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## **Important Changes to Missouri Supreme Court Rule 4: Part I**

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On July 1, 2007, the revisions to Missouri Supreme Court Rule 4: the Rules of Professional Conduct went into effect. In the first part of this two part series, we will discuss the changes to Rule 4 that will most likely have an impact on your practice. While this article highlights some of the more significant changes, it is not a substitute for reading the text of the Rules of Professional Conduct.

### **Rule 4 1.0: Terminology**

Rule 4 1.0: Terminology, addresses definitions to key terms used throughout Rule 4. Perhaps the most significant change in the new Definitions is the requirement that conflict of interest waivers be confirmed in writing after the client gives informed consent. The informed consent requirement replaces the consents after consultation standard. Under Rule 4 1.0(e), informed consent is an 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. As noted in Comment 6 to Rule 4 1.0, the level of communication to obtain informed consent will vary depending on the Rule involved as well as the circumstances surrounding the need for informed consent. The lawyer should explain: (1) the circumstances of the conflict; (2) the material risks of the conflict; (3) any available alternatives to the proposed course of conduct; (4) the effect the course of conduct may have on the attorney client relationship; and (5) whether the lawyer should advise the client to seek outside counsel regarding the informed consent. M.R.P.C. 4 1.0.

The drafters acknowledged situations where the client gives informed consent but confirmation in writing is unfeasible at the time of consent. In those instances, the lawyer must obtain or transmit the informed consent in writing within a reasonable time.

The definition of writing under the new Rule 4 has been expanded to include tangible or electronic records of communication. The previous Rule did not address electronic Rules of communication. Furthermore, the term signed has been revised in Rule 4 1.0(n) as an electronic sound, symbol, or process that is attached to or associated with a writing that is executed or adopted by a person with the intent to sign the writing. M.R.P.C. 4 1.0.

### **Rule 4 1.3: Diligence**

While the text of Rule 4 1.3 regarding a lawyer s duty of diligence has remained unchanged, the comments to the new Rule may require the lawyer to have a plan in the event of the lawyer s own death or disability. The new Rule recommends the planning lawyer designate another competent lawyer to assume responsibilities of the client s files in the lawyer s unexpected absence. The Missouri Bar has addressed the issue of planning for your clients in the event of your death or disability with the publication of *Planning*

*Ahead: A Guide to Protect Your Client's and Your Survivor's Interests in the event of Your Disability or Death.* Copies can be downloaded from the Missouri Bar website ([www.mobar.org](http://www.mobar.org)).

#### **Rule 4 1.18: Duties to Prospective Clients**

This is a new Rule addressing conflicts of interest and confidentiality of information involving a potential client. The drafters of the new Rule have included the phrase significantly harmful to describe what constitutes disqualifying information.

The Rule defines a prospective client as any person who discusses the possibility of forming a legal relationship with an attorney. Even where no attorney client relationship results from the discussion, the attorney shall not use or reveal the information learned from the prospective client. The Rule disqualifies a lawyer from representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. (**Emphasis Added**).

Under the new Rule, a lawyer can avoid disqualification resulting from receipt of significantly harmful confidential information in an initial client interview where there is informed consent, confirmed in writing by the affected client and the potential client, OR, if the lawyer takes reasonable measures during the initial meeting to avoid exposure to more disqualifying information than is reasonably necessary to determine whether to represent the prospective client and is then timely screened from any participation in the matter. The significance of this change is that in some conflict of interest situations, representation may be permissible by other firm members so long as the information possessed by the disqualified attorney is not significantly harmful to the client, or if the lawyer is screened from the representation. For lawyers for whom this type of disqualification is an issue, revision of the firm's intake procedures to comply with the Rule's standards can reduce the risk of being conflicted out of a representation merely for having talked to a prospective client.

#### **Rule 4 4.2: Communication with Person Represented by Counsel**

The new Rule represents a significant departure from the previous Rule's interpretations. Previously, it was generally impermissible for an attorney to contact a former employee of an organization without getting permission from that organization's counsel. Comment [7] now states, in part, that: Consent of the organization's lawyer is not required for communication with a former constituent, which would include a former employee. In all cases, any attorney wishing to speak with a represented person should consider getting the consent of the represented person's attorney expressed in writing to avoid future disputes.

#### **Rule 4 4.3: Dealing with Unrepresented Persons**

This Rule has been amended to prohibit a lawyer from giving legal advice to an unrepresented person where the lawyer knows or should reasonably know that the interests of the person could be in conflict with the interests of the lawyer's client. The attorney may advise the unrepresented person to seek legal counsel.

#### **And That's Not All**

Additional rules changes that will be discussed in the next issue of *The Advocate* include: Rule 4 1.5: Fees; Rule 4 1.6: Confidentiality of Information; Rule 4 1.8: Conflict of Interest: Prohibited Transactions; Rule 4 1.9: Duties to Former Clients; Rule 4 1.15: Safekeeping Property; Rule 4 2.4: Lawyer Serving as Third Party Neutral; and Rule 4 4.4: Respect for Rights of Third Persons. In the meantime, the Rules are available at [www.courts.mo.gov](http://www.courts.mo.gov) under the Quick Links Court Rules click on, for additional review.