."]

"*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*. [To be inserted after term "Fraud" and before term "Knowingly."][2] (Emphasis added.)

These "confirmed in writing" and "informed consent" standards were earlier proposed by the American Bar Association Ethics 2000 amendments—the same definitional changes that were earlier rejected by the Michigan Supreme Court when it considered those ABA amendments.[3] Amended MRPC 1.2(b) adds the slight mitigation of "*preferably* confirmed in writing"[4] (emphasis added), but any lawyer relying on that will be faced with a "who said what" contest in the event of a challenge to compliance.

Though ostensibly limited to the unbundled services permitted by the new MRPC 1.2, the "preferably confirmed in writing" and "informed consent" definitions could cause confusion and inevitably bleed over to many other MRPC provisions requiring consent, such as engagements, conflict waivers, etc. This is despite the fact that the present provisions for unwritten engagements and "client consent after consultation" have operated well for Michigan lawyers and clients without these changes. There is no empirical evidence to the contrary.[5]

The "preferably confirmed in writing" requirement is made even more perilous by the court's order to add an "informed consent" requirement. As in the ABA Ethics 2000 proposal, "informed consent" is not defined ("adequate information and explanation"), even though it must include an explanation "about the material risks…and reasonably available alternatives."[6]

While superficially benign and even politically attractive in its sound, informed consent is no less onerous nor any less defective than the ABA version. What are the "material risks presented" or "reasonably available alternatives" that must be explained before any limited scope engagement or conflict waiver is valid? It is also unclear whether ABA Rule 1.0, Comment 6 (which considers important factors such as whether the person is "experienced in legal matters generally" or "represented by independent counsel")[7] will be construed as part of the rule.

Also disconcerting is the potentially broad impact of the new MRPC Rule 1.2—Scope of Representation:

Rule 1.2 Scope of Representation

(a) [Unchanged.]

(b) A lawyer licensed to practice in the State of Michigan may limit the scope of a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.[8]

Some may take solace in the use of the conjunctive "and," concluding that the change is limited to only those engagements for litigation clients in need of limited services. But then have all other representations having "limiting objectives" (the wording of the former Rule 1.2(b)) now been abolished?

If still permitted, do *all* limited scope representations now require informed consent, preferably in writing?

Are not virtually *all* engagements limited scope representations?

Are we to become mired in satellite hearings about the undefined terms in the amendments? MCR 2.117(C)(2)(d) contemplates an opposing counsel or the court setting a hearing to establish the actual scope of a representation if either of them believes an attorney has exceeded the disclosed limited scope. That could easily be misused for tactical reasons.

FAST FACTS

Recent changes to the Michigan Rules of Professional Conduct go far beyond "unbundled" services and "limited scope" engagements.

While likely intended to benefit clients with limited resources, these amendments also create several uncertainties and may require a different approach to limited scope engagements and conflict waivers for all clients and lawyers.

Every engagement is a limited scope engagement.

SAMPLE
Conflict Waiver/Consent

Re: Waiver of Conflict and Consent to Representation

Dear ***[A]*** and ***[B]***:

We represent both ***[Client A]*** and ***[Client B]***. ***[Client A]*** has asked us to represent it involving ***[Describe Engagement]***.

We believe that the representation of ***[A]*** and our relationship with ***[B]*** will not be adversely affected; nevertheless, the Rules of Professional Conduct prohibit us from representing either ***[A]*** or ***[B]*** in this matter, without the knowing and voluntary waiver of the conflict by both clients, and that you be informed, and consider, the implications, advantages, risks, and alternatives in doing so.

Our representation of ***[A]*** in this matter could yield **advantages** to both parties. We routinely handle matters of this nature and the benefit of our experience may assist both parties in resolving these issues in the most efficient way, and successfully concluding this transaction as both ***[A]*** and ***[B]*** desire. ***[Add other fact-specific advantages.]***

There are also **risks**. Because we have represented both parties, the possibility exists that protected information could be transferred during the representation. While the possibility exists, we believe the probability of this occurring to be remote and we do not anticipate the exchange of any such information. We shall admonish all lawyers and staff on this matter to avoid it. In addition, an irreconcilable actual conflict in the future could mean that we could not represent either of you in this matter. ***[Add other fact-specific risks.]***

Alternatives would include one or the other party retaining other independent legal counsel, and permitting our representation of the other party. Both parties could retain independent legal counsel. One or both parties could refuse to waive and consent to our continued representation of one or both of the parties. Each of these alternatives could involve substantial additional expense and delay, and the necessity to orient newly retained legal counsel as to the details and progress of the current respective engagements. ***[Add other fact-specific alternatives.]***

Because of our conflict, both of you may wish to seek independent counsel to advise each of you regarding this waiver. If, after full review and consultation, you decide to waive the conflict and allow us to represent ***[A] (or [A and B])*** in this matter, please sign your copy of this letter and return it to us. If you have any questions, or if we can provide any other information, please call us.

Very truly yours,

[Lawyer]

After full review and consultation, the undersigned waive the conflict and consent to ***[Your Firm]***'s representation of ***[Prospective Client A and Client B]***.

Signed:

[Prospective Client A]

Signed:

[Client B]

No matter how broadly or narrowly these amendments are construed, lawyers will not know in advance how to conform their conduct to the requirement of the law.

Likewise, MCR 2.117(C)(3) allows an attorney to withdraw from a limited scope representation in a civil action upon filing a notice that the attorney "has taken all actions necessitated by the limited representation." The rule permits the client to object on the grounds that the attorney has not completed the services. If a client objects to the withdrawal, will there be a hearing on whether the lawyer has completed the services?

Such hearings could implicate privilege, confidentiality, and protected information. Does an objecting client waive those protections, or would one of the exceptions in MRPC 1.6 (to defend against an accusation of wrongful conduct) permit the attorney to disclose information to the extent necessary to withdraw?

Nevertheless, no matter how broadly or narrowly these amendments are construed, lawyers will not know in advance how to conform their conduct to the requirement of the law. According to the ABA comment:

> A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client is inadequately informed and the consent is invalid.[9]

There is no clear materiality limitation and no definition of what is material in a specific context. The omission of any fact from the proposed consent disclosure will void the consent. To be valid, informed consent disclosures may begin to look like SEC proxy statements—and still always be subject to attack after the fact. This is undefined negligence in a quasi-criminal, strict-liability code.[10]

Moreover, little comfort can be taken from any of the comments, whether from the MRPC or the ABA. In Michigan, the comments are *not* the law, and the rules are the only authority.[11] The changes to MRPC by ADM 2016-41 do not change this principle. See Preamble, Scope, Final Comment [21]:

> The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on scope provide general orientation. *The comments are intended as guides to interpretation, but the text of each rule is authoritative.*[12] (Emphasis added.)

Until further clarified by other MRPC amendments or court decisions, lawyers would be well-advised to take increased care in explaining the material risks presented and reasonably available alternatives necessary for informed consent, and assure that the client's informed consent is preferably confirmed in writing. ■

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With thanks to Teresa S. Decker for her contributions.

ENDNOTES

1. Admin Order No 2016-41 (September 20, 2017) <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2016-41_2017-09-20_FormattedOrder_AmendtOfMRPC1.0-1.2-4.2-4.3-MCR2.107-2.117-6.001.pdf>. All websites cited in this article were accessed February 9, 2018.
2. *Id.*, p 1.
3. Admin Order No 2003-62 (July 2, 2004) <https://www.icle.org/contentfiles/milawnews/Rules/Ao/2003-62_07-02-04_order.html>.
4. Admin Order No 2016-41, p 2.
5. Michigan Supreme Court, Proposed & Recently Adopted Orders on Admin Matters, *Comments: 2016-41—Proposed Amendment of MRPC 1.0, 1.2, 4.2, and 4.3, and MCR 2.107, 2.117, and 6.001 Would Establish Explicit Rules for Limited Scope Representation (LSR)* (issued April 5, 2017) <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/michigan-rules-of-professional-conduct.aspx>.
6. Admin Order No 2016-41, p 1.
7. American Bar Association, *Comment on Rule 1.0: Client-Lawyer Relationship* <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_0_terminology/comment_on_rule_1_0.html>.
8. Admin Order No 2016-41, pp 1–3.
9. American Bar Association, *Comment on Rule 1.0.*
10. On this, Michigan law is clear. Attorney discipline proceedings are "quasi-criminal." *In re Woll*, 387 Mich 154, 161; 194 NW2d 835 (1972) and *In re Clink*, 117 Mich 619; 76 NW 1 (1898). Likewise, "liability" under MRPC provisions is "strict" or "absolute" in that at the "liability"/prosecution stage, it is usually irrelevant whether the violation was knowing or negligent, intentional or accidental, frequent or isolated, or damaging or not. Factors like these are considered at the "adjudicative" phase and may mitigate the severity of the sanction, but do not generally affect the attorney's responsibility for the violation.
11. *Grievance Administrator v Deutch*, 455 Mich 149, 164; 565 NW2d 369 (1997).
12. American Bar Association, *Model Rules of Professional Conduct: Preamble and Scope* <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html>.