



Client Consent, Informed and Otherwise

Depending on the specific occasion involved, our ethics rules¹ require that our clients give their consent to what we as their lawyers propose for them. That consent is required to be evidenced in several differing ways, and it is important that we make sure we understand the appropriate form for each situation.

The four forms of client consent described in our ethics rules are: (1) simple “agreement” or consent; (2) informed consent; (3) informed consent confirmed in writing; and (4) informed consent confirmed in writing signed by the client. Let’s take them in order:


Agreement/Consent. This form is found in ER 1.5(e), dealing with fees, where the client simply needs to agree to a division of a fee between lawyers not in the same firm. There are no specific requirements about what needs to be said to the client about the terms of the fee agreement. However, the agreement does need to be in writing and signed by the client. A simple agreement or consent is also required in ER 1.8(1) concerning situations where the lawyer is related to opposing counsel. There is no requirement that it be in writing. For this type of consent, Comment [7] to ER 1.0 reminds us that we cannot assume consent or agreement from a client’s silence, but we may infer it from a client’s conduct as long as the client possesses “reasonably adequate information about the matter.”

Informed consent. This is a defined term under ER 1.0(e) and means the agreement by the client to a proposed course of conduct after the lawyer has communicated sufficient information and explanation concerning the material risks of and the reasonably available alternatives to what is being considered. Thus, unlike the previous type of agreement, this one (and the ones that follow) comes with its own set of instructions. A recent Arizona ethics opinion² reviews the considerations involved here, as do Comments [6] and [7] to ER 1.0. Informed consent by the client is required by ER 1.6(a) to allow for disclosure by the lawyer of information relating to the representation, and is further required by ER 1.8(b) concerning the use of information relating to the representation to the disadvantage of a client, and ER 1.8(f) dealing with situations where a person other than the client is paying for the lawyer’s services.

Informed consent, confirmed in writing. This form of consent is found in ER 1.7(b), involving a client’s waiver of a concurrent conflict of interest. It is also found in ER 1.9(a), concerning the waiver of a conflict of interest, as described in that rule, by a former client, and in ER 1.9(b), dealing with the waiver by a former client of a conflict presented when a lawyer leaves a firm but his client remains. We see it again in ER 1.18(d), involving the waiver by a prospective client of conflicts presented by the lawyer’s subsequent representation of a client with adverse interests. ER 1.0(b) defines the term “confirmed in writing” and ER 1.0(n), as well as Comment [20] to ER 1.7, explain what is meant by “in writing,” which includes

email and memoranda written by the lawyer and then transmitted to the client. Comment [20] also describes what the wise lawyer will include in what gets written.

Informed consent, confirmed in writing and signed by the client. This type of consent is found in ER 1.8(a), dealing with business transactions with a client, and requires the client’s written informed consent to the essential terms of the transaction.³ It is also found in ER 1.8(g), involving aggregate settlements where two or more of the lawyer’s clients are settling claims by or against them. Failure to have a client’s signature on the written consent can void the transaction, so it’s important to honor the obligation.⁴ Distinguish these situations from when the client agrees to a division of fees between lawyers in different firms. The agreement in those cases needs to be in a writing signed by the client, but the formalities of “informed consent” are not required. ER 1.5(e)(3).

Last, but definitely not least, ER 1.4(a)(1) requires us as lawyers to promptly inform our clients of any situation with respect to which the client’s informed consent, as defined by ER 1.0(e), is required. This means that we need to be able to distinguish the situations and attendant obligations described above in order to competently represent our clients and to comply with the pertinent ethical obligations involved. 

endnotes

1. Ariz. Rules of Professional Conduct, Rule 42, ARIZ.R.S.CT.
2. Ariz. Ethics Op. 07-04 (November 2007).
3. Note that the requirement of written client consent cannot be fulfilled merely by having the client execute documents that are part of the transaction itself, such as deeds and promissory notes. *In re Trewin*, 684 N.W.2d 121 (Wis. 2004).
4. See, e.g., ABA Formal Op. 06-438 (Lawyer Proposing to Make or Accept an Aggregate Settlement or Aggregated Agreement) (Feb. 10, 2006) and cases cited.

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics



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