Wisconsin Town Attorneys

2021 Town Law Conference

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Ethics for Town Lawyers

What's New in the World of Professional Responsibility?

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I. MUNICIPAL ATTORNEYS ARE COVERED BY THE SAME SUPREME COURT RULES THAT APPLY TO ALL OTHER ATTORNEYS BUT OFTEN ARE FACED WITH DIFFERENT ISSUES BECAUSE OF THE REPRESENTATION OF A GOVERNMENTAL BODY AND SOMETIMES, THE PUBLIC.

Consider the following comments from the Rules of Professional Conduct:

Preamble: A Lawyer's Responsibilities.

Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

SCR 20:1.7 Conflict of Interest: General Rule.

Government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.

SCR 20:1.10 Imputed Disqualification: General Rule.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On the balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

SCR 20:1.13 Organization As Client.

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statute and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, the government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.

SCR 20:3.9 Advocate in Non-adjudicative Proceedings.

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues, and advance arguments in the matters under consideration. The decision-making body, like a court, should be able to rely upon the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

SCR 20:4.2 Communication with Person Represented by Counsel.

Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

II. WHO IS THE CLIENT?

A. Rules recognize entity as client and duty of loyalty follows to the entity (government unit).

B. Requirement in Rule that attorney report "up the ladder" if conduct warrants action being taken.

C. **Rule: SCR 20:1.13 - Organization as client.**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) Except as provided in par. (d), if, (1) despite the lawyer's efforts in accordance with par. (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not SCR 20:1.6 permits such disclosure, but only if and to the extend the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to pars. (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the layer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other

constituents, subject to the provisions of SCR 20:1.7. If the organization's consent to the dual representation is required by SCR 20:1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(h) Notwithstanding other provisions of this rule, a lawyer shall comply with the disclosure requirements of SCR 20:1.6(b).

E. See Appendix A for Comment to Rule.

III. DECISIONMAKING IN THE LOCAL GOVERNMENT SETTING.

A. Rule requires more discussion with client on means to accomplish representation.

B. **Rule 20:1.0(f) defines informed consent by client as:**

"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.

C. **Rule 20:1.4: Communication.**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) **reasonably consult with the client about the means by which the client's objectives are to be accomplished;**

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests by the client for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

IV. CONFIDENTIALITY IN THE LOCAL GOVERNMENT SETTING.

A. Lawyer may not reveal information learned during course of representation.

B. **Rule 20:1.6.**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b), and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's conduct under these rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a court order.

V. RULES AFFECTING CONFLICT OF INTEREST.

A. Concept of "concurrent conflict of interest."

B. **Rule 1.7: Conflict of Interest: Current Clients.**

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve 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; and

(4) each affected client gives informed consent, confirmed in writing.

C. Personal Conflict in providing advice to official who has expressed animosity.

D. Conflict when providing advice to officials on opposite sides of debate on topic/issue.

VI. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL.

A. **SCR 20:4.2 Communication with person represented by counsel.**

In representing the client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Comment

[7] In the case of a represented organization, this Rules prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

B. Rules are different for communicating with government official.

APPENDICES

Wisconsin Comment to SCR 20:1.13

WISCONSIN COMMITTEE COMMENT Paragraph (h) differs from the Model Rule and calls attention to the mandatory disclosure provisions contained in Wisconsin Supreme Court Rule 20:1.6(b). ABA COMMENT The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client,

including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation. Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)—(6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal. Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of

government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope. Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case. Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder. Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization. SCR 20:1

Wisconsin Committee Comment

Paragraph (h) differs from the Model Rule and calls attention to the mandatory disclosure provisions contained in Wisconsin Supreme Court Rule 20:1.6(b).

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authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

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Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

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Dual Representation

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[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

ETHICAL CONSIDERATIONS FOR MUNICIPAL LAWYERS

A. All information learned during the course of representation is considered confidential under SCR 20:1.6. How does this interface with the day-to-day communication and discussions that a municipal attorney has with elected officials?

It is generally recognized that all information learned during the course of representation is considered confidential information and may not be disclosed by the lawyer without permission from the client or if impliedly authorized because of the representation. The impliedly authorized standard allows municipal lawyers to disclose a lot of information as part of their regular representation of the local government/municipality.

Some of the conversations during the course of representation are really casual conversations or personal conversations that are not directly related to the representation by the municipal attorney. There is grounds to conclude that some of the information learned during discussions with local government officials and elected officials is not considered confidential information learned during the course of representation although distinguishing between confidential information and non-confidential information would be very difficult to accomplish. Municipal lawyers need to recognize that the majority of the conversations and communications that they have with local elected officials would be considered attorney-client confidential information.

B. It is clear that the local government unit is the client for the municipal attorney; however, it is often not clear who the "constituents" are of the local government unit under SCR 20:1.13, who provide direction to the municipal attorney and whose conversations would normally be considered attorney-client confidential and attorney-client privileged.

Constituents of a local government unit will change on a regular basis depending upon the representation being provided by the municipal attorney. If the municipal attorney is representing a committee that is authorized to take action, the chair of the committee and most often, all of the members of the committee, would be considered constituents of the local government unit. Otherwise, the constituents would be considered the leaders of the local government unit such as the mayor, town chairman or village president.

Many times, a top administrator would be considered a constituent of the local government unit such as the city administrator, town administrator or village administrator. Other high-level positions would also be considered constituents such as common council president.

C. It appears that the "constituent" that would give direction for the local government unit would change on a regular basis depending upon the representation being provided by the municipal attorney (such as representing the Zoning Board of Appeals) but how does that relate to general conversations with elected officials when the municipal attorney is not directly handling a matter for a governing or committee of the local government unit?

The difficult question is which entity or person is authorized to give an informed consent waiver of the attorney-client confidentiality rule. Generally, municipal attorneys would say that the governmental body such as the common council or the village board is the only entity that can give consent to release attorney-client confidential information and attorney-client privileged information. It is probably true that the governing body is the only entity that can provide a waiver or release of attorney-client privileged information. It is more common that a high-level constituent could give permission to release attorney-client confidential information or to determine that the release of information is impliedly authorized as part of the representation so that the municipal attorney should check with that high-level constituent before releasing information that would be considered confidential.

The more difficult question is when a municipal attorney is providing general legal advice to one elected official or one high-level administrator. This would still be considered a representation by the municipal attorney and therefore subject to the attorney-client confidentiality requirements. General conversations that do not relate to providing advice or do not relate to matters being handled by the municipal attorney may be considered non-confidential/non-privileged communication but as noted above, the line for making that determination is very fuzzy. If the municipal attorney is giving general advice to one individual and that individual gives permission to disclose the to others, the municipal attorney would be free to release that information to others.

Another difficult question is when the municipal attorney is asked advice from a single person (elected official or constituent administrator) and is told not to disclose that information to anyone else. It is generally assumed that the representation provided by the municipal attorney is to the local government entity and the municipal attorney must disclose any information learned during the course of representation to the local government entity if requested. This can be viewed like a joint representation of the local government entity and the particular individual and there are no secrets between jointly represented clients.

It is important that the municipal attorney make it clear that any conversations being held with a single individual would not be considered protected by attorney-client confidentiality unless it is a request for an ethics opinion which is considered protected under state law. Thus, it would be difficult to argue that a communication between a municipal attorney and a single elected official must be kept confidential and not disclosed to the governing body although I would not automatically conclude that such a conversation with an individual person must be disclosed to the top level administrator or top level elected official such as the mayor or village president. The request for the

confidential information should come from the governing body such as the common council or the village board.

D. Are general conversations with local government officials and elected officials all considered confidential communications and therefore considered privileged and protected from disclosure under the Wisconsin Public Records Law?

As noted above, general conversations regarding matters that are not related to the representation would still be considered public records or public information under Wisconsin Public Records Law (if reduced to writing) but would not be considered attorney-client confidential information. The line between general conversations information that is not related to the representation and information learned during the course of representation is very fuzzy and arguments could be made that any communication between a municipal attorney and a municipal official is part of the representation and would be considered confidential and also privileged. There is a practical consideration which is that there are communications between municipal attorneys and elected officials about such things as family matters which certainly would not be considered attorney-client confidential if reviewed by a court.

E. If a municipal lawyer has a conversation with a local elected official who requests an opinion from the municipal attorney, may other elected officials ask the municipal attorney to disclose the nature of the conversation and the nature of the opinion being requested by a particular local elected official? The question centers around whether every conversation by a municipal attorney with an elected official is considered confidential and not subject to disclosure even to other local elected officials who are also considered constituents of the client (local government unit).

The best practice for the municipal attorney is to notify the elected official at the start of the conversation that things being said to the municipal attorney are not considered confidential as it relates to other elected officials or more importantly as it relates to the governing body. The analysis would be that the municipal attorney is representing the elected official in his or her capacity as a constituent of the local government unit and the local government unit is the entity that owns the attorney-client confidentiality and attorney-client privilege obligations. In other words, I do not think a local elected official can come to the municipal attorney and say *"I want to tell you something in confidence but I don't want you to repeat it to anyone else*," when the municipal attorney is engaged in general municipal attorney activities and representing the municipal client.

Probably the most critical issue is whether the mayor or village president can make inquiry to the municipal attorney as the "designated" chief executive officer of the local government unit and such inquiry would be about a matter that is in controversy between the mayor/village president and the local elected official. Again, there is really no guidance on this topic although it would not be reasonable for the local elected official to assume that any conversation with the municipal attorney is kept confidential from the designated representative of the local government unit. The municipal attorney may be able to argue that he/she is not going to release that confidential information to the mayor/village president but will only release that information if requested by the common

council or the village board. This may be "political suicide" but may be the only alternative available to the municipal attorney.

F. Are conversations by the municipal attorney with a single elected official protected as a confidential communication with a lawyer or privileged under the attorney-client privilege Rule or must the municipal attorney disclose the content of a conversation to the chief executive officer of the governing body or the governing body as a whole?

See above response.

G. If the municipal attorney is asked for information that is considered confidential under SCR 20:1.6, may the municipal attorney refuse to provide that information until a proper informed consent has been received from the appropriate governing body (Common Council or County Board) or may other local elected officials waive the attorney-client confidentiality requirement of SCR 20:1.6?

See above response.

H. May the municipal attorney rely upon the requirements of attorney-client confidentiality under SCR 20:1.6 as a basis to deny access to documents under the Wisconsin Public Records Law? It is clear that the municipal attorney can rely upon the attorney-client privilege rule to decide not to disclose information under a public records request, but privilege may be lost for certain documents and therefore the privilege statute is not available as a clearly stated public policy that can be used by the municipal attorney when conducting the balancing test under the Wisconsin Public Records Law.

This is a very difficult question and there is no case law that provides guidance. It is clear that a municipal attorney can rely upon state statutes (attorney-client privilege) to avoid the release of information asked for under the Public Records Law. If the privilege has been waived by the disclosure of information to another person who is not protected by the privilege (such as an unrelated department head), the reliance on the privilege statute may not be effective. The question then becomes whether the municipal attorney can rely upon the Supreme Court Rules (20:1.6) to argue that the information is attorney-client confidential and therefore may not be disclosed under the Wisconsin Public Records Law. This creates tension between the theory of open government and the important protection of attorney-client confidentiality. In the end, a judge is likely to rule that if the information is not privileged under the evidentiary statute, the information can be released to the public records requestor even though the information would still be considered attorney-client confidential. I do not think that a judge would rely upon SCR 20:1.6 to find that the information (in the written document) is still confidential and therefore not subject to disclosure under the Public Records Law. This is very troublesome because it creates a potential circumstance where information discussed with the municipal attorney may be disclosed under the Wisconsin Public Records Law even

though the information would still be considered confidential and not subject to any type of disclosure by the municipal attorney under the Supreme Court Rules.

Another consideration is the language of SCR 20:1.6 regarding confidentiality (attached). In particular, SCR 20:1.6 provides in (c)(5) that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law. This raises the question whether a municipal attorney may disclose confidential information in order to comply with the Wisconsin Open Meetings Law and Public Records Law. There has never been a test on this question, but it does allow for discretionary disclosure of confidential information if the municipal attorney truly believes that the information must be released pursuant to the Wisconsin Public Records Law (as an example). In this scenario, the local elected official or governmental unit would file a complaint with the Office of Lawyer Regulation if a municipal attorney decides to release information under the discretionary disclosure exception. More likely, the local government unit would terminate the employment of the municipal attorney than pursue an OLR complaint. Thus, we may never get a real answer to this question.

The language in SCR 20:1.6(c)(5) may become a basis for a defense by a municipal attorney to the disclosure of information that others consider attorney-client confidential. It would seem that the best practice would be for the municipal attorney to get permission to disclose the information from the governing body of the local government unit in order to avoid any controversy about disclosing confidential information.

Wisconsin Formal Ethics Opinion EF-20-02: Lawyer Examining a Current or Former Client as Adverse Witness

June 25, 2020

Synopsis: *A lawyer faced with cross examining*[1] *a current client will have a conflict of interest that would prevent the lawyer from continuing both representations unless the conflict is subject to the written and signed informed consent of both clients. A lawyer faced with cross examining a former client will have a conflict if the subject matter of the prior representation is the same or substantially related to the examination or there is a substantial risk the lawyer will use information relating to the representation of the former client to the disadvantage of the former client. In both situations the conflict of interest would be imputed to other members of the lawyer's firm.*

Scenario One

Lawyer A represents a party in a contested divorce. At the same time, Lawyer B, a lawyer in the same firm, represents the sibling of the opposing party in an unrelated debt collection matter. It is likely that the sibling will be a witness in the divorce trial as to issues related to custody and placement. May Attorney A depose, pursue discovery, and cross examine Attorney B's client at the divorce trial?

Scenario Two

A public defender represents a client in a robbery case. Upon receipt of the prosecution's witness list, the public defender discovers a key state witness is her former client who she represented a year ago in connection with drug charges. Based on her prior representation, the public defender knows the former client has three prior felony convictions and has struggled with substance abuse problems. May the public defender cross examine the former client at trial?

Introduction

This opinion addresses situations where a lawyer is faced with conducting an adverse examination of a current or former client of the lawyer or the lawyer's firm. Whether a conflict

[1] In this opinion, the terms cross examination and adverse examination are used interchangeably. In addition, the discussion would apply to pretrial depositions and discovery requests as well as adverse examinations at trial.

that arises from cross-examining a current client is subject to informed consent depends on the specific facts and circumstances.[2] Former client conflicts are generally subject to informed consent.[3] In both situations the conflict would be imputed to other members of the attorney's firm.[4] This opinion reviews the relevant Wisconsin Supreme Court Rules ("SCRs") and then applies them to the scenarios presented.

Opinion

The Rules of Professional Conduct for Attorneys (the "rules") that govern conflicts of interest set forth different standards for current and former client conflicts. For this reason, a threshold determination is whether the situation involves a current or former client.[5]

Current Clients

A lawyer faced with an adverse examination of a current client must consider several rules: SCR 20:1.7 (Conflicts of interest for current clients), SCR 20:1.8(b) (use of confidential information to detriment of client); SCR 20:1.6 (Confidentiality), and SCR 20:1.4 (Communication).

The situation presents the lawyer with two choices, both problematic. The first is to aggressively examine the client, and use or disclose protected information that could harm or embarrass the client in service to the other client, while betraying the duties of loyalty and confidentiality owed to the client who is a witness. The second is to conduct either no examination or a limited

[2] The committee's conclusions are consistent with ethics opinions from other jurisdictions. Current clients – *Conn. Op. 99-14* (1999); *Md. Op. 81-73* (1981); *Mich. Op. RI-239* (1995); *Mich. Op. RI-218* (1994); *Nassau County Op. 86-46* (1986); *Ore. Op. 1991-110* (1991); *Pa. Op. 2002-71* (2002); *Tenn. Op. 85-F-92* (1985), and *West Virginia State Bar Comm. on Legal Ethics v. Frame*, 433 S.E. 2d 579 (W. Va. 1993). Former clients – *A.B.A. Formal Opinion 92-367*, *Phil. Bar Assoc. Professional Guidance Committee Opinion 2014-1* (2014); *Ala. Op. 90-25* (1990); *Ariz. Op. 91-05* (1991); and *Va. Op. 1407* (1991). *But see Ohio Op. 2013-4* (Oct. 11, 2013). (A public defender may cross examine a former client whom the attorney previously represented. This opinion appears to be an outlier and assumes a minority view of what information is "generally known").

[3] *See* SCR 20:1.9(a).

[4] In the former client situation screening of the conflicted lawyer is permitted only if the attorney performed "minor and isolated services in the disqualifying representation" at a prior firm. See SCR 20:1.10(a)(2)(i).

[5] If the representation was for a specific matter, it will generally be assumed to end when the matter is resolved. In transactional or open-ended situations, the status of the relationship may be more ambiguous. It is the responsibility of the lawyer to clarify when the representation ends. Comment [4] to SCR 20:1.3 states:

> If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

See also Wolfram, *Former Client Conflicts*, 10 Geo. J. Legal Ethics 677, 702-709 (1997).

examination to protect the witness-client, and by so doing, failing to provide the other client with competent[6] and diligent[7] representation.

In order to determine whether a conflict between current clients exists, the lawyer must look to SCR 20:1.7(a), which states in relevant part:

> (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will 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.

Conflicts under both subsections exist when a lawyer is faced with cross examination of a current client.

Although central to application of the rule, the term "directly adverse" is not expressly defined in the rule or its' accompanying ABA Comment. However, paragraph [6] of the Comment states:

> [6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client−lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. *Similarly, a directly adverse conflict may arise when a lawyer is required to cross−examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.*
>
> (emphasis added)

By design, examination of an adverse witness seeks to advance the interests of a represented client by discrediting the witness, either by demonstrating they are untruthful or mistaken.

[6] *See* SCR 20:1.1.

[7] *See* SCR 20:1.3.

Common strategies include presenting proof of the witness' prior bad conduct, their criminal record, inconsistent prior statements, bias, a history of alcohol or substance abuse, or a faulty memory.[8] Hostile treatment of a current client in a public forum is inevitability harmful to the lawyer-client relationship, undercuts the loyalty owed to the client, may be humiliating to the client, and, if based on information previously obtained from the client, violates the duty of confidentiality.[9] Cross examination of a current client, whether a party or only a witness, will always be "directly adverse" to that client.[10]

As noted, the situation also creates a "significant risk" that the lawyer's representation will be "materially limited" in one or more ways. SCR 20:1.7(a)(2). A vigorous adverse examination of the client poses risks to the duties of loyalty and confidentiality. Alternatively, a "soft" examination to protect the client-witness will improperly limit the level of competent and diligent representation owed the other client. Cross examination of a current client will always present a conflict of interest within the meaning of SCR 20:1.7.[11] Such conflicts are imputed to other members of the firm and screening of the conflicted lawyer will not defeat the imputation of the conflict. SCR 20:1.10(a).

Consequently, continued representation is permissible only if all the requirements of SCR 20:1.7(b), regarding informed consent, can be satisfied. These requirements are discussed later in this opinion.

Former Clients[12]

After the termination of a lawyer-client relationship, the lawyer has a continuing duty to protect former clients' information and a duty to avoid former client conflicts. Thus, a lawyer may not

[8] *See* Wis. Stat. §§904.04, 906.09. Regardless of the case, a significant part of any cross examination involves attempting to show why the witness is unworthy of belief, focusing on personal characteristics of the witness that are unrelated to the issues in the case. For this reason, a risk of harm to the client-witness or former-client witness will exist even when the cases are neither the same nor substantially related.

[9] *See* SCR 20:1.6. Information relating to the representation of a client may be used or disclosed without client consent in only a few circumstances; generally informed client consent is necessary. *See also* SCR 20:1.8(b) (prohibition against use of confidential information to the "disadvantage" of the client absent informed consent).

[10] Comment c(i) to §121 of the *Restatement (Third) of the Law Governing Lawyers* (2000) further explains, "'[a]dverse' effect relates to the quality of the representation, not necessarily the quality of the result obtained in a given case. The standard refers to the incentives faced by the lawyer before or during the representation because it often cannot be foretold what the actual result would have been if the representation had been conflict-free." *See also A.B.A. Formal Opinion* 92-367 at 5-7 (conducting cross examination of client sufficiently adverse to trigger application of Rule 1.7); California Opinion 2011-182 at 2 ("adverse" includes actions that are "unfavorable" or "detrimental" even absent significant harm).

[11] The same analysis applies to other forms of adverse discovery against current clients, such as depositions, subpoenas, and interrogatories.

[12] SCR 20:1.18 provides protections to conflicts with prospective clients that parallel those for former clients.

"knowingly represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. . ." unless the former client provides "informed consent confirmed in a writing signed by the client." SCR 20:1.9(a).

The scope of the prohibition against representing an adverse client in the "same" matter is self-evident. Less clear is when the cases are "substantially related".[13] Guidance is found in the ABA Comments to SCR 20:1.9:

> [3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

Put another way, matters are "substantially related" when it is reasonable to assume that the lawyer in the prior representation would have access to information that would be relevant and useful in the new matter. The former client is not required to assert that specific factual information was provided to the lawyer.[14] Whether or not the lawyer actually received such information is irrelevant to the analysis.[15]

In considering the propriety of cross examining, or conducting any form of adverse discovery against a former client, the lawyer must consider whether it is reasonable to *assume* that a lawyer in the prior representation would have had access to information useful in cross examining the former client. For example, a lawyer who previously represented a client in connection with a drunk driving offense would face a conflict in cross examining that former client as an adverse witness in a contract case because it would be reasonable to assume that issues that may have arisen in the drunk driving matter, such as possible substance abuse and illegal conduct, that would be relevant in attacking the credibility of the witness. On the other hand, a lawyer who

[13] The "substantial relationship" test first appeared in case law and was subsequently codified into A.B.A. Model Rule 1.9. *See T.C. Theater Corp. v. Warner Bros. Pictures Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953); 51 *Law. Man. Prof. Conduct* 201, 222-224. *See also*, *Restatement (Third) of the Law Governing Lawyers* §132 (2000), Wolfram, *Former Client Conflicts*, 10 Geo. J. Legal Ethics 677 (1997).

[14] See SCR 20:1.9, ABA Comment [3]; "A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services."

[15] See *Burkes v Hales*, 165 Wis. 2d 585, 478 N.W. 2d 37 (Ct. App. 1991) "The general rule is that once a substantial relationship between the two representations is shown, the inquiry ends. "If the 'substantial relationship' test applies ..., 'it is not appropriate for the court to inquire into whether actual confidences were disclosed.' " *Analytica Inc. v. N.D.P. Research*, 708 F.2d 1263, 1267 (7th Cir.1983) (citation omitted.) The test is whether the lawyer "could have obtained" confidential information in the first representation that would have been relevant in the second; whether such information actually was obtained and, if so, whether it actually was used against the former client is irrelevant. Id. at 1266" (citations omitted).

previously represented a client in a simple real estate matter would not face a conflict in cross examining the former client who witnessed a traffic accident because it would be unreasonable to assume that information learned in the real estate matter would be relevant in cross examining the former client.

As noted, analysis of former client conflicts under SCR 20:1.9(a) does not depend on whether relevant information was actually disclosed to the lawyer in the prior representation. If, however, relevant information is actually in the lawyer's possession, additional considerations arise. SCR 20:1.9 (c) provides:

> … A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

This provision prohibits the *use,* even without disclosure, of information relating to the representation of former clients that might disadvantage the former client even if the cases are not the "same", "substantially related" or involve material adversity. It also prohibits *revealing* such information without the informed consent of the former client.[16]

The rule provides an exception to the prohibition on adverse use of information when the information is "generally known". SCR 20:1.9(c)(1). This provision has been interpreted narrowly. In ABA Formal Opinion 479, the ABA Standing Committee on Professional Ethics concluded that information is "generally known" only if widely recognized by members of the public in the relevant geographic area or within the former client's industry, profession, or trade.

The ABA Standing Committee rejected the notion that information is "generally known" if the information had previously been disclosed or is available in a public record, such as a court file or CCAP.[17] Thus, a lawyer faced with the prospect of cross examining a former client would be prohibited from making use of information relating to the representation of the former client unless that information fits the narrow definition of "generally known," meaning the information

[16] Comment a to §132 of the *Restatement (Third) of the Law Governing Lawyers* (2000) notes, "In light of the confidentiality requirements . . . a lawyer representing a client in a matter may not use confidential client information if doing so will adversely affect a material interest of the former client, even though that matter is not substantially related to a former representation . . ."

[17] The Wisconsin Supreme Court rejected a request to expand the exception to include information available to the public or that has been previously revealed and declined to modify the language of the rule and ABA Comment. *In the Matter of the Petition to Modify SCR 20:1.9(c)* (July 21, 2016).

is not just available from a public source, such as a court file or a public data base, but rather widely disseminated and recognized. If such information does not fit that definition, and the information would be useful in cross examining the former client, the lawyer is materially limited in representing the current client because the lawyer is in possession of useful information that the lawyer cannot use in representing the client. SCR 20:1.7(a)(2).

Thus, although the conflict analyses differ, a lawyer faced with an adverse examination of either a current or former client will often face a conflict of interest that would prevent representation in either case.

Imputation of Conflict and Screening

In general, the disqualification of one lawyer is imputed to her entire firm without the option of screening. SCR 20:1.10(a). In certain circumstances, screening may be possible in cases involving former clients, but only in cases where the "disqualified lawyer performed no more than minor and isolated services" in the disqualifying representation and the services were performed at a prior firm. SCR 20:1.10(a)(2).[18]

Informed Consent

When faced with a conflict of interest, an affected current or former client may be able to give informed consent to continued representation.

SCR 20:1.0(f) provides:[19]

> "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.

The requirements for informed consent are outlined in SCR 20:1.7(b)(1)-(4).

[18] If the former client was represented by an attorney no longer with the firm, representation of a client with interests adverse to the former client would be prohibited, absent consent by the former client, if the remaining firm lawyers have access to information relating to the representation of the former client, such as a closed file. SCR 20:1.10(b), (c) and comment (c)(i) to §124 of the *Restatement (Third) of the Law Governing Lawyers* (2000). If the former attorney is now a government attorney, the conflict analysis would be controlled by SCR 20:1.11(f); *see also* SCR 20:1.10(d). In the government lawyer context, the conflicts of one lawyer are not imputed to others in the firm and screening of the affected lawyer is required.

[19] Consent to a conflict must be confirmed in a writing signed by the affected current or former client. SCR 20:1.0(q) defines "writing": "[w]riting" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. 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."

In the case of currently represented clients, the lawyer must determine if it is reasonable to believe that the lawyer can competently and diligently represent each client notwithstanding the conflict. The "reasonableness" standard of SCR 20:1.7(b)(1) is objective – neither the lawyer's nor the client's subjective beliefs are dispositive. In the case of cross examination of former client the lawyer may conclude the conflict is non-consentable if the risk of harm to one or both clients appears unavoidable or the lawyer's duty of confidentiality prevents making a disclosure necessary to obtain the client's informed consent.[20] Former clients may consent to conflicts, but the lawyer must determine whether the current client conflict is consentable under SCR 20:1.7(b), and consent must be obtained from both the current and former client.[21] Finally, each affected client must provide informed consent in writing. SCRs 20:1.7(b)(4) and 20:1.9(a).

Obtaining valid informed consent requires that the lawyer discuss with each affected client or former client the facts and circumstances that give rise to the conflict[22] Direct communication with the client or former client is at the core of obtaining valid informed consent. [23] The dialogue must be grounded in the facts of the particular case, the varied interests of the lawyer and affected clients or former clients, how these interests might align or conflict, a presentation of the options available to the client or former client, the likely consequences of pursuing each option, both positive and negative, and emphasis that consent will squarely place the attorney in an posture adverse to his client or former client. It may be the case that the lawyer cannot make the necessary disclosures to obtain informed consent if either of the affected clients or former clients do not consent.[24] It is also important that the client or former client know they can refuse to consent or withdraw consent previously given.

[20] *See* A.B.A. Rule 1.7 cmt. ¶¶14-17; *see also Phil. Bar Assoc. Professional Guidance Committee Opinion* 2014-1 (2014) (finding non-consentable conflict when attorney faced with cross examination of former firm client); *State v. Loyal*, 753 A. 2d 1073 (N.J. 2000)(defense counsel's prior representation of key prosecution witness justified mistrial); *FMC Techs Inc. v. Edwards*, 420 F. Supp. 1153 (W.D. Wash. 2006)(violation of Rule 1.9 for attorney to represent client in case in which former client important adverse witness); *but compare*, *Daniels v. State*, 17 P. 3d 75 (Alaska Ct. App. 2001)(attorney may remain on case in which former client government witness where attorney claims no knowledge of confidences that could be used against witness); *People v. Frisco*, 119 P. 3d 1093 (Colo. 2005)(absent showing of confidences obtained from former client and current state witness that would be useful to current client the attorney need not be disqualified in present case); *Banner v. Flint*, 136 F. Supp. 678 (E.D. Mich. 2000)(cross examination of former client permissible with informed consent from former client).

[21] *See* §§ 122(1) and 132 of the *Restatement (Third) of the Law Governing Lawyers* (2000).

[22] SCR 20:1.6(c)(6) provides for discretionary disclosure of confidential information, "to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client".

[23] *See* SCR 20:1.4.

[24] *See Restatement (Third) of the Law Governing Lawyers* (2000) §122 cmt. c(i). provides:

"…[d]isclosing information about one client or prospective client to another is precluded if information necessary to be conveyed is confidential . . . The affected clients may consent to disclosure . . . but it also might be possible for the lawyer to explain the nature of undisclosed information in a manner that nonetheless provides an adequate basis for informed consent. If means of adequate disclosure are unavailable, consent to the conflict may not be obtained."

Finally, the lawyer must remember that consent to a conflict of interest is not consent to adverse use or disclosure of information relating to the representation of the current or former client. Adverse use or disclosure of such information requires separate informed consent. SCR 20:1.6(a) and SCR 20:1.9(c). If the lawyer believes that effective cross examination requires the adverse use or disclosure of such information, and the affected current or former client will not give informed consent, the conflict is non-consentable.

Withdrawal from Representation

Comment ¶4 to SCR 20:1.7 provides:

> [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9.

If the lawyer learns sufficiently in advance that she may need to conduct an adverse examination of a current or former client, the most prudent course of action may be to decline representation.[25] Resolving the issues are invariably more difficult when the issue arises during trial, particularly when the identity of adverse witnesses is not known until the matter is well underway. If the conflict is unavoidable, the lawyer may be required to seek to withdraw from both cases and be obliged to follow whatever ruling the trial court makes.[26]

There is a substantial body of case law that addresses withdrawal, continuation, and related issues in both civil and criminal cases.[27] Although the issues are similar to those discussed in this opinion, the standards and procedures involved are distinct and beyond the scope of this opinion.

[25] Lawyers should be mindful that the conflict arises when a lawyer learns that a current or former client may be an adverse witness in the matter, not when the witness is examined. Similarly, the lawyer who finds out through discovery that a current or former client may be an adverse witness at trial of the matter has a conflict upon discovery, even if the lawyer does not believe that the matter will proceed to trial.

[26] A possible alternative to withdrawal is to arrange for substitute counsel to conduct the adverse examination. *United States v. Britton*, 289 F. 3d 976 (7th Cir. 2002) (permitted when former client examined on minor point). *But see United States v.* Cheshire, 707 F. Supp. 235 (M.D. La. 1989) (substitute counsel not allowed when the former client is an important witness).

[27] *See generally* 51 Law. Man. Prof. Conduct 122. Additional considerations apply in criminal cases involving a constitutional right to conflict-free representation, *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), where cross examination is protected by the confrontation clause and viewed as critical to effective representation, *Davis v. Alaska,* 415 U.S. 308 (1974). Compliance with ethics requirements will generally satisfy constitutional requirements although the failure to follow ethics requirements may not be a basis for post-conviction relief. *See State v. Tkacz*, 2002 WI App. 281, 258 N.W. 2d 611, 654 N.W. 2d 37 (2002) (prosecutor's prior

Review of Scenario One

This scenario involves two current firm clients represented by two firm attorneys. One is represented by Attorney A in a divorce case; the other is a sibling of the opponent in the divorce case and is represented by Attorney B in an unrelated collection matter.

A conflict exists under SCR 20:1.7(a)(1) because the client represented by firm Attorney B is an adverse witness in the divorce case involving Attorney A. There is also a conflict under SCR 20:1.7(a)(2) because of a "significant risk" representation of both clients would be "materially limited" by the attorneys' responsibilities to each client. Faced with examining the sibling, either at trial or in a deposition, Attorney A must choose between an aggressive examination and possible use of protected information the sibling shared with Attorney B or a 'soft' examination which would deprive Attorney A's divorce client of competent and diligent representation. The Michigan State Bar Professional Ethics Committee in a similar case noted:

> Generally, a lawyer may not undertake a representation in which the lawyer will be called upon to cross-examine a client/witness who is testifying against another client, because of the risk that the lawyer would conduct "a soft deferential, cross-examination rather than a diligent and vigorous one." See RI-128; ABA Op 92-367.

Mich. Op. RI-239 (1995). The conflict would be imputed to every lawyer in the firm and screening is not available. SCR 20:1.10(a). The fact that the subject matters of the representations are unrelated is immaterial to the analysis of whether a conflict of interest exists but may be relevant to the analysis of whether the conflict is subject to the informed consent of both clients. If the subject matters of the respective representations are unrelated and information relating to the representation of the witness client would not be useful in cross examining the witness, the lawyer may seek the informed consent of both clients to continue the representations. If either client refuses to consent, the lawyer must with withdraw.

Review of Scenario Two

As a scenario involving a former client, the public defender's options are controlled by SCR 20:1.9, which prohibits representation adverse to the former client in the "same" or a "substantially related" matter, SCR 20:1.9(a), or the use of confidential information not generally known "to the disadvantage of the former client." SCR 20:1.9(c). Because the matters in which the lawyer represented the former client were drug related offenses, it is reasonable to assume both that the lawyer would have had access to information that would be useful in attacking the credibility of the former client, such as substance abuse issues, and that the matters are substantially related, resulting in a conflict under SCR 20:1.9(a). Moreover, the adverse use or disclosure of

representation of defendant insufficient to demonstrate conflict of interest to disqualify prosecutor from prosecuting former client in new criminal matter).

information relating to the lawyer's representation of the former client, such as the client's substance abuse problems, would be useful in attacking the former client's credibility.[28]

Like the first scenario, continued representation is theoretically possible given that the rules provide for informed consent from the former client. However, while the former client may give consent to the conflict, it is unreasonable to conclude that the former client would consent to disclosure of information relating to the representation to attack her credibility. If so, this limitation would prevent competent and diligent representation of the current client. In a similar case the Philadelphia Bar Association Professional Guidance Committee concluded,

> As for the question concerning the conflict of interest, the Committee believes that there is a non-waivable conflict of interest that precludes Inquirer from continuing to represent his Client in the criminal matter. . . Accordingly, there is no question that Inquirer cannot continue to represent his client going forward, and Inquirer must withdraw from that representation so that new counsel may be appointed . . .

Phil. Bar Assoc. Professional Guidance Committee Opinion 2014-1 (2014) at 3-4. Of note, as a criminal matter, this scenario involves the constitutional right to the effective assistance of counsel.[29] The public defender should seek to withdraw from representation in such a case.

Conclusion

A lawyer faced with conducting an adverse examination of a current client will face a conflict of interest. A lawyer faced with cross examination of a former client may face a similar problem and must carefully analyze whether her duty to avoid former client conflicts and the impermissible use or disclosure of information relating to the representation of the former client prevent continued representation. In both situations, the conflict may subject to the informed consent of the affected current and former client if the conditions set forth in SCR 20:.1.7(b) are met.

[28] None of the information learned from the former client and relevant to their subsequent cross examination fits within the "generally known" exception in SCR 20:1.9(c). See infra at 8-9.

[29] *See* n. 27 infra. *See also United States v. Johnson*, 131 F. Supp. 1088 (N.D. Iowa 2001).

Wisconsin Formal Ethics Opinion EF-21-01: Threatening Criminal Prosecution or Professional Discipline

January 1, 2021

Synopsis: *There is no prohibition in the Rules of Professional Conduct against threatening criminal prosecution to gain an advantage in a civil matter. A lawyer considering doing so, however, must take care to ensure that the criminal matter is related to the client's civil claim, the lawyer has a good faith belief that both the civil claim and the criminal charges are supported by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. There is similarly no prohibition in the Rules of Professional Conduct on the lawyer and the lawyer's client agreeing, as part of a settlement, to refrain from reporting information regarding the purported criminal conduct to the relevant authorities.*

A lawyer may not, however, use the threat of reporting another lawyer's misconduct to the disciplinary authority to gain an advantage in a matter because the Rules of Professional Conduct prohibit a lawyer from limiting a person's right to report misconduct and lawyers themselves, in certain circumstances, have mandatory duty to report the substantial misconduct of other lawyers and judges. Wisconsin Formal Ethics Opinion E-01-01 is withdrawn.

Introduction

In Formal Ethics Opinion E-01-01, the State Bar's Standing Committee on Professional Ethics (the "Committee") considered the same questions addressed in this opinion. When that opinion was issued in 2001, Wisconsin's Rules of Professional Conduct for Attorneys (the "Rules") contained Supreme Court Rule ("SCR") 20:3.10, which prohibited lawyers from "presenting or threatening to present criminal charges solely to gain an advantage in a civil matter." SCR 20:3.10, however, was repealed in 2007.[1] Also in 2007, the Wisconsin Supreme Court adopted SCR 20:1.8(h)(3), which prohibits lawyers from making an "agreement limiting a person's right to report the lawyer's conduct to the disciplinary authorities."[2] Given these changes to the Rules, the Committee now considers the questions addressed in Formal Opinion E-01-01 under the current Rules.

[1] The repeal of the rule was part of the Wisconsin Supreme Court's "Ethics 2000" revision of the rules – see Wis.Sup. Ct. Order No. 04-07, 2007 WI 4.

[2] SCR 20:1.8(h)(3) was amended effective January 1, 2021. The prior version of this Rule prohibited limiting "the client's" right to report the lawyer's conduct to the disciplinary authorities.

Opinion

Threatening Criminal Prosecution

Wisconsin's Rules no longer contain any express prohibition on threatening "to present criminal charges solely to obtain an advantage in a civil matter." One reason for the removal of the former Rule is that such an explicit prohibition was never part of the ABA Model Rules of Professional Conduct, and while such an express prohibition was contained in DR 7-105(A) of the ABA Model Code of Professional Responsibility, its omission from the Model Rules was deliberate.[3] Moreover, Wisconsin's former SCR 20:3.10 also proved difficult to enforce.[4] The lack of a specific prohibition, however, does not mean that there are not constraints imposed by other Rules on a lawyer's ability to use the threat of criminal prosecution to the advantage of the client in a civil matter. Specifically, lawyers may not advance a claim on behalf of a client without a basis in law and fact (SCR 20:3.1), may not make false statements of law or material fact to third persons [SCR 20:4.1(a)], may not use means in representing a client that have no substantial purpose other than to embarrass, delay or burden a third person [SCR 20:4.4(a)] and may not state or imply an ability to improperly influence a government agency or official by means that violate the rules or other law [SCR 20:8.4(d)].

This opinion considers a situation where a lawyer wishes to use the threat of criminal prosecution to gain an advantage in a civil matter. Before a lawyer may threaten to report an opposing party to the prosecuting authorities if the client's demands are not met in a civil matter, the lawyer must consider the following questions carefully.[5]

[3] ABA Formal Opinion 92-363 explains; "The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters' position that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." C.W. Wolfram, Modern Legal Ethics (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph)."

[4] See e.g *Disciplinary Proceedings against Coe,* 2003 WI 117, 665 N.W.2d 849 (2003).

[5] The former SCR 20:3.10 did not prohibit lawyers from simply *informing* someone that the lawyer intended to report their conduct to prosecuting authorities and there is no prohibition in the current Rules. As stated in Wisconsin Formal Opinion E-01-01, which discussed the then current SCR 20:3.10; "The committee now opines that in a civil matter, a lawyer may inform another person that their conduct may violate a criminal provision provided the criminal conduct is related to the civil matter, the lawyer has formed a good faith belief that the conduct complained of constitutes a criminal violation, and the lawyer or the lawyer's client has a duty or right to report the criminal violation." This analysis continues to be valid.

1) Is the lawyer's belief that criminal conduct has occurred well founded in fact and law?

SCR 20:3.1(a) states;

> (a) In representing a client, a lawyer shall not:
> (1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;
> (am) A lawyer providing limited scope representation pursuant to SCR 20:1.2(c) may rely on the otherwise self-represented person's representation of facts, unless the lawyer has reason to believe that such representations are false, or materially insufficient, in which instance the lawyer shall make an independent reasonable inquiry into the facts.
> (2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or
> (3) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.

This Rule requires that the lawyer have a well-founded basis in fact and law for any assertion of criminal conduct of another, and the lawyer must be able to articulate the law the lawyer believes to have been violated and the facts that support such a violation.[6]

2) Are the lawyer's statements about the criminality of the conduct in question and the intention to report the conduct if concessions are not made in good faith?

SCR 20:4.1(a) states:

> (a) In the course of representing a client a lawyer shall not knowingly:
> (1) make a false statement of a material fact or law to a 3rd person;

A lawyer who informs a third person that their conduct violates criminal law knowing that the statement is not correct, or who falsely informs a third person that their conduct will be reported to the authorities when there is no intent to do so violates SCR 20:4.1(a).

3) Is the asserted criminal conduct related to the client's civil claim and is the threat of reporting legitimately related to the client's lawful objectives in the civil matter?

SCR 20:4.4(a) states:

[6] Of course, this Rule applies to a lawyer who reports conduct of another on behalf of a client even without attempting to use the threat of reporting to the client's advantage.

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.

Accordingly, a lawyer who makes a claim of criminal conduct merely to harass another violates SCR 20:4.4(a).

Related to the requirements of SCR 20:4.4(a) is the necessity that the asserted criminal conduct be related to the civil matter in which the lawyer represents the client. This was discussed in ABA Formal Opinion 92-363:

> While the Model Rules contain no provision expressly requiring that the criminal offense be related to the civil action, it is only in this circumstance that a lawyer can defend against charges of compounding a crime (or similar crimes). A relatedness requirement avoids exposure to the charge of compounding, which would violate Rule 8.4(b)'s prohibition against "criminal act[s] that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." It also tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration. See Rule 8.4(c).

The Committee agrees with this analysis. Moreover, the lawyer who threatens to report criminal conduct of an opponent unrelated to the matter may be subject to the claim that the threat has no "substantial purpose other than to embarrass, delay or burden" and therefore violates SCR 20:4.4(a).[7]

4) The lawyer must be careful to avoid stating or implying an ability to improperly influence the criminal process.

SCR 20:8.4(d) states that it is professional misconduct for a lawyer to "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law." This provision underscores the importance of the lawyer carefully choosing her words, and documenting them, when raising the issue of whether criminal conduct may be involved or reported in connection with a civil matter. The lawyer may, if based on a good faith examination of the facts and law, inform a person that their conduct constitutes a crime, or that the lawyer intends to report the conduct to authorities. However, the lawyer may not inform a person that she will commence a criminal action because

[7]The Attorney's Oath, SCR 40.15, which is enforceable in disciplinary matters pursuant to SCR 20:8.4(g) states, in relevant part: "I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged."

that authority exclusively rests with the district attorney.[8] The lawyer must exercise care to ensure that the lawyer does not, for example, imply that the lawyer's relationship with a prosecutor will ensure criminal charges are brought. This is particularly important with dealing with an unrepresented person.[9] Finally, as part of negotiations, the lawyer may not promise that her client will not cooperate with a lawful investigation of possible criminal conduct should one occur, although, as noted below, negotiations may include an agreement to not report the conduct.

If these guidelines are followed, lawyers who represent clients who have lawful remedies under both civil and criminal law for the same matter, are free to pursue both on behalf of their clients.[10] To prohibit a lawyer from invoking the possibility that a matter might be referred to prosecuting authorities would in effect deprive clients of an otherwise lawful option simply because they have retained a lawyer.[11]

Of course, threatening to refer a matter to the prosecuting authorities to gain advantage requires that if the client's demands are satisfied, the matter will *not* be referred to prosecuting authorities. There is no prohibition in the rules on agreeing, as part of the settlement of a client matter, not to report alleged criminal conduct.[12] Concerns may arise that a threat of criminal prosecution in connection with a civil matter may be extortionate and that agreeing not to report may constitute compounding and thus potentially violate SCR 20:8.4(b). These concerns were addressed in ABA Formal Opinion 92-363:

> It is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services." Model Penal Code, § 223.4 (emphasis added); see also § 223.2(3) (threats are not criminally punishable if they are based on a

[8] See Wis. Stat. §978.05; Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888)(private prosecutions prohibited in Wisconsin).

[9] See also SCR 20:4.3.

[10] The Committee agrees with ABA Formal Opinion 92-363; "Accordingly, it is the opinion of the Committee that a threat to bring criminal charges for the purpose of advancing a civil claim would violate the Model Rules if the criminal wrongdoing were unrelated to the client's civil claim, if the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded, or if the threat constituted an attempt to exert or suggest improper influence over the criminal process. If none of these circumstances was present, however, the threat would be ethically permissible under the Model Rules."

[11] See e.g. N.Y. City Bar Formal Op. 1995-13.

[12] A number of other opinions have agreed with the position of ABA Formal Op. 92-363. See e.g. Alaska Ethics Op. 97-2 (1997); Utah Ethics Op. 03-04 (2003); North Carolina Ethics Op. 2008-15 (2009). It has also been held that a lawyer's threat of criminal prosecution if embezzled funds were not repaid was a legitimate negotiating tactic. *Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992).

claim of right, or if there is an honest belief that the charges are well founded.) As to the crime of compounding, we also note that the Model Penal Code, § 242.5, in defining that crime, provides that:

> A person commits a misdemeanor if he accepts any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission of any offense or information relating to an offense. *It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.* (emphasis supplied)

It is likewise beyond the scope of the Committee's authority to interpret criminal laws, but the Committee notes that a threat to accuse someone of a crime does not constitute the crime of extortion pursuant to Wis. Stat. 943.30(1) unless the threat is made "maliciously." Wis JI-Criminal 1473A, note 4, states that a threat is made "maliciously" if it is made willfully and with an illegal intent. In one case, the Wisconsin Supreme Court stated "it is true that a person so injured has the right in demanding payment for the damages caused by the wrongdoer's misconduct to state to him that a criminal prosecution will be instituted against him for the misconduct if the damages are not paid…"[13] Similarly, Wisconsin law states that the crime of compounding "does not apply if the act upon which the actual or supposed crime is based has caused a loss for which a civil action will lie and the person who has sustained such loss reasonably believes that he or she is legally entitled to the property received."[14] The purpose of this brief discussion of substantive criminal is not to opine on what conduct may or may not violate criminal statutes, but rather to highlight the importance of any assertion of criminal conduct being well-founded, related to the civil case and made in good faith.

Threatening Disciplinary Action

In Ethics Opinion E-01-01, the Committee stated that a "lawyer who seeks to gain a bargaining advantage by threatening to report another lawyer's misconduct commits misconduct even if that lawyer believes that the other lawyer's conduct raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness. Seeking such a bargaining advantage in such circumstances is inappropriate because reporting such misconduct is an obligation imposed by the Rules. SCR 20:8.3(a). See ABA Formal Ethics Opinion 94-383. Likewise, a lawyer commits misconduct by entering into any agreement to not report such misconduct. See In re Himmel, 125 Ill. 2d 531, 533 N.E.2d 790 (Ill.1988)."

The committee reaffirms that position in consideration of the current Rules. In 2001 when Formal Opinion E-01-01 was drafted, there was no express prohibition in the Rules on using the threat of reporting a lawyer's conduct to disciplinary authorities, but that opinion relied on

[13] *O'Neil v. State,* 237 Wis. 391, 296 N.W. 96 (1941).

[14] Wis. Stat. 946.67(2).

lawyer's mandatory duty to report serious misconduct under SCR 20:8.3, and lawyer's obligations in "not advancing claims or factual positions that the lawyer knows are frivolous, SCR 20:3.1; not using means that have no substantial purpose other than to embarrass, delay, or burden a third person, SCR 20: 4.4; or engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, SCR 20:8.4(c)."[15] Those obligations continue to exist, but an express prohibition now exists in the rules. SCR 20:1.8(h)(3) prohibits lawyers from making "an agreement that limiting a person's right to report the lawyer's conduct to disciplinary authorities."[16] Moreover, every lawyer has a mandatory duty to "cooperate with the office of lawyer regulation in the investigation, prosecution and disposition of grievances."[17] Thus, offering or making any agreement that purports to limit any person's right to report a lawyer to the disciplinary authorities, such as an agreement to refrain from reporting misconduct if certain demands are met, is itself misconduct.[18]

While the Rules do not expressly prohibit a lawyer from simply *informing* another lawyer that their conduct may violate one or more rules, lawyers should still exercise caution. Even when the lawyer is not seeking to use the threat of filing a grievance to the advantage of a client, lawyers should still exercise caution before accusing another lawyer of misconduct and stating or implying that a grievance may be filed. A lawyer who threatens to file a grievance that is not warranted under existing law violates SCR 20:3.1(a). In addition, a lawyer who threatens to file a grievance without any actual intent to do so violates SCR 20:4.1, which prohibits a lawyer from making a false statement of material fact. Such threats also violate SCR 4.4(a), which prohibits a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person," because it burdens both the lawyer threatened and his or her client by "introducing extraneous factors into their assessment of whether to settle."[19]

Sometimes, such as when the lawyer believes in good faith that opposing counsel has a conflict based upon prior representation of the client in a substantially related matter, it is entirely appropriate to raise the issue of the conflict with opposing counsel. Without a substantial purpose, however, a lawyer who simply accuses opposing counsel of engaging in misconduct runs the risk of committing misconduct themselves. Calling opposing counsel unethical to gain an advantage is "the antithesis of professionalism," Iowa State Bar Ass'n Comm. On Ethics & Practice

[15] In contrast, ABA Formal Opinion 94-383 took the position that a lawyer *could* use the threat of reporting a lawyer's conduct as a bargaining point in the narrow circumstance where the threat would not violate Model Rules 3.1, 4.1, 4.4, 8.3 or 8.4.

[16] A prior version of SCR 20:1.8(h)(3) prohibited making an agreement limiting "a client's" right to report misconduct. The current version of the Rule became effective on January 1, 2021. See Wisconsin Supreme Court Order in connection with Rules Petition 19-12, 2020 WI 62.

[17] See SCR 21.15(3). This duty applies whether the lawyer is the subject of the grievance or is contacted as a witness – see Wisconsin Formal Ethics Op. EF-20-01.

[18] See SCR 20:8.4(a), which states that it is misconduct to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

[19] See ABA Formal Op. 94-383.

Guidelines, Op. 14-02 (Oct. 24, 2014), and may violate the attorney's oath, which requires the lawyer to "abstain from all offensive personality," SCR 40.15. Violating the attorney's oath is misconduct under SCR 20:8.4(g).

Conclusion

Lawyers are not prohibited by the Rules from threatening criminal prosecution to gain an advantage for a client in a civil matter, provided that the lawyer does not advance a claim on behalf of a client without a basis in law and fact, does not make false statements of law or material fact to third persons, does not use means in representing a client that have no substantial purpose other than to embarrass, delay or burden a third person and does not state or imply an ability to improperly influence a government agency or official by means that violate the rules or other law. A lawyer may not, however, use the threat of reporting a lawyer's conduct to the disciplinary authorities to gain an advantage for a client.

Wisconsin Formal Ethics Opinion E-01-01 is withdrawn.

Wisconsin Memorandum Ethics Opinion 8/75 B

Municipal Attorney Conflict

Revised May 13, 2021

Question:

Is there an inherent conflict of interest in a lawyer's representation of both a municipality and an area sanitary district?

Opinion:

The answer to this question depends on whether the sanitary district is part of the municipality involved. This requires the lawyer to carefully examine whether under the enabling statutes the city, town or village is authorized to and has created a sanitary district that it part of the same entity, a question of law and fact beyond the scope of the disciplinary rules.

If the municipality and area sanitary district are not the same entity and thus not the same client, representation of both would be permissible unless their interests are directly adverse or there is a "significant risk" representation of one client would be materiality limited by the lawyer's obligations to the other client. SCR 20:1.7(a). In such a situation representation of both would not be permissible unless the attorney reasonable believed they could provide "competent and diligent" representation to both, the representation was not "prohibited by law", did not involve a claim by one client against the other, SCR 20:1.7(b)(1)-(3), and both clients provided written informed consent. SCR 20:1.7(b)(4); *See also* A.B.A. Formal Opinion 97-405.

Revised Wisconsin Ethics Opinion E-86-06: Duty of Lawyer to be Candid with Court in Connection with Prior Convictions[1]

December 29, 2018

SYNOPSIS

A lawyer is not required to proactively disclose facts to a court if the facts would be harmful to the lawyer's client. Nor is a lawyer required to correct inaccurate statements made by opposing counsel to the court unless the inaccurate statements were based upon false facts provided by the lawyer or the lawyer's client.

Scenario

In Wisconsin, a first-offense operating while intoxicated ("OWI") charge is non-criminal. Subsequent offenses expose the defendant to escalating penalties and mandatory jail time. The existence of and number of prior OWI convictions must be proven by the state to subject the defendant to a greater penalty. A defendant with two prior OWI convictions is incorrectly charged with a second rather than third OWI offense. During a court hearing it becomes apparent the court and prosecutor are unaware of the correct number of prior offenses that would require charging a third offense, subjecting the defendant to a more serious penalty.

Question

Does a lawyer have an affirmative duty to disclose to the court the existence of prior OWI convictions that would expose the client to a more severe penalty when the court appears unaware of the correct number of prior convictions but has not asked the lawyer or client about the relevant facts?

Analysis

Wisconsin Supreme Court Rule ("SCR") 20:3.3 highlights the duty of the lawyer:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

[1] This opinion was revised to reflect Wisconsin's current Rules of Professional Conduct for Attorneys.

> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.

ABA Comment [2] which follows SCR 20:3.3 identifies the role of the lawyer in protecting the integrity of the adjudicative process:

> [2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

SCR 20:3.3 balances the lawyer's duty to the client with the duty to the tribunal. It places several responsibilities on the lawyer regarding the facts[2] relevant to the case:

(1) Counsel may not knowingly make a false statement of fact or law to the tribunal[3],

[2] The attorney has a proactive responsibility to inform the court of relevant legal authority even if adverse if it has not been disclosed by opposing counsel and it appears the court is unaware of the authority. SCR 20:3.3(a) (2). This duty – to correct misunderstandings about the controlling law – is not at issue in the scenario addressed in this opinion.

[3] SCR 20:3.3(a) (1).

(2) Counsel may not knowingly present false evidence to a tribunal[4],

(3) Counsel must remedy criminal or fraudulent conduct by the client related to the proceeding[5],

(4) In an *ex parte* proceeding counsel must inform the tribunal of all material facts, even if adverse, to enable the tribunal to make an informed decision.[6]

These varied duties can arise in several situations:

(1) the court may demonstrate an incorrect understanding of the facts to the advantage of the defendant;

(2) opposing counsel may misstate the relevant facts to the advantage of the defendant;

(3) the court may directly ask counsel about the relevant facts, or,

(4) the court may directly ask the defendant about the relevant facts.

Although the scenario presented reflects only the first situation described this opinion will address the responsibility of counsel in each of them given they are closely related and can arise in the context of a single hearing.

In the first two situations the lawyer has no ethical duty to proactively correct the mistaken beliefs of the court or prosecutor.

In Wisconsin the number of prior OWI convictions controls the potential penalty for the most recent offense. Defense counsel has no obligation to assist the state in proving prior convictions, either by directly offering proof of prior convictions or correcting an inaccurate recitation of prior convictions by the prosecution.[7] Lawyers generally have no duty to assist opposing parties by making them aware of facts that may assist them but damage the lawyer's client.[8]

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[4] SCR 20:3.3(a) (3). In criminal cases the defendant's constitutional rights to testify and present a defense may require counsel to present testimony that might otherwise violate this rule. *See* ABA comments ¶¶ 7, 9 and *State v. McDowell,* 2004 WI 70, 681 N.W.2d. 500.

[5] SCR 20:3.3(b). Violations of SCRs 20:3.3(a)(1) and (3) must also be corrected by counsel.

[6] SCR 20:3.3(d).

[7] *See* Restatement (Third) of the Law Governing Lawyers, §120 cmt. d "A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness."

[8] *See* Restatement (Third) of the Law Governing Lawyers, §120 cmt. b." The procedural rules concerning burden of proof allocate responsibility for bringing forward evidence. A lawyer might know of testimony or other evidence vital to the other party, but unknown to that party or their advocate. The advocate who knows of the evidence, and who has complied with applicable rules concerning pretrial discovery and other applicable disclosure requirements (see, e.g, § 118), has no legal obligation to reveal the evidence, even though the proceeding thereby may fail to ascertain the facts as the lawyer knows them."

In the third and fourth situations, where the court directly asks counsel or the defendant about the prior record, the lawyer's responsibilities would be different.

In the third situation, counsel may not knowingly report an incorrect number of prior OWI convictions. SCR 20:3.3(a)(1). This does not mean counsel must provide information adverse to the client.[9] Counsel may respectfully decline to answer, suggest that the court's inquiry is best directed to the prosecutor, or seek her client's permission to provide the information.[10]

The Committee's response to the fourth situation, where the court directly questions the client, is informed by the dual principles that the client should not answer falsely but also that the client is not obliged to provide information to assist the prosecution.

In all cases counsel should prepare the client in advance of a court hearing. Counsel should normally advise the client that counsel, and not the client, should respond to questions from the court or opponent. Thus, if the court directly engages the client, the client should defer to counsel to respond. If this is not possible, the client should be admonished to answer truthfully if any answer is given. SCRs 20:1.2(d), 20:8.4(a). The Committee believes that a false statement by the client about the number of prior OWI convictions could require remedial action even if harmful to the client. SCR 20:3.3(b).[11]

In summary, in a criminal proceeding a defense lawyer is not obligated to correct an error made by the court or prosecuting attorney but has a duty not to provide false information to the court. Courts and prosecuting attorneys, in turn, should honor the obligations of defense attorneys to protect the client's confidential information and put the state to its proof.

[9] Counsel's knowledge of the client's prior convictions is information that relates to the representation and is protected by SCR 20:1.6(a).

[10] It is the opinion of the Committee that it is inappropriate for the court or prosecutor to request that either defense counsel or the defendant assist the prosecution by providing information about the elements of the crime charged or sentencing factors that affect potential penalties. There may be strategic reasons for the defense to correct the mistake notwithstanding the absence of any ethical obligation to do so.

[11] SCR 20:3.3(b) requires action if the client's behavior is "criminal or fraudulent". Making a false statement to a tribunal is not criminal in Wisconsin if the person is not under oath, Wis. Stat. §§946.31, 946.32 nor acts for some form of consideration, Wis. Stat. §946.65. However, the Committee believes an unsworn false statement might be deemed to be fraudulent. If faced with a duty to remedy a client's false statement, counsel may seek permission from the client to correct the misstatement, explaining that it is likely to be discovered anyway sooner rather than later, or may unilaterally correct the statement without prior consultation with the client. *See also* ABA Formal Ethics Op. 87-353.

Wisconsin Ethics Opinion E-90-05: Lawyer who represents Municipality as Defense Counsel in State Prosecutions

Revised April 13, 2020

Question:

May a part-time lawyer for a municipality or a member of the lawyer's law firm represent defendants in state prosecutions in which the municipality's law enforcement personnel are potential witnesses?

Opinion:

For purposes of this opinion, it is assumed that a private law firm represents a municipality. It is also assumed that criminal cases are prosecuted by the district attorney who represents the state but works with the municipality's police department on cases arising in the municipality.

When a lawyer from the firm represents a criminal defendant where one or more police officers from the municipality are adverse witnesses, the lawyer faces two problems. First, the lawyer owes a duty of confidentiality to the municipality that covers any information that relates to the representation of the municipal client. Lawyers from the firm may have access to information about the department or its officers that may be useful in cross examining a police officer. Disclosure of any information that relates to the representation of the municipality in defense of a criminal defense client would violate SCR 20:1.6(a) and adverse use of such information even absent disclosure would violate SCR 20:1.8(b). Second the firm owes a duty of loyalty to the municipality, and attacking the credibility of the municipality's police officers, even without disclosure or use of information protected by SCR 20:1.6, is directly adverse to the interests of the municipality. See SCR 20:1.7(a)(1).

On the other hand, the failure to aggressively challenge the police involved in the case could deprive the criminal defense client of competent and diligent representation. See SCRs 20:1.1, 20:1.3. Thus, simultaneous representation of the municipality and a criminal defendant when the municipality's police officers are involved would create a "significant risk that the representation of one or more clients [would] be materiality limited by the lawyer's responsibilities to another client. . ." SCR 20:1.7(a)(2). This conflict is imputed to all members of the lawyer's firm and may not be screened. See SCR 20:1.10(a). No lawyers in the firm could

defend criminal cases involving the municipality's police department absent compliance with SCR 20:1.7(b).

In order to comply with SCR 20:1.7(b), the lawyer would have to reasonably conclude they could competently and diligently represent both clients notwithstanding the conflict of interest. It seems unlikely this is possible if competent representation of a defendant required vigorous cross examination of the municipality's police officers. SCR 20:1.7(b)(1). If so, the lawyer would have to obtain the informed consent of both clients, confirmed in separate writings signed by each client. In the case of the municipal client, the informed consent would have to come from a constituent of the municipal client who has the lawful authority to make such decisions on behalf of the municipal client. Ordinarily, this would not be the police officers involved in the matter.

E-95-1 Communicating with government agency represented by counsel

Question

Is a lawyer for a private person who is involved in a noncriminal matter involving a governmental entity precluded from making direct contact with government officials or employees about the matter, when the lawyer knows that the governmental entity is represented by counsel in the matter?

Opinion

Lawyers are generally precluded, under SCR 20:4.2, from communicating ''about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.'' The comment to the rule states that ''a party to a controversy with a government agency [has a right] to speak with government officials about the matter.'' Generally, when an organization such as a governmental entity is a party, the prohibition on direct contact extends to ''persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.'' SCR 20:4.2 comment.

Thus, several principles are at work in this context. First, the person who is involved in the matter with the governmental entity may make direct contact with government officials who are involved, but the person's lawyer generally may not do so. Second, this prohibition on the lawyer extends only to certain key officials of the governmental entity; it does not, for example, extend to all governmental employees. Third, the prohibition applies only to discussions about the particular matter and not to unrelated issues.

One of the complications that arises under the direct contact rule as it applies to governmental entities is defining the point at which the governmental entity is represented in the matter. In litigation, when an appearance has been entered on behalf of the governmental entity, the fact of the representation usually will

be clear. In various transactional and negotiation settings, the fact of representation may be less clear and may depend upon whether the lawyer for the governmental entity has notified the other lawyer of his or her representation in the matter. When such notice is given, the fact of the representation generally is established. From that point forward, direct contact with relevant government officials is improper, unless consent is given by the entity's lawyer or the law otherwise clearly permits the contact.

One of the purposes of the direct contact rule is to preserve the integrity of the lawyer-client relationship. This goal can be threatened when counsel for a governmental entity is required, under open meeting statutes and other laws, to provide a public airing of counsel's advice. In some cases, counsel for the other party may be afforded an opportunity to speak to the government decisionmakers at the same time and in the same forum as government counsel's advice is offered. While this procedure represents a marked departure from the usual confidential relationship between lawyer and client, it reflects the high value placed upon open government under our democratic system. In such circumstances, the controlling law of the jurisdiction takes precedence over the direct contact prohibition.

In summary, the direct contact rule of SCR 20:4.2 precludes a lawyer, in the course of representation, from making direct contact with covered government officials with respect to a matter when the lawyer knows the governmental entity is represented by counsel in the matter. The exceptions to the rule are direct contact with the consent of the government's lawyer or pursuant to laws and procedures of the controlling jurisdiction clearly allowing such contact.