

## **VERMONT RULES OF PROFESSIONAL CONDUCT**

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### *Kennedy's Highlights*

*(NOT a substitute for full research of the rule & opinions/decisions on it)*

- Rule 1.0 was last amended in 2016, when Rules 1.0(o) and (p) are added to define terms used in the simultaneous amendments to Rules 1.5(f) and (g).

### **Rule 1.0. TERMINOLOGY**

(a) “Belief ” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “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.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other entity or association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “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.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of any other entity or association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief ” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is

reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court and all ancillary court proceedings such as depositions and hearings before a referee or master, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(o) “Advance,” “advance payment of fees,” or “retainer” means a payment by a client in anticipation of the future rendition of services that is not earned until such services are rendered and that is to be credited toward the fees earned when such future services are rendered.

(p) “Nonrefundable fee” means a fee paid to an attorney and earned by the attorney before professional services are rendered. Such a nonrefundable fee may be in exchange for retaining the attorney’s availability alone or may be in exchange also for the right to receive specified services in the future for no additional fee, or for a stated fee.

#### **Comment**

##### *Confirmed in Writing*

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

##### *Firm*

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A

group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations, including public defenders. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

### *Fraud*

[5] When used in these rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

### *Informed Consent*

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. 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 or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Of course, the information and explanation adequate to establish informed consent by a non-client may be confidential information of a client that is protected by Rule 1.6. In such a case, the consent of the non-client cannot be obtained unless the affected client gives informed consent to disclosure of the necessary information and explanation, or the nature of that information and explanation can be conveyed to the non-client in a way that protects the client’s confidential information. ALI, Restatement Third: The Law Governing Lawyers, § 122, comment c(i). Cf. Rule 1.9, Comment [3].

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information

about the matter. A number of rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

#### *Screened*

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

#### **Historical Citation**

Amended June 17, 2009, eff. Sept 1, 2009; November 22, 2011, eff. January 23, 2012; March 7, 2016; eff. May 9, 2016.

#### **Reporter's Notes—2016 Amendment**

Rules 1.0(o) and (p) are added to define terms used in the simultaneous amendments adding Rules 1.5(f) and (g).

#### **Reporter's Notes—2012 Amendment**

The amendment to Rule 1.0, Comment [8], implements the simultaneous amendment of Rule 1.10 to the list of rules to which the definition of screening applies.

#### **Reporter's Notes — 2009 Amendment**

V.R.P.C. 1.0 is adopted to conform to the Model Rules amendments in moving former preliminary section III, "Terminology," to a new Rule 1.0. See Reporter's Notes to simultaneous amendments of Preamble and Scope. "The purpose of this change is to give the defined terms greater prominence and to permit the use of Comments to further explicate some of the provisions." ABA Reporter's Explanation of Model Rule 1.0.

The ABA Reporter's Explanation further provides as follows:

1. Delete "consult" or "consultation"

The Commission recommends deletion of the term "consent after consultation" in favor of "informed consent," which is defined in paragraph (e). This change is being made throughout the Rules. No change in substance is intended.

2. Paragraph (b): "Confirmed in writing"

The Commission has proposed requiring a lawyer to obtain the informed consent of a client or other person, "confirmed in writing," in some circumstances. See, e.g., Rule 1.7. The term "writing" is defined in paragraph (n).

### 3. Paragraph (c): “Firm” or “law firm”

These changes conform the definition to the changes made in the Comment to Rule 1.10. The Commission is also recommending that the material presently in the Rule 1.10 Comment be moved to the Comment under this Rule. See Comments [2] -[4]. The phrase “including the government” has been added to Comment [3] to clarify that legal departments of government entities are included within the definition of “firm.” The reference to “other association authorized to practice law” was added to encompass lawyers practicing in limited liability entities. No change in substance is intended.

### 4. Paragraph (d): Clarify that “fraud” refers to conduct characterized as fraudulent under other applicable law

The [former] definition is ambiguous because it does not clearly state whether, in addition to the intent to deceive, the conduct must be fraudulent under applicable substantive or procedural law. In other words, it is possible that conduct might be considered “fraudulent” merely because it involves an intention to deceive, even if it does not violate any other law. The Commission recommends clarifying that the conduct must be fraudulent under applicable substantive or procedural law.

### 5. Paragraph (e): “Informed consent”

The Commission recommends that throughout the Rules the phrase “consent after consultation” be replaced with “gives informed consent.” The Commission believes that “consultation” is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions. The term “informed consent,” which is familiar from its use in other contexts, is more likely to convey to lawyers what is required under the Rules. No change in substance is intended.

### 6. Paragraph (2): “Partner”: Added reference to “member of an association authorized to practice law”

As with the change to paragraph (c), this reference was added to encompass lawyers practicing in limited liability entities.

### 7. Paragraph (k): “Screened”

The current Model Rules do not impute conflicts of interest in certain situations when the personally disqualified lawyer is screened from any participation in the matter. See Rules 1.11(b) (former government lawyers) and 1.12(c)(1) (former judges). The Commission is proposing similar treatment of other situations involving a conflict of interest on the part of one lawyer in a firm. See Rules 1.12(c)(1) (former third-party neutrals) and 1.18(d)(1) (discussions with prospective clients). The Commission is recommending that the requirements of an effective screen be set forth in this paragraph and in the accompanying Comments.

### 8. Paragraph (m): “Tribunal”

This term was not previously defined. The Commission recommends including a definition and including not only courts but also binding arbitration and legislative bodies, administrative agencies or other bodies acting in an adjudicative capacity. [For clarity, language has been added to specify that “court” includes ancillary proceedings such as depositions or master’s or referee’s hearings.]

### 9. Paragraph (n): “Writing” or “written”

Given the Commission’s recommendation that writings be required in more circumstances, it also recommends that the term be defined and that the definition include tangible or electronic records. With respect to electronic records, the paragraph provides a definition of “signed” that includes methods intended as the equivalent of a traditional signature. The electronic signature provisions are modeled on the Uniform Electronic Transactions Act.

#### COMMENT:

[1] This new Comment was added to clarify that if it is not feasible to obtain or transmit a writing at the time a person gives informed consent, a lawyer may undertake or continue representation based on the oral informed consent, so long as the writing is obtained or transmitted within a reasonable time thereafter.

[2] This paragraph was taken from the Comment to Rule 1.10. It is unchanged, except for the addition of a reference to paragraph (c).

[3] This paragraph was taken from the Comment to Rule 1.10. The only change is stylistic, and no substantive change is intended.

[4] This paragraph was taken from the Comment to Rule 1.10. The Commission concluded that the [former] Comment is confusing. The revision is intended to clarify that organizational structure will determine whether the entire organization or different components will constitute a firm or firms for purposes of these Rules.

[5] Under applicable substantive law, “fraud” may not be actionable unless someone relied on a misrepresentation or failure to inform and consequently suffered damages. This paragraph makes it clear that reliance is not required for purposes of the disciplinary rules, which focus entirely on the nature of the conduct in question.

[6] This new Comment provides cross-references to Rules requiring the lawyer to obtain the informed consent of the client or another person within the meaning of this Rule. It also explains the requirements of lawyer communication under the Rule. [Language has been added to ABA Comment [6] clarifying the application of the definition of “informed consent” in Rule 1.0(e) when disclosure of confidential client information may be necessary to obtain the consent.]

[7] This new Comment explains what is required in order to constitute a manifestation of consent by the client.

[8] -[10] These new Comments provide cross-references to Rules that provide for screening and explain in more detail what measures may be adequate to assure an effective screen.