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New Maine Rules of Professional Conduct

As of August 1, 2009, the Code of Professional Responsibility contained in Maine Bar Rules 3.1 through 3.15 will no longer be in force. From then on, Maine lawyers will be governed by the new Maine Rules of Professional Conduct.

The new Rules are the product of several years of work by the Maine Task Force on Ethics. They were adopted by the Maine Supreme Judicial Court on February 26, 2009. The effective date of August 1, 2009 allows ample time for Maine lawyers to become fully acquainted with the new Rules. The complete text of the Rules can be found on the Court's website.

Status of Preamble, Comments and Reporter's Notes

The Rules are preceded by a Preamble and followed by important Comments and Reporter's Notes. While the Court did not adopt the Preamble, Comments and Reporter's Notes as part of the Rules, it has nevertheless published them on its website along with the Rules. The Comments offer helpful guidance on the interpretation of the new Rules and the Reporter's Notes explain the relationship of the new Rules to the current Code of Professional Responsibility and the ABA Model Rules.

Status of Maine Ethics Opinions

Opinions rendered by the Maine Professional Ethics Opinions will continue to be relevant authority to the extent the ethics rules underlying them have not significantly changed. In obtaining guidance on the interpretation of the new Rules, however, the lawyer is advised to consult first the definitions contained in new Rule 1.0, then the Comments and Reporter's Notes, and then relevant Maine and ABA ethics opinions.


Important Seminar in June

The Maine State Bar Association is organizing an important seminar to educate lawyers on the new Rules. The half-day seminar will be conducted in Portland on June 10 and repeated in Bangor on June 19. The faculty will consist of members of the Maine Task Force on Ethics that was responsible for drafting the new Rules.

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All lawyers will need to spend time educating themselves on the new Rules, including lawyers who may already be fully acquainted with the ABA Model Rules. While adhering to the ABA Model Rules organizational format, the new Rules are not identical to the ABA Model Rules. In some cases, the Task Force adopted the ABA Model Rule without modification. In others, the Task Force made significant changes to the ABA Model Rule, sometimes to preserve what historically has worked well under the Maine Code and other times to fill a void left by both the ABA Model Rule and the Maine Code.

Simultaneous Representation – Concurrent Conflicts-of-Interest

One approach to integrating the new Rules is to focus on an area of ethics and compare the new Rule to its corollary in the Maine Code. For example, one might look at conflicts in the simultaneous representation of two or more current clients, referred to as concurrent conflicts-of-interest under the new Rules.

Under Maine’s current Code, everything to do with conflicts is contained in Rule 3.4. Under the new Rules, conflicts are dealt with by a number of different rules, Rule 1.7 (conflicts between current clients), Rule 1.8 (specific rules relating to current client conflicts), Rule 1.9 (duties owed to former clients), Rule 1.10 (imputation of conflicts), Rule 1.11 (special conflict rules relating to former and current government lawyers), Rule 1.12 (conflicts relating to former judges, arbitrators and mediators) and Rule 1.18 (duties to prospective clients).

Our current focus is on Rule 1.7, which deals with conflicts between current clients. Rule 1.7 contains some slightly different terminology from its corollary found in Maine Bar Rule 3.4(c). Sometimes a difference in terminology between the Code and the new Rules suggest substantive change, other times it does not.

Under Rule 1.7(a), a concurrent conflict-of-interest exists if:

- (1) the representation of one client would be directly adverse to another client, even if representation would not occur in the same matter or in substantially related matters; or
- (2) there is a significant risk that the representation of one or more clients would be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The above provision represents no real change from current practice. Subparagraph (1) states directly what most lawyers have considered inherent in Rule 3.4 of the Maine Code, namely that a lawyer cannot sue an existing client or take on a matter that is directly adverse to another current client. Client loyalty and the ability to exercise independent judgment lie at the heart of this prohibition.

Subparagraph (2) contains a wording change from Maine's existing test for conflict of interest found in Rule 3.4(b)(1). Subparagraph (2) speaks in terms of a "significant risk" that representation would be "materially limited," whereas current Rule 3.4(b)(1) employs the test whether there is a "substantial risk" that representation would be "materially and adversely affected." Is this wording variation significant? No. The Reporter's Notes clarify that Rule 1.7 does not represent a significant departure from the treatment of conflicts in Maine Bar Rule 3.4. The difference in wording exists in this case because where possible, the Task Force used the language of the ABA Model Rules for the sake of consistency.

New Rule 1.7(b) provides that where a concurrent conflict-of-interest exists, the lawyer may still represent a client if:

- (1) the lawyer reasonably believes that the lawyer would be able to provide competent and diligent representation to each affected client; and
- (2) each affected client gives informed consent, confirmed in writing.

Subparagraph (1), while worded differently from the Maine Code, retains the objective test for simultaneous representation currently found in Maine Rule 3.4(c)(2)(i). Subparagraph (2) contains a new requirement that informed consent for simultaneous representation be confirmed in writing, something that has always been prudent practice, but not required by existing Maine Rule 3.4(c)(2).

New Rule 1.7(c) addresses prohibited concurrent representation regardless of consent. It states that under no circumstances may a lawyer represent a client if:

- (1) the representation is prohibited by law;
- (2) the representation involves 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.

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Subparagraph (2) represents a softening of the current prohibition found in Maine Rule 3.4(c)(1), which prohibits such representation in litigation or “any other proceeding for dispute resolution” as opposed to a “proceeding before a tribunal.” An example of a proceeding in which representation would be prohibited by current Rule 3.4(c)(1), but not by new Rule 1.7(c)(2) would be a private arbitration.

Conclusion

Every Maine lawyer must be ready to adapt to Maine’s Rules of Professional Conduct as of August 1, 2009. This will require a careful reading of the new rules along with the Comments and Reporter’s Notes. The Reporter’s Notes are helpful in comparing the new Rules to the current Maine Code of Professional Responsibility so one can understand where substantive changes have been made. Upcoming seminars offered by the Maine State Bar Association will be extremely helpful to lawyers in learning and understanding the new Rules.

About the Author -

Phillip E. Johnson is a member of the Augusta litigation firm of Johnson & Webbert, LLP. He specializes in lawyer professional responsibility and is the former Chair of the Professional Ethics Commission of the Board of Overseers of the Bar. He also served on the Maine’s Ethics 2000 Task Force.