



What Needs To Be In Writing

Arizona's new Rules of Professional Conduct¹ have several new provisions that require certain matters between a lawyer and client to be in writing and require that some of these written agreements be signed by the client. The consequences for failing to comply with these new ethical rules may be quite serious and may include both disciplinary charges and rulings that the agreements involved cannot be enforced by the lawyer. What are the new requirements?

Fee Agreements

Former ER 1.5 provided that all contingent fee agreements had to be in writing and signed by the client. This is still the rule, but new ER 1.5(b) now provides that *all* undertakings between a lawyer and a client must be in writing and must include (a) a description of the basis or rate of the fee and expenses for which the client will be responsible and (b) what the scope of the lawyer's representation in the matter is going to be.

In non-contingent fee cases, the writing does not have to be signed by the client, but it must be communicated to the client before or within a reasonable time after commencement of the representation. For clients whom you are currently representing or whom you are representing as of Dec. 1, 2003, the effective date of the new rules, you should confirm in writing with those clients any changes in the scope of representation or the basis of the fees they are being charged after December 1.

ER 1.5(d) provides that no fee denominated as "earned upon receipt" or "nonrefundable" can be charged unless the client is simultaneously advised in writing that he or she can discharge the lawyer at any time and may in that event be entitled to a refund based on the value of the representation to the client.

New ER 1.5(e) now provides that a

division of fees between lawyers who are not in the same firm may be made only if the client agrees, in a writing signed by the client, to the participation of the lawyers involved in accordance with the other requirements set forth in that rule.

Recap: *All engagements must be reflected by a writing. Contingent fee agreements still have to be in writing and signed by the client, but other fee agreements need only be communicated in writing to the client. If the fee agreement includes a provision for nonrefundable fees, the client must be advised in writing that the lawyer can be discharged at any time and that a refund may be available. Where a division of fees is going to occur between lawyers who are not in the same firm, then the client needs to sign the agreement.*

Conflicts of Interest

New ER 1.7(b) provides that any waiver of a conflict of interest between current clients must be accompanied by the informed consent of each affected client, confirmed in writing. "Confirmed in writing" is a defined term set forth in ER 1.0(b) and means either given in (a) a writing by the person (the client) or (b) a writing that the lawyer promptly transmits to the person confirming his or her oral consent.

ER 1.8(g) provides that a lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against those clients (both civil and criminal) unless each client gives informed consent, in a writing signed by each client, that they understand the existence and nature of all the claims or pleas (in a criminal case) involved and the participation of each person in the settlement.

Recap: *Conflict waivers must be evidenced by a writing. Although it's generally considered a good idea to have the client sign*

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a waiver of a conflict, the ethical rules do not require it. When there is an aggregate settlement of the claims of or against current clients, each client is required to sign a writing acknowledging that each understands the transaction.

Business Transactions With Clients

New ER 1.8(a) states that a lawyer may not enter into a business transaction with a client except under certain specified conditions, among which are that the client is advised in writing by the lawyer to get independent legal counsel and the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction.

Recap: *In any business transaction with a client, always a questionable practice, the lawyer must put in writing his advice to the client to get independent representation, and the client must sign a writing giving informed consent to the essential terms of the business transaction. Remember that “informed consent” is a defined term under ER 1.0(e) and denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and an explanation about the material risks of and reasonable available alternatives to the proposed course of conduct.*

Settling Client Claims Against the Lawyer

ER 1.8(h) prohibits a lawyer from settling claims that a client or former client has against the lawyer for malpractice or for ethical violations reportable to the State Bar authorities, unless that person is advised in writing to seek the advice of independent legal counsel in connection therewith.

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Recap: Any settlement with a client concerning claims for malpractice or ethical violations must be accompanied by a writing advising the client to seek his or her own lawyer. The writing does not have to be signed by the client.

Conflicts With Former Clients

New ER 1.9 provides that a lawyer cannot represent someone against a former client or a client of a firm in which the lawyer was formerly associated in the same or substantially related matter unless the former client gives informed consent, confirmed in writing. Remember, this is a defined term.

Recap: Conflict waivers with former clients must be confirmed in writing, but need not be signed by the former client.

- Whenever you have a new client, are settling a malpractice or ethical dispute with a client or are resolving conflicts of interest with current or former clients, you need to get out the new

rules to make sure you are covering all the bases as far as having the proper writings and client consents.

- Whenever you are charging a nonrefundable fee or are splitting fees with another lawyer who is not in your firm, make sure you have the appropriate information given to the client and in the appropriate form of writing.

Remember that a client *must* sign (a) a contingent fee agreement, (b) agreements providing for division of fees between lawyers who are not in the same firm, (c) informed consents to the terms of transactions involving business deals between a lawyer and a client and (d) an acknowledgment in any situation in which a lawyer representing two or more clients participates in making an aggregate settlement of the claims of or against those clients. ▀

endnote

1. Rule 42, ARIZ.R.S.C.T.