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Answering Some Common Questions about SCR 20:4.2 and Transitioning Your Law Practice

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Wisconsin Informal Ethics Opinion EI-17-04: Contact with Persons Represented in Unrelated Matters

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Synopsis: *SCR 20:4.2(a) prohibits communication with a represented person about the subject matter of the representation by another lawyer who represents a person in the same matter. Therefore, a lawyer who does not represent a person in the relevant matter is free to communicate with a represented person about the matter without the consent of the person's counsel. Lawyers are also free to meet with represented prospective clients provided the lawyer does not represent another person in the same matter or is otherwise prohibited from doing so. When communicating with former clients who have transitioned to successor counsel, lawyers should be cautious not to communicate with the former client about matters within the scope of successor counsel's representation of the former client.*

Introduction

This opinion addresses three questions about when a lawyer may interact with a person who is represented by another lawyer. Sometimes there is confusion about whether it is appropriate for a lawyer to communicate with such a person without the consent of the person's counsel. Supreme Court Rule ("SCR") 20:4.2 governs the lawyer's responsibility in such a situation. In this opinion, the State Bar's Standing Committee on Professional Ethics (the "Committee") considers three situations. In the first, a lawyer who represents a client in Matter A wishes to communicate with a witness, who is represented by counsel in separate Matter B. In the second, a person who is already represented by counsel wishes to consult with a second lawyer about the possibility of retaining the second lawyer in the very matter in which the person is already represented. Finally, in the last situation, a client has discharged a lawyer and the client has retained successor counsel, and the first lawyer wishes to communicate with the client.

Discussion: Scenario One – witness represented in a different matter

Contact with represented persons is governed by SCR 20:4.2, which reads as follows:

(a) In representing a 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.

(b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1.2(c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise.

ABA Comment paragraph [4] explains:

> [4] *This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.* For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.
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> (emphasis added)

The Rule and comment make plain that the prohibition contained in SCR 20:4.2 applies only to a person or party *represented in the same matter* in which the contacting lawyer represents a client and prohibits communication about *that matter*.[1] Thus, for example, a lawyer who represents a client charged with attempted homicide is free to contact a witness who is represented in connection with an unrelated burglary charge without the consent of the lawyer who represents the witness on the burglary charge.[2]

[1] See also Restatement (Third) of the law Governing Lawyers §99, comment d.

[2] See also N.Y. State Ethics Op. 904 (2012).

Lawyers are free to communicate with represented persons concerning matters outside the scope of the representation.[3]

The Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA) directly addressed this situation in Formal Opinion 95-396:

> If a person is represented by counsel on a particular matter, that representation does not bar communications on other, unrelated matters. For example, suppose a lawyer represents Defendant on a charge involving crime A. Under Rule 4.2, another lawyer may not, pursuant to a representation, either as prosecutor or as counsel for a co-defendant involving crime A, communicate with Defendant about that crime without leave of Defendant's lawyer. However, if the communicating lawyer represents a client with respect to a separate and distinct crime B and wishes to contact Defendant regarding that crime, the representation by counsel in crime A does not bar communications about crime B. Similarly, the fact that Defendant had been indicted on crime A would not prevent the prosecutor from communicating with Defendant, directly or through investigative agents, regarding crime B.
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> (footnote omitted)

New York State Bar Association Ethics Opinion 884 (2011) similarly concluded:

> Under Rule 4.2, a lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer. A non-party witness in such matter is not protected by Rule 4.2. Consequently, a lawyer for a party may communicate with the witness without the consent of counsel who represents the witness in a related matter, provided that during such interview the lawyer does not violate Rules 3.4(a)(1) or (2) or 8.4(b) or (d). This, however, does not prevent the witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. The conclusion of this opinion does not extend to civil matters.

SCR 20:4.2 also does not prohibit a lawyer from contacting a person who is represented on a different, but related, matter. It is worth noting that SCR 20:4.2(a) prohibits

[3] Indeed, lawyers may be obligated to contact witnesses who are represented in different matters. In *State v. Reno*, 2017 WL 5077948, the Wisconsin court of appeals upheld a finding that a lawyer provided ineffective assistance of counsel because the lawyer failed to interview or subpoena an important witness who was represented on a different matter because the lawyer mistakenly believed he was prohibited from doing so by SCR 20:4.2.

communication about the matter in which the person is represented, but the Rule does not forbid communications about related matters, as long as the person is not represented in the related matters.[4] Thus, a person may face criminal charges and a civil lawsuit arising from the same underlying facts, but the person may have counsel in connection with the criminal charges, but be unrepresented in the civil lawsuit. In such a situation, a lawyer representing the opposing party in the civil lawsuit may contact the person without the consent of the lawyer who represents the person in connection with the criminal charges.

Courts have consistently interpreted the Rule this way, particularly in criminal matters. For example, in *People v. Santiago*, 925 N.E.2d 1122, (Ill. 2010), the Illinois Supreme Court held that prosecutors did not violate Rule 4.2 by interviewing a mother who was a suspect in a child abuse case without notifying the lawyer who had been appointed to represent her in a separate child protection proceeding arising from the same underlying facts.[5]

A lawyer may contact a person with respect to a matter in which the person is unrepresented without violating SCR 20:4.2. However, for purposes of SCR 20:4.2, a lawyer has obligations when, in the course of representing a client, he or she contacts an unrepresented person. The Committee discussed these obligations in Wisconsin Ethics Opinion E-07-01[6]:

> To summarize these duties, when contacting a constituent of a represented organization (or any unrepresented person), the applicable Rules mandate:
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> 1. The lawyer must inform the unrepresented constituent of the lawyer's role in the matter (see SCR 20:4.3).
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> 2. The lawyer must refrain from giving legal advice to an unrepresented constituent if there is a reasonable possibility that the interests of the client may conflict with those of the unrepresented constituent (see SCR 20:4.3).

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[4] This contrasts with SCR 20:1.9(a), which forbids lawyers from representing new clients whose interests are adverse to former clients in the same or *substantially related matters.*

[5] See also *State ex. Rel. Oklahoma Bar Assoc. v. Harper,* 995 P.2d 1143 (Okla. 2000); *Grievance Comm. v. Simels,* 48 F.3d 640 (2d. Cir. 1995).

[6] Wisconsin Ethics Opinion E-07-01 discusses the extent to which SCR 20:4.2 covers current and former constituents of a represented entity.

> 3. The lawyer must not ask any questions reasonably likely to elicit information that the lawyer knows or reasonably should know is privileged and, if necessary, should caution the unrepresented constituent not to reveal such information (see SCR 20:4.4).
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> 4. The lawyer must not make any false statements of material fact to or mislead an unrepresented constituent (see SCR 20:4.1 and SCR 20:8.4).
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> (footnote omitted)

These obligations are discussed further in E-07-01.

Lawyers may not make false statements of material fact to third parties.[7] This prohibits a lawyer from making a false statement in response to a question about whether the lawyer represents someone in connection with a particular matter.[8]

Discussion: Scenario Two – second opinions

SCR 20:4.2, ABA Comment paragraph [4] provides in relevant part:

> This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. (The existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter). *Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.*
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> (emphasis added)

The Restatement (Third) of the Law Governing Lawyers §99, comment c., also states, in relevant part:

> A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without

[7] See SCR 20:4.1(a).

[8] See also Wisconsin Ethics Opinion E-07-01.

> consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation. If such additional or substituted counsel is retained, an opposing lawyer may, of course, communicate and otherwise deal with new counsel for the nonclient.

The Comment thus again provides a clear answer; as long as lawyer is not representing another person in the matter, a lawyer may meet with a represented person without the consent of that person's lawyer to discuss the matter and consider forming a lawyer-client relationship.[9]

When such a meeting occurs, the lawyer's responsibilities are governed by SCR 20:1.18 (Duties to Prospective Client). Rule 1.18(b) provides that, even if no client-lawyer relationship ensues from the meeting, "a lawyer who has learned information from a prospective client shall not use or reveal that information learned in the consultation." That information includes the existence of the consultation itself. So the lawyer should not notify the client's other lawyer of the fact of the consultation without the informed consent of the prospective client.[10]

Lawyers thus owe prospective clients a duty of confidentiality with respect to the information given to the lawyer by the prospective client *and the fact of the consultation itself.* As discussed above, the lawyer need not seek the consent of the lawyer representing the person seeking a second opinion and the lawyer may not notify the other lawyer of the fact of the consultation without the informed consent of the prospective client.

Discussion: Scenario Three – former client represented by successor counsel.

Considering this raises a threshold question: is the discharged lawyer "representing a client" within the meaning of SCR 20:4.2 when that lawyer contacts a former client regarding the representation? Courts and ethics committees that have considered this question have overwhelmingly answered it in the affirmative on the theory that lawyers are, in effect, representing themselves. In Formal Opinion 2011-1 (2011), the Ethics Committee of the New York City Bar provided an excellent review of authorities:

[9] See also Florida Ethics Opinion 02-05 (2003); Philadelphia ethics Opinion 2004-1 (2004) and New York State Ethics Opinion 1010 (2014).

[10] For an extensive discussion of obligations to prospective clients, see Wisconsin Ethics Opinion EF-10-03 (2010).

> Rule 4.2(a) begins with phrase "[i]n representing a client," which appears to limit the scope of the rule. The weight of authority, however, is that a lawyer may not contact a represented person even when the lawyer is acting pro se and thus not "representing a client" at the time of contact. As explained by the court in *In re Discipline of Schaefer*, 25 P.3d 191, 199 (Nev. 2001), "[t]he lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se." *Accord In re Disciplinary Proceeding Against Haley*, 126 P.3d 1262, 1269 (Wash. 2006); *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1119-20 (Idaho 1996); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994); *In re Conduct of Smith*, 861 P.2d 1013, 1016-17 (Or. 1993); *Comm. on Legal Ethics v. Simmons*, 399 S.E.2d 894, 898 (W. Va. 1990); *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App. 1999); District of Columbia Op. 258 (1995); Hawaii Op. 44 (2003). *But see Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990) (lawyer, in his role as a tenant of an office building, may contact the landlord directly about the landlord's attempt to evict the lawyer, even though the landlord is represented by counsel in that proceeding).

The Committee agrees that SCR 20:4.2 applies to a lawyer who wishes to communicate with a former client now represented by successor counsel.[11]

This leads to the inevitable conclusion that a lawyer who wishes to communicate with a former client now represented by successor counsel about matters concerning the representation must seek the permission of successor counsel. Thus, for matters that frequently arise when a client changes counsel in a matter, such as file transfer or assertions of liens on settlement proceeds[12], a former lawyer should begin communication with successor counsel. It may be the case that successor counsel may consider some matters outside the scope of the representation, but former counsel should clarify by consulting with successor counsel.[13]

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[11] For a thorough and thoughtful discussion of the application of the rules of professional conduct to lawyers acting *pro se*, see Margaret Raymond, *Professional Responsibility for the Pro Se Attorney,* 1 St. Mary's J. Legal Mal. & Ethics 2 (2011).

[12] For example, a former lawyer may assert a lien on settlement proceeds pursuant to Wis. Stat. 757.36.

[13] Of course, lawyers are free to contact former clients about matters *outside* the scope of successor counsel's representation. For example, New York City Bar Formal Op. 2011-1 states "In our view, therefore, an inquiry from an attorney to a former client, including, but not limited to, a request for unpaid fees and expenses, would not run afoul of Rule 4.2 in the absence of any reason to believe that successor counsel is representing the client with respect to payment of those fees."

Conclusion

Lawyers represent clients in connection with specific matters, and SCR 20:4.2 prohibits lawyers who represent a client in a specific matter from communicating about that matter with another person who is represented in the same matter. Lawyers are therefore free to communicate with represented persons about matters outside the scope of the representation or when the lawyer represents no other person in the matter.

Ethics Opinion E-07-01: Contact with Current and Former Constituents of a Represented Organization

(Effective date: July 1, 2007)

Synopsis: *When an organization is represented in a matter, SCR 20:4.2 prohibits a lawyer representing a client adverse to the organization in the matter from contacting constituents who direct, supervise or regularly consult with the organization's lawyer concerning the matter, who have the 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. All other constituents may be contacted without consent of the organization's lawyer. Consent of the organization's lawyer is not required for contact with a former constituent of the organization, regardless of the constituent's former position. When contacting a current or former constituent of a represented organization, a lawyer must state their role in the matter, must avoid inquiry into privileged matters and must not give the unrepresented constituent legal advice. The mere fact, however, that a current or former constituent may possess privileged information does not in itself prohibit a lawyer adverse to the organization from contacting the constituent. A lawyer representing an organization may not assert blanket representation of all constituents and may request, but not require, that current constituents refrain from giving information to a lawyer representing a client adverse to the organization. The mere fact that an organization has in-house counsel does not render the organization automatically represented with respect to all matters. Former Opinions E-82-10 and E-91-01 are withdrawn.*

This Opinion discusses the extent to which SCR 20:4.2 prohibits contact with current and former constituents of an organization when the organization is represented with respect to a matter.[1] The Opinion also discusses the obligations under the Rules of Professional Conduct of lawyers seeking to contact constituents of represented organizations and the obligations of lawyers representing organizations.

SCR 20:4.2 *Communication with Person Represented by Counsel* reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

[1] This question most frequently arises with respect to current and former employees of represented corporations. The Committee uses the phrase "constituents of a represented organization" to track the language of the Comment to SCR 20:4.2, but emphasizes that this Opinion applies to represented organization of all types, including corporations. Special considerations apply however, with respect to constituents of represented governmental entities. See ABA Formal Ethics Opinion 97-408 and Wisconsin Ethics Opinion E-95-1.

lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by a court order. [2]

As is apparent, the language of the Rule itself does not provide explicit guidance with respect to constituents (e.g. employees, officers, agents) of a represented organization. Paragraph [7] of the Comment to the Rule, however, provides as follows:

> *[7] In the case of a represented organization, this Rule 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.*

The Comment to SCR 20:4.2 thus provides specific guidance with respect to the question at hand. Before discussing the parameters of allowable contact with current and former constituents of represented organizations, the Committee believes some background information regarding the history and purpose of SCR 20:4.2 is appropriate. Understanding the intent of the drafters of ABA Model Rule 4.2, which Wisconsin has adopted as SCR 20:4.2, and the Rule as interpreted by courts and ethics committees of other states will provide enhanced guidance for Wisconsin lawyers.

I. History and Purpose of SCR 20:4.2

Wisconsin's current SCR 20:4.2 and Comment are identical to ABA Model Rule 4.2 and Comment. The ABA Model Rule and its Comment were amended in 2002 as part of the ABA's Ethics 2000 revision of the Model Rules of Professional Conduct. Like the current Rule 4.2, the prior Model Rule (which was almost identical to Wisconsin's prior SCR 20:4.2) itself contained no reference to constituents of a represented organization but rather addressed the issue in the Comment.[3]

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[2] In addition to the language of the Rule and Comment, the Committee also looked to other states for guidance because of the lack of Wisconsin case law on this topic and the age of the previous Wisconsin Ethics Opinions, E-82-10 and E-91-01, which drew upon rules that no longer exist.

[3] The applicable language of both the ABA's and Wisconsin's Comment to former Rule 4.2 stated "In the case of an organization, the Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on behalf of the organization."

The 2002 amendments to the Comment were significant and reflected the ABA's intention to clarify the language and provide better guidance. In particular, the ABA removed language from the Comment prohibiting contact with constituents having "managerial responsibility," which had frequently been criticized as "vague and overly broad."[4] Language prohibiting contact with constituents "whose statements may constitute an admission on the part of the organization" was also removed. This is because this language was originally intended to protect those jurisdictions which still maintained the old evidentiary rule that statements by an agent bound the principal, in the sense that, when such statements of an agent are admitted into evidence, the principal may not introduce other evidence to contradict the statement.[5] Modern evidence rules, however, while permitting an employee's statement to be admitted as an exception to the hearsay rule, do not bind the employer, who is free to introduce evidence contradicting the employee's statement.[6] Accordingly, that language in the old Comment was often misinterpreted to prevent contact with any constituent whose statement may constitute a non-binding admission.[7] Finally, a sentence was added to the comment to clarify that Rule 4.2 does not prohibit contact with former constituents of an organization, regardless of the position the former constituent once occupied.[8]

Thus, the changes made by the ABA have narrowed the Rule's prohibition with respect to constituents of a represented organization. As will be discussed *infra*, this is in keeping with the pronounced trend in case law and ethics opinions.

Although often invoked in the context of litigation, SCR 20:4.2 is a *disciplinary* rule and prescribes conduct which can subject a lawyer to professional discipline. The purpose behind this disciplinary Rule is to "contribute to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation."[9] Put more succinctly, the "(p)urpose of the rule is to protect the attorney-client relationship from intrusion by opposing counsel."[10]

Applying this Rule to the representation of an individual is relatively simple. Defining the parameters of the attorney-client relationship with respect to a represented organization proves more difficult. It is clear that when a lawyer represents an organization, the client is the organization itself.[11] It is also clear that an organization acts only through its constituents, some of whom should be afforded the protections of SCR 20:4.2. In determining just which constituents should be protected by SCR 20:4.2,

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[4] See ABA Model Rule 4.2 -Reporter's Explanation of Changes.
[5] Such statements are often referred to as "judicial admissions."
[6] Wisconsin follows the modern rule – see sec. 908.01(b)4 Stats.
[7] See ABA Model Rule 4.2 -Reporter's Explanation of Changes.

[8] This recognized the long-standing position of the ABA. See *ABA Formal Opinion 91-359 (1991).*
[9] See SCR 20:4.2, Comment [1].
[10] *Palmer v. Pioneer Inn Associates, LTD., 118 Nev. 943, 948, 59 P.3d 1237 (2002).*
[11] See SCR 20:1.13.

courts have attempted to balance many competing interests. One court described the factors to be balanced as follows:[12]

> *Many competing policies must be considered when deciding how to interpret the no-contact rule as applied to organizational clients: protecting the attorney-client relationship from interference; protecting represented parties from overreaching by opposing lawyers; protecting against the inadvertent disclosure of privileged information; balancing on one hand an organization's need to act through agents and employees, and protecting those employees from overreaching and the organization from the inadvertent disclosure of privileged information, and on the other hand the lack of any such protection afforded an individual, whose friends, relatives, acquaintances and co-workers may generally all be contacted freely; permitting more equitable and affordable access to information pertinent to a legal dispute; promoting the court system's efficiency by allowing investigation before litigation and informal information-gathering during litigation; permitting a plaintiff's attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with Rule 11; and enhancing the court's truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely.*

In balancing these interests, courts have formulated a variety of tests. On one end of the spectrum is an outright ban on contact with any constituent of a represented organization.[13] The advantage of such a bright-line test is clarity and certainty, but this comes at a high cost; an opposing party might have to resort to filing suit to begin to gather information about the viability of a possible claim, or simply be without the means to informally gather information in transactional or certain administrative proceedings without formal discovery. This involves great expense when compared to informal interviews and clogs the courts with potentially baseless claims. It also gives organizations almost complete control over information in a matter and thus a great advantage over individuals, whose friends, colleagues and associates are not protected by SCR 20:4.2.

Many courts, therefore, have adopted various tests, such as the "party-opponent admission test,"[14] the "managing-speaking agent test,"[15] the "control group test,"[16] the "case-by-case balancing test,"[17] and the "alter–ego test,"[18] which seek to balance an

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[12] *Palmer v. Pioneer Inn Associates, LTD., 118 Nev. 943, 951, 59 P.3d 1237 (2002).*

[13] See *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv., Ltd., 745 F.Supp 1037 (D.N.J. 1990).*

[14] See *Cole v. Appalachian Power Co., 903 F.Supp. 975 (S.D.W.Va. 1995); Brown v. St. Joseph County, 148 F.R.D. 246 (N.D.Ind.1993); University Patents, Inc. v. Kligman, 737 F.Supp 325 (E.D.Pa. 1990).*

[15] See *Chancellor v. Boeing Co., 678 F.Supp. 250 (D.Kan.1998); Wright by Wright v. Group Health Hosp., 103 Wash.2d 192, 691 P.2d. 564 (1984).*

[16] *See Fair Automotive v. Car-X Service Systems, 128 Ill.App.3d 763, 471 N.E.2d 554 (1984).*

[17] See *B.H. by Monahan v. Johnson, 128 F.R.D. 659 (N.D. Ill.1989).*

organization's right to counsel with an opposing party's right to gather information with respect to a matter. The decisions discussing various tests are not entirely consistent in the use of these names, but the fact that such a variety of different tests has developed illustrates the difficulty in reaching an appropriate balance. Because the Wisconsin Supreme Court has adopted the ABA Model Rule and Comment, which outlines its own test, the particulars of other such tests need not be discussed here. But it is worth noting that the test adopted in SCR 20:4.2 is very close to the "alter-ego test" and also very close to the test adopted by the *Restatement (Third) of the Law Governing Lawyers, §100.*

It is clear from a review of these cases and other sources that courts seek to interpret Rule 4.2 to protect those within an organization who act on behalf of an organization in connection with a matter i.e. those who direct and consult with the organization's lawyer or whose act or omission serves as a basis for the matter in question. These decisions also recognize that Rule 4.2 is not meant to protect an organization from the disclosure or discovery of potentially damaging facts.[19] As one court stated "(p)reventing the disclosure of unfavorable facts merely because they happen to have occurred in the workplace is not a legitimate organizational interest for purposes of applying rule 4.2."[20] Thus the Rule's protection extends to those constituents who may be said to personify the organization as a "client" in a matter, but ordinarily does not extend to constituents of an organization who simply possess relevant facts. With this background information, the Committee turns to the questions prompting this opinion.

II. Current Constituents of an Organization

Comment [7] to SCR 20:4.2 outlines two categories of protected constituents of a represented organization. Any constituents falling within these two categories may not be contacted by opposing counsel without the consent of the organization's lawyer. Conversely, any constituent falling outside these two categories may be contacted without consent of the organization's lawyer. The categories are as follows:

1) Constituents who supervise, direct or regularly consult with the organization's lawyer concerning the matter or who have authority to obligate the organization with respect to the matter. This category clearly applies to those constituents (typically upper-level management) to whom the organization's lawyer looks for decisions with respect to the matter. Thus a senior vice president of a corporation who is directing outside tax counsel about an IRS matter is clearly covered by the Rule. Note, however, that the category is specific to the *matter* in question. In large organizations, some management constituents may direct or control counsel for some matters, but not others. The vice president of human resources may direct the corporation's lawyer on an employment discrimination matter and thus be covered by SCR 20:4.2. However, if the chief financial officer was a witness to the alleged act of

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[18] See *Niesig v. Team I, 76 N.Y.2d. 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990).*
[19] See e.g. *Aiken v. The Business and Industry Health group, Inc., 885 F.Supp 1474 (D. Kan. 1995)*
[20] *Messing v. President & Fellows of Harvard College, 436 Mass. 347, 764 N.E.2d 825 (2002)*

discrimination, but has no involvement in the direction or control of the organization's lawyer handling the defense of the discrimination claim, the officer would not be protected by SCR 20:4.2. The mere fact that a constituent holds a management position does not trigger the protections of the Rule.

This category also includes those constituents who "regularly consult" with the organization's lawyer concerning the matter. This need not be a constituent who also directs the organization's lawyer. So, for example, an engineer employed by a company who works closely with and provides expertise to the lawyer defending the company against a defective product claim, or an employee who is assigned the task of collecting documents and information for the organization's lawyer would both be covered by the Rule. However, a constituent who is simply interviewed or questioned by an organization's lawyer about a matter does not "regularly consult" with the organization's lawyer.

Finally, this category includes those constituents who have authority to settle or compromise a matter on behalf of the organization. Such a person obviously acts as an "alter-ego" of the organization and must be protected by the Rule. Typically this category would include members of an organization's upper-level management. Again, it is worth noting that simply the status of being a "manager" does not automatically invoke the protections of the Rule. Thus a department manager of an employee who is alleged to have committed a negligent act does not fall within this category if the department manager does not have the authority to settle or compromise the claim on behalf of the organization.

2) Constituents whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. This category includes those individuals whose actions or omissions have triggered the matter in question and would likely be a named party but for the fact of their membership in the organization. Typical examples of constituents in this category would include the truck driver for a company who is alleged to have caused injury while in the course of employment, the manager who is alleged to have sexually harassed an employee, or the machine operator who is alleged to have ignored safety protocols and injured another employee. It is important to note that this category includes constituents who are alleged to have committed acts or omissions that may impute liability to the organization even if the organization or constituent disputes or denies the allegations.[21] This category, however, does not include constituents who are simply witnesses to the alleged act or omission.

Finally, should a current constituent have their own counsel in a matter, or be *actually* represented by the organization's lawyer, then SCR 20:4.2 would prohibit contact with that constituent regardless of their position within the organization.

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[21] See *Restatement (Third) of the Law Governing Lawyers, §100, comment (d).*

III. Former Constituents of an Organization

By the plain language in Comment [7] to SCR 20:4.2, "(c)onsent of the organization's lawyer is not required for communication with a former constituent." This is consistent with the long-standing position of the ABA "that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer in the matter may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer."[22] This is also the position of the *Restatement (Third) of the Law Governing Lawyers,* which states that "(c)ontact with a former employee or agent is ordinarily permitted, even if the person had formerly been within the category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary's search for relevant facts without facilitating the employer's relationship with its counsel."[23]

The vast majority of reported decisions on the question hold that Rule 4.2 does not prohibit or restrict contact with former constituents. While some courts have held otherwise,[24] the great majority of courts considering this issue have followed the recent trend of embracing the position that Rule 4.2 does not prohibit contact with former constituents of an organization.[25] Recent ethics opinions from other states also adhere to this view.[26]

The conclusion that Rule 4.2 does not prohibit contact with former constituents of an organization flows logically from the purpose of the Rule: to protect the attorney-client relationship and not inhibit access to factual information. As expressed by Professors Rotunda and Dzienkowski in *The Lawyer's Deskbook on Professional Responsibility (ABA 2006-2007), §4.2-6(c):*

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[22] *ABA Formal Opinion 91-359.*

[23] *Restatement(Third) of the Law Governing Lawyers, §100, Comment g.* The *Restatement* notes however, that in certain unusual circumstances, such as a former employee consulting regularly with an organizations lawyer about the matter, a former employee may be covered by the no-contact rule.

[24] *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv., Ltd., 745 F.Supp 1037 (D.N.J. 1990); Porter v. Arco Metals Co., 642 F.Supp. 1116 (D.Mont. 1986); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36 (D. Mass. 1987).* As noted in the *Restatement,* however, there appears to be no reported decisions since 1990 holding that Rule 4.2 covers former constituents on the basis of the former relationship alone.

[25] *Clark v. Beverly Health and Rehabilitation Services, Inc., 440 Mass 270, 797 N.E.2d 905 (2003); Continental Ins. Co. v. Superior Court (Commercial Bldg. Maint. Co.), 32 Cal. App. 4th 94, 37 Cal. Rptr. 843 (1995); Niesig v. Team I, 76 N.Y.2d. 363, 559N.Y.S.2d. 493 (1990); H.B.A. Mgmt. Inc. v. Estate of Schwartz, 693 So.2d 541 (Fla. 1997); Smith v. Kalamazoo Ophthalmology, 322 F. Supp.2d 883 (W.D. Mich. 2004); Terra Int'l. v. Mississipi Chem., 913 F. Supp. 1306 (N.D. Iowa 1996); Orlowski v. Dominick's, 937 F.Supp. 723 (1996); Humco Inc. v. Noble, 31 S.W.3d 916 (Ky. 2000); Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1985); Smith v. Kansas City Southern Railway Co., 87 S.W.3d 266 (Mo.App. 2002).*

[26] *Ohio Ethics Opinion 2005-03 (2005); Utah Ethics Advisory Opinion No. 04-04 (2004); DC Ethics Opinion 287(1998).*

Any other reading of Rule 4.2 is unnatural and strained. It is not the purpose of Rule 4.2 to prevent the disclosure of prejudicial testimony but to protect the client-lawyer relationship. The attorney for the employer does not have a client-lawyer relationship with a former employee. Moreover, to so interpret the Rule would make it more expensive for the lawyer to obtain information about her case, because she would have to proceed by way of deposition rather than interview if the opposing lawyer refused consent. Furthermore, Rule 4.2 protects a person from being damaged by a binding disclosure made without that person's lawyer being present. But former employees are not represented by the employer's lawyer.

As put by one court[27] in holding that Rule 4.2 does not prohibit contact with former employees of a corporation:

Indeed, exclusion of former employees furthers both the specific and the more general purposes of rule 4.2 It must be remembered that rule 4.2 is but one part of a comprehensive system of laws and regulations designed to hold counsel to the highest professional standards in our adversary system. Within that system, pretrial (including precomplaint) discovery plays an essential role. It is the phase in which material facts are discovered, issues are narrowed as theories of the case are tested, rejected, or refined, and the parties and their attorneys have the opportunity to assess the strengths and weaknesses of their case with an eye toward both trial and the negotiation of settlement. Courts have long recognized that informal interviews are an exceptionally efficient means for the meaningful gathering of facts. They are generally more conducive to full disclosure and far less costly than the more structured processes of formal discovery, or even informal investigation with opposing counsel present. See Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990) ("Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information")...

Former employees may be a useful source of meaningful information, because they may feel less directly tied to the employer's interests and therefore more willing to discuss informally what they know. At the same time, these employees may still have economic and other ties to the organization that would make them reluctant to speak freely in the presence of the organization's attorneys, even in an informal setting. In effect, immunizing former employees from all ex parte interviews would permit the organization to monitor the flow of nonprivileged information to a potential adversary at the expense of uncovering material facts. Fairness in our established system of adversary representation would be the casualty.

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[27] *Clark v. Beverly Health and Rehabilitation Services, Inc., 440 Mass. 270, 277, 797 N.E.2d 905 (2003).*

Thus, by reference to the plain language of the Comment and by looking to the purposes of SCR 20:4.2, the inescapable conclusion is that SCR 20:4.2 does not prohibit contact with former constituents of an organization regardless of the former position held by the former constituent. Of course, if a former constituent is currently represented by their own counsel with respect to a matter, or is *actually* represented by the organization's lawyer in the matter (assuming the former constituent consents and such representation does not constitute a conflict of interest. See SCR 20:1.7), then SCR 20:4.2 applies.

IV. Obligations of a lawyer contacting a current or former constituent not covered by SCR 20:4.2.

Although SCR 20:4.2 does not prohibit contact with some current and all former constituents of an organization, that does not mean that lawyers contacting such constituents are free from all constraint. Comment [7] to SCR 20:4.2 states "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."

SCR 20:4.4(a) provides as follows:

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

Comment [1] to SCR 20:4.4 provides:

> *Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.*

Comment [9] to SCR 20:4.2 states "In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3."

SCR 20:4.3 provides as follows:

> *In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer's role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer*

knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

These two Rules thus impose the obligation to inform an unrepresented person of the lawyer's role in the matter and to avoid seeking privileged information.[28] Reported decisions and ethics opinions have also cautioned lawyers seeking to informally contact current and former constituents of represented organizations to observe certain guidelines when making such contacts.[29] Some decisions go beyond these two Rule-based proscriptions and set forth other guidelines for lawyers in these circumstances.

One of the purposes of imposing such guidelines is to protect the organization's privileged information. In *Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct 677, 66 L.Ed.2d 584 (1981)*, the Supreme Court held that attorney-client privilege may attach to communications with any employee of a corporation, not simply high-ranking management.[30] A lawyer is thus forbidden by SCR 20:4.4 from seeking to induce disclosure of information protected by the privilege when contacting any constituent of a represented organization.

The mere fact, however, that a constituent is in possession of information protected by the privilege does not mean that the constituent is covered by SCR 20:4.2. It is important to bear in mind that the privilege protects communications, not facts. As the Supreme Court noted in *Upjohn*, "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[31]

In the wake of *Upjohn*, it was argued that the scope of Rule 4.2 should be extended to all constituents who may be in possession of privileged information, but courts and ethics opinions have rejected such an interpretation as overly broad and unnecessary to protect organizations.[32] As one court noted, if a lawyer violates an

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[28] The prohibition applies only to information protected by fundamental and general law such as the attorney- client privilege, physician-patient privilege and work-product immunity. It does not extend to duties of confidentiality based on contract, such as confidentiality agreements, which may be of indeterminate scope and of which opposing counsel is unlikely to be aware. Further, if the Rule encompassed such contract based duties, an organization could turn SCRs 20:4.2 and 4.4 into an impenetrable shield by simply requiring its constituents to sign agreements prohibiting them from ever speaking with a lawyer opposing the organization thus creating the very outcome that courts interpreting the Rule consistently reject . See *Restatement (Third) of the Law Governing Lawyers, §102, comment b.*

[29] See e.g. See e.g. *Smith v. Kalamazoo Ophthalmology, 322 F. Supp.2d 883 (W.D. Mich. 2004); Niesig v. Team I, 76 N.Y.2d. 363, 559N.Y.S.2d. 493 (1990); Snider v. Superior Court, 113 Cal.App. 4th 1187, 7 Cal.Rptr.3d 119 (2003); Midwest Motor Sports Inc. v. Arctic Cat Sales, Inc., 144 F. Supp.2d 1147 (D.S.D. 2001); McCallum v. CSX Transp. Inc., 149 F.R.D. 104 (M.D.N.C. 1993); Ohio Ethics Opinion 2005-03 (2005); Utah Ethics Advisory Opinion No. 04-04 (2004); DC Ethics Opinion 287(1998); South Carolina Ethics Opinion 01-01 (2001); Virginia Ethics Opinion 1749 (2001).*

[30] Commonly referred to as the "litigation control group."

[31] *449 U.S. at 395.*

[32] See *Snider v. Superior Court, 113 Cal.App. 4th 1187, 7 Cal.Rptr.3d 119 (2003); Clark v. Beverly Health and Rehabilitation Services, Inc., 440 Mass. 270, 797 N.E.2d 905 (2003); Lang v. Superior Court, 826 P.2d 1228 (Ariz.Ct.App. 1992); Restatement (Third) of the Law Governing Lawyers, §102, comment d.; Virginia Legal Ethics Opinion 1749 (2001)*

organization's attorney-client privilege "the court may disqualify him or her from further participation in the case...and, under certain circumstances, may exclude improperly obtained evidence or take other appropriate measures to achieve justice and ameliorate the effect of improper conduct."[33] Thus, protections such as protective orders, disqualification motions and motions for sanctions are available to organizations. Furthermore, lawyers who violate an organization's attorney-client privilege may be subject to disciplinary action for violations of SCR 20:4.3 and SCR 20:4.4.

Thus, if a constituent who witnessed an act that serves as a basis for a suit against an organization is interviewed about the matter by the organization's lawyer, and is not otherwise protected by SCR 20:4.2, opposing counsel may contact the constituent with respect to factual information about the matter. There are however, ethical duties placed upon lawyers who seek to contact such a constituent.

To summarize these duties, when contacting a constituent of a represented organization (or any unrepresented person), the applicable Rules mandate the following:

1. **The lawyer must inform the unrepresented constituent of the lawyer's role in the matter (see SCR 20:4.3).** [34]

2. **The lawyer must refrain from giving legal advice to an unrepresented constituent if there is a reasonable possibility that the interests of the client may conflict with those of the unrepresented constituent (see SCR 20:4.3).**

3. **The lawyer must not ask any questions reasonably likely to elicit information that the lawyer knows or reasonably should know is privileged and, if necessary, should caution the unrepresented constituent not to reveal such information (see SCR 20:4.4).**

4. **The lawyer must not make any false statements of material fact to or mislead an unrepresented constituent (see SCR 20:4.1 and SCR 20:8.4).**

These guidelines are derived from the language of the Rules themselves and are the failure to follow then could therefore result in disciplinary action. As noted above, however, some courts and ethics committees that have offered guidelines to lawyers beyond the language of the Rules which may be of valuable assistance to lawyers who seek to avoid civil sanction and disciplinary enforcement, and the Committee herein offers similar suggested guidelines:

1. **The lawyer should clearly identify the client and the fact that the client is adverse to the organization.**

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[33] *Triple A Machine Shop, Inc. v. State of California, 213 Cal.App.3d 131, 261 Cal.Rptr. 493 (1989)*

[34] This normally means identifying the client. See SCR 20:4.3, Comment [2].

2. **The lawyer should inquire as to whether the constituent has counsel of their own in the matter.**

3. **The lawyer should explain the purpose of interview.**

4. **The lawyer should inform the constituent that they need not speak to the lawyer**

There is no Wisconsin authority mandating this second set of guidelines, but the Committee hopes that by following these guidelines, lawyers will avoid grievances and civil litigation concerning the lawyer's conduct.

V. Obligations of a Lawyer Representing an Organization

Lawyers representing organizations also have obligations relative to constituents who may be contacted by opposing counsel. These obligations reflect the lawyer's role of representing the organization itself, as opposed to the organization's constituents.

1. A lawyer representing an organization may not assert blanket coverage of all current and former constituents of an organization by SCR 20:4.2 unless the lawyer *actually* represents each and every constituent of the organization. Courts and ethics opinions have consistently rejected broad assertions of representation of all employees based upon nothing more than the fact of employment and this Committee agrees with these decisions.[35] As discussed *supra*, when a lawyer represents an organization, the client is the organization itself, not its constituents, and SCR 20:4.2 prohibits contact only with certain current constituents. Therefore, there is no basis for asserting such sweeping coverage and lawyers must be mindful of their obligations under SCR 20:4.1(a)(1), which prohibits a lawyer from making a false statement of fact or law to a third person, and SCR 20:3.4(a), which prohibits a lawyer from unlawfully obstructing another party's access to evidence.

Lawyers may, in certain circumstances, represent current or former constituents of an organization in the same matter in which the lawyer represents the organization [*see* SCR 20:1.13(g)], but in seeking to represent a constituent, the lawyer must be mindful of the prohibition on certain types of solicitation [*see* SCR 20:7.3(a)]. The lawyer must first obtain the constituent's consent to representation after determining whether a conflict of interest exists and, if so, determining whether the conflict is waivable (*see* SCR 20:1.7). If a waivable conflict exists, the lawyer must obtain the informed consent [*see* SCR 20:1.0(f)] in writing to the conflict of both the constituent and the organization in order to undertake the dual representation. If the lawyer does undertake such dual representation, the lawyer must inform both clients of the implications of dual representation, such as the lack of confidentiality between the clients, the lack of attorney-client privilege with

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[35] See *Harry A. v. Duncan, 330 F.Supp.2d 1133 (D. Mont. 2004); Michaels v. Woodland, 988 F.Supp 468 (D. N.J. 1997); Carter-Herman v. City of Philadelphia, 897 F.Supp. 899 (E.D.Pa. 1995); Brown v. St. Joseph County, 148 F.R.D. 246 (N.D. Ind. 1993),; ABA Formal Opinion 95-396 (1995); Utah Ethics Opinion 04-06 (2004).*

respect to disputes between the clients, and the likelihood that the lawyer may not continue to represent either client in the case of an unwaivable conflict or a conflict to which one client refuses to waive.

2. **Lawyers for organizations may appear on behalf of the organization when a constituent is deposed, but that does not mean that the lawyer represents that constituent as an individual**. This practice is common, but the mere fact that a lawyer accompanies a constituent to a deposition and consults with that constituent does not transform that constituent into a client. As stated in one recent ethics opinion:[36]

> *While corporate counsel may certainly consult with the constituent called as a witness in a deposition, this consultation is part of counsel's representation of the corporation and does not render the attorney counsel to the witness as an individual. Nor does such corporate representation block opposing counsel's ability to attempt to interview such a fact witness separate and apart from formal discovery.*

The lawyer's client remains the organization and the lawyer is obligated to protect the interests of the organization first. In such a situation, the lawyer should take care to ensure that the constituent does not misunderstand the lawyer's role (*see* SCR 20:1.13(f) and SCR 20:4.3).

3. **SCR 20:3.4(f) permits a lawyer representing an organization in a matter to *request* that employees or agents of the client refrain from voluntarily giving relevant information to another party.** It is important to note that this Rule does not allow a lawyer to *forbid* constituents from speaking to the other side. That being said, this Rule would permit a lawyer for an organization to contact employees and ask that they not speak to the lawyer representing a client adverse to the organization. The lawyer should be careful to choose language that makes plain that such request is not an order. This Rule also applies only to current employees.

It is also worth noting that neither SCR 20:3.4 nor SCR 20:4.2 prohibit a lawyer for an organization from seeking a protective order from a court restricting access to certain current or former constituents if circumstances warrant. For example, if a vice president, who worked closely with the organization's lawyer on a particular matter but did not witness any of the events underlying the matter, leaves his or her job and becomes a former constituent and thus not covered by SCR 20:4.2, the organization's lawyer might appropriately seek a court order limiting another party's access to the former vice president. Such a former employee clearly has much privileged information and is highly unlikely to possess any relevant factual information. Thus there is little reason for the lawyer opposing the organization to contact such a former employee because the lawyer would be prohibited by SCR 20:4.4 from asking the former employee about anything that the employee would likely know.

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[36] *Utah Ethics Opinion 04-06 (2004). See also,* Banks v. Office of the Senate Sergeant-at-Arms, *222 F.R.D.1 (D.D.C. 2004).*

VI. In-house Counsel

Finally, the Committee wishes to comment upon the status of organizations with permanent in-house counsel. The fact in itself that an organization has in-house counsel, or regularly retains outside counsel, does not render the organization represented with respect to a specific matter.[37] "Similarly, retaining counsel for all matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer."[38]

A lawyer does not violate SCR 20:4.2 by contacting in-house counsel for an organization that is represented by outside counsel in a matter. The retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person.[39]

Ethics Opinions E-82-10 and E-91-01 are hereby withdrawn.

OF COUNSEL STATUS

ETHICS ARTICLE

Question:

I read a lot about attorneys becoming of-counsel to a law firm. What does that really mean?

Answer:

There has been a lot of discussion about the "of-counsel" status especially as we see the greying of many lawyers. The ABA Standing Committee on Ethics and Professional Responsibility has issued formal opinions on this as well as the Wisconsin State Bar Committee on Professional Ethics.

The Wisconsin Committee on Professional Ethics adopted the ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion when it issued Formal Opinion E-93-1. In that Opinion, the Committee on Professional Ethics noted the following characteristics regarding the of-counsel status:

- The defining characteristic of the relationship is that the attorney has a close, regular, personal relationship with the law firm;

- The lawyer does not have the same shared liability and managerial responsibilities as a partner;

- The of-counsel attorney is subject to the same conflict of interest rules and any representation by the of-counsel attorney must be considered when the law firm is addressing conflicts of interest of current clients, former clients, and imputed conflicts.

The ABA Opinion and Wisconsin Opinion went on to recognize the different types of scenarios where an of-counsel relationship would exist and noted four basic patterns for the relationship:

- Part-time practitioner who practices law in association with the law firm but on a basis different from the mainstream lawyers of the firm as it relates to compensation and billable hour requirements;

- A retired partner of the firm who while not actively practicing law remains associated with the firm and available for occasional consultation;

- A lawyer who is a probationary partner brought into the firm from another practice with the expectation of becoming a partner in the firm;

- Permanent designation of an associate who does not obtain partnership status but is a contributing member of the firm.

Under each of these scenarios, there is a recognition of the status of the lawyer as being different from an active partner or shareholder who is engaged in the practice of law and subject to billable hour and revenue goals as an active lawyer in the firm.

It is important to recognize that an "of-counsel" lawyer still has the same professional responsibilities as a partner/shareholder lawyer, but merely is treated differently within the organization. The "of-counsel" status can be identified on firm letterhead and other firm communications signifying the relationship between the lawyer and the law firm, but that does not change the professional responsibility requirements of the attorney and of the law firm.

SELLING THE LAW PRACTICE

SCR 20:1.17 Sale of law practice

A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area or in the jurisdiction in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's affected clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

WHY LAW FIRMS MERGE

Law firms merge for the following reasons:

- Increase opportunity for retaining client base;
- Enhance capacity to serve larger and more prestigious clients;
- Broaden geographic areas served by merger;
- Derive benefits not otherwise available (synergistic effect);
- Strengthen or add specialty areas to satisfy requirements of clients – present and future;
- Correct structural imbalances (offset departure of attorney, experience levels)

AREAS FOR INTEGRATION

- Culture
- Governance
- Performance standards, expectations and billing rates
- Practice areas;
- Clients;
- Internal communications and development of personal relationships;
- Administration

THE 7 DEADLY SINS OF LAW FIRM MERGERS AND COMBINATIONS

1. Absence of an articulated, agreed upon growth strategy
2. Laissez-faire approach to merger consideration and execution
3. Irrational attachment to legacy firm and an inability to focus on the new firm
4. Fatal need to one-up potential partners, as if you are representing a client
5. Selfish obstructionism
6. Avoiding deal breaking issues
7. Inability to integrate

ETHICS OF SERVING ON BOARDS

I. DUTIES AND RESPONSIBILITIES OF BOARD OF DIRECTORS.

A. Common law duties - Includes:

1. Duty of care - exercise care in the performance of duties for the corporation as a reasonable person would in a like position and under similar circumstances.

2. Duty of loyalty - avoid or fairly resolve conflicts of interest between directors and the corporation; allow the corporation to take full advantage of business opportunities rather than exploiting them personally; maintain confidentiality and discretion regarding the affairs of the corporation.

3. Duty of obedience - carry out the purposes of the corporation as expressed in organizational documents.

B. General Board Responsibilities.

1. To Serve as Trustees/Advisers/Benefactors.

a. Preserve and protect the organization's assets.

b. Ensure organization's continued activities in pursuit of its charitable purposes.

c. Ensure that the organization acts in prudent and effective manner.

d. Have duty of loyalty; care; obedience; to act in good faith with diligence, care and skill.

e. Act as advisers to the organization's employees and members with respect to the organization's "business".

2. To Establish Goals and Policies and Monitor Their Accomplishment.

a. Establish long-term goals and operating policies.

b. Ensure that goals and policies are clearly articulated, observed in the course of day-to-day operations, and modified when their modification is in the best interests of the organization.

3. To Ensure the Organization's Continuity.

Stagger board terms so new directors have the benefit of the experience and knowledge of veteran directors.

C. Specific Responsibilities of Board Members.

1. Mission statement.

a. Use as a guide in determining the propriety of proposed activities.

b. Assists the Board and staff in focusing and clarifying the organization's basic goals.

2. Strategic goals.

Long-term goals used for advance-planning purposes.

3. Operational goals/objectives.

a. Blueprint for achieving the strategic goals and fulfilling the mission statement.

b. Focus on short term (one to three years).

c. Developed by executive staff and approved by the board.

d. Include discrete, quantifiable tasks and deadlines for their accomplishment.

e. Serve as a basis for budget development and evaluating staff and board performance.

4. Operations.

a. Exercising authority to approve or disapprove new projects, capital expenditures and other activities.

(1) Directors risk liability for the organization's actions, whether or not they actively exercise their decision-making authority.

(2) "Rubber stamping" of staff requests may constitute a violation of the directors' duty of care.

b. Directors should ask for whatever information is reasonably necessary to make proper decisions.

c. Solicit staff opinions.

5. Budget and finance.

a. Review and approve (or disapprove) budgets prepared by staff.

b. Monitor financial performance by reviewing interim financial statements prepared by staff.

c. Engage independent CPA's to review (or audit) annual financial statements and report to the board.

d. Take reasonable steps to ensure the security of the organization's funds and other assets.

e. Maintain the organization's exempt status and consult with attorneys or accountants regarding avoidance of tax penalties for improper activities or unrelated business income.

f. Consult with qualified insurance brokers and obtain appropriate types and amounts of insurance.

g. Direct appropriate and secure investment of the organization's assets as required by the Internal Revenue Code and by the Uniform Fiduciaries Act.

6. Constituency relations - Maintain good relations with:

a. Members and other contributors.

b. Recipients of benefits provided by the organization.

c. Employees and volunteers.

d. Federal, state and local governments and governmental agencies.

e. The local business community and residents of neighborhoods in which the organization operates.

f. Corporate and institutional funding sources.

g. Any national or parent organization with which the organization is affiliated.

h. The press and the general public.

7. Personnel.

a. Oversee hiring, supervising and establishing benefits for the organization's executive staff.

b. Develop job descriptions.

c. Ensure compliance with applicable worker's compensation, unemployment compensation, withholding, nondiscrimination, and other employment-related laws and regulations.

d. Approve policies and mechanisms for recruiting, training, supervising, and retaining volunteers.

8. Performance evaluation.

a. Evaluate performance of executive director and other personnel under its direct supervision.

b. Maintain written records of management evaluations.

c. Discharge managers who perform their jobs unsatisfactorily.

d. Evaluate conduct and performance of board, committees and its members.

9. Funding.

a. Solicit annual membership dues and annual contributions.

b. Build and maintain an endowment fund to generate operating income.

c. Participate in capital campaigns for special projects.

d. Make presentations and grant applications to funding sources.

e. Ensure compliance with fund-raising regulations.

10. Compliance with laws and regulations.

a. Monitor compliance with federal, state, and local laws and regulations.

b. All board actions should be reviewed for compliance with the organization's articles and bylaws, and with grants, contracts, and conditions attached to restricted gifts.

11. Amendment of organizational documents.

Amend articles of incorporation and/or bylaws as necessary.

12. Compensation of directors.

a. Board of directors has authority to establish compensation for directors.

b. Directors of nonprofit organizations typically receive only out-of-pocket expenses.

II. LIABILITY FOR BOARD MEMBERS UNDER THE WISCONSIN STATUTES.

A. Limited liability.

Self Dealing - a contract or transaction between a corporation and one or more of its officers is not void or voidable under Wisconsin law if any of the following occurs:

1. The director's interest in the transaction is disclosed to the board that authorizes, approves, or ratifies the contract or transaction by a vote of consent sufficient for the purpose without counting the votes or consents of the interested directors;
2. The director's interest is disclosed or known to the members entitled to vote and they authorize, approve, or ratify such contract or transaction by vote or written consent;

3. The contract or transaction is fair and reasonable to the corporation.

B. Criminal conduct.

Officers may be held personally liable for violations of criminal law unless they had reasonable cause to believe their conduct was lawful or no reasonable cause to believe their conduct was unlawful.

C. Willful misconduct.

Officers may be held personally liable for willful misconduct; however, the statute does not define what constitutes willful misconduct.

D. Exceptions to limited liability - personal immunity provided to nonstock corporate officers and directors does not apply to any of the following:

1. A civil or criminal proceeding brought by or on behalf of any governmental unit, authority, or agency (unless brought in its capacity as a private party or contractor).

2. A proceeding brought by any person for a violation of state or federal law where the proceeding is brought pursuant to an express private right of action created by sate or federal statute.

3. The liability of a director under section 181.29 of the Wisconsin Statutes (making loans to officers). See Item 6 below.

E. Preservation of limited liability by reliance on other sources of information.

Officers are permitted by statute to rely upon information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:

1. An officer or employee of the corporation whom the officer believes in good faith to be reliable and competent in the matters presented.

2. Legal counsel, public accountants, or other persons as to matters the officer believes in good faith are within the person's professional or expert competence.

3. In the case of reliance by a director, a committee of the board of which the director is not a member, if the director believes in good faith that the committee merits confidence.

A BOARD MEMBER'S CODE OF ETHICS

1. Selflessness. Board members should make decisions in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their families or their friends.

2. Integrity. Board members should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties.

3. Objectivity. In carrying out business, including making appointments, awarding contracts, or recommending individuals for rewards and benefits, board members should make choices based only on merit.

4. Accountability. Board members are accountable to the public for their decisions and actions and must submit themselves to whatever scrutiny is appropriate to their office.

5. Openness. Board members should be as open as possible about all the decisions and actions they make. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands it.

6. Honesty. Board members have a duty to declare any private interest relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

7. Leadership. Board members should promote and support these principles by leadership and example.

WHEN ARE YOU STILL A LAWYER?

Ten Things to Never Say in a Social Setting

1. In a social setting, many people may ask for your opinion and advice on a legal matter. Be careful not to be so free with your professional advice because the consequences of establishing an attorney/client relationship where you had no such intention may likely fall upon you and not the client.

2. Never provide a casual acquaintance at a cocktail party or other social event with free legal advice unless you are sure that you want to enter an attorney-client relationship.

3. Be careful not to disclose confidential information learned from a would-be client at a social setting.

4. Never give confidential legal advice in the presence of strangers.

5. Be careful to avoid representation of someone without clearing conflicts – it is impossible to check for a conflict at a cocktail party!

6. Never misstate your qualifications, experience or expertise or hold yourself out to prospective clients as an "expert" in a particular area of the practice of law unless specifically permitted under the Rules of Professional Conduct.

7. Never guarantee success nor exaggerate your ability to win a case.

8. Never state to the person with whom you are speaking that you know the judge or a government agent implying a relationship which will somehow help you in a potential matter.

9. Gossip at a cocktail party is never beneficial and it could expose a client confidence.

10. Refrain from making statements about a defendant or its product which, if spoken in court, are privileged, but when spoken outside the protected litigation forum, are no longer privileged and may be defamatory.

PURCHASING TAIL INSURANCE

Understanding Tail Coverage

blog.alpsnet.com/understanding-tail-coverage

To this day I still get the occasional call from an attorney wanting to know how to go about purchasing a tail policy and my response is always the same. I need to make sure that the caller understands there really is no such thing as a tail "policy." Clarification on this point is important because confusion over what a tail is and isn't can have serious repercussions down the road. To make sure you don't end up running with any similar misconceptions, here's what you need to know.

An attorney leaving the practice of law can't purchase a malpractice insurance policy because he or she will no longer be actively practicing law. There simply is no practice to insure. This is why an attorney can't buy a tail "policy." What you are actually purchasing when you buy a tail is an extended reporting endorsement (ERE). This endorsement attaches to the final policy that is in force at the time of your departure from the practice of law. In short, purchasing an ERE, which is commonly referred to as tail coverage, provides an attorney the right to report claims to the insurer after the final policy has expired or been cancelled. Again, under most ERE provisions, the purchase of this endorsement is not one of additional coverage or of a separate and distinct policy. The significance of this is that under an ERE there would be no coverage available for any act, error, or omission that occurs during the time the ERE is in effect. So for example, if a claim were to arise several years post retirement out of work done in retirement as a favor for a friend, there would be no coverage for that claim under the ERE. This is why you hear risk managers say things like never write a will for someone while in retirement. I know it can be tempting, but don't practice a little law on the side in retirement because your tail coverage will not cover any of that work.

Another often misunderstood aspect of tail coverage arises when an attorney semi-retires and makes a decision to purchase a policy with reduced limits in order to save a little money during the last few years of practice. The problem with this decision is that insurance companies will not allow attorneys to bump up policy limits on the eve of a full retirement, again, because no new policy will be issued. For many attorneys, this means the premium savings that came with the reduced limits on the final policy or two will turn out not to have been worth it and here's why. All claims reported under the ERE will be subject to the available remaining limits of the final policy that was in force at retirement and this may not be enough coverage.

By way of example, if you were to reduce your coverage limits from one million per occurrence/three million aggregate to five hundred thousand per occurrence/five hundred thousand aggregate during the last year or two of active practice in order to save a little money, you will only have coverage of five hundred thousand per occurrence/five hundred thousand aggregate available to you for all of your retirement years assuming there was no loss payout under that final policy. In terms of peace of mind, for many that would be an insufficient amount of coverage. Therefore, if you anticipate wanting those higher limits of one million/three million during your retirement years, keep those limits in place heading into retirement.

Unfortunately, while many attorneys hope to obtain an ERE at the end of their career, the availability of tail coverage isn't necessarily a given. For example, most insurers prohibit any insured from purchasing tail coverage when an existing policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurance company for deductible amounts paid on prior claims. An attorney's failure to comply with the terms and conditions of the policy; the suspension, revocation, or surrender of an insured's license to practice law; and an insured's decision to cancel the policy or allow coverage to lapse may also create an availability problem.

An attorney's practice setting is also relevant. Particularly for retiring solo practitioners, insurers frequently provide tail coverage at no additional cost to the insured if the attorney has been continuously insured with the same insurer for a stated number of years. Given that tail coverage can be quite expensive, shopping around for the cheapest insurance rates in the later years of one's practice isn't a good idea as the opportunity to obtain a free tail could be lost. Review policy provisions or talk with your carrier well in advance of contemplating retirement in order not to unintentionally lose this valuable benefit.

The situation for an attorney who has been in practice at a multi-member firm is a bit different. Here, when an attorney wishes to retire, leave the profession, or is considering

a lateral move and is worried about the stability of the firm he or she is departing from, some insurance companies will not offer an opportunity to purchase an ERE due to policy provisions. The reason is the firm's existing policy will continue to be in force post attorney departure. This isn't as much of a problem as it might seem in that the departing attorney will be able to rely on former attorney language under the definition of insured. However, because the definition of insured varies among insurers, you should discuss this issue with your firm's malpractice insurance representative so options can be identified and reviewed well in advance of any planned departure. That said, I can share that under two of our policies and as long as certain conditions are met, ALPS provides some of the most comprehensive tail coverage options in the industry, to include free individual EREs in the event of retirement, death, disability or a call to active military service.

Be aware that the period in which one can obtain an ERE can be quite limited. Most policies provide a 30-day or shorter window that will start to run on the effective date of the expiration or cancellation of the final policy. There are even a few very restrictive policies in the market that require the insured to exercise the option to purchase an ERE on the date of cancellation or expiration. Given this, you should review relevant policy language well in advance of contemplating departing the profession as the opportunity to purchase an ERE is one you can't afford to miss.

The duration of tail coverage or more accurately the length of time under which a claim may be reported under an ERE varies depending upon what is purchased. Coverage is generally available with a fixed or renewable one, two, three, four, or five-year reporting periods or with an unlimited reporting period. If available to you, the unlimited reporting period would be the most desirable, particularly for practitioners who have written wills during their later years of practice.

The premium charge for an ERE is usually specified in the policy. Often the cost is a fixed percentage of the final policy's premium and can range from 100% to 300% depending on the duration of the purchased ERE. While many insurers require the premium to be paid in full up front, as stated above, some insurers do offer a renewable ERE that declines in cost at each renewal, effectively allowing the costs of an ERE to be spread out over time.

Given all of the above, if the ERE provisions outlined in your policy language have never been reviewed, now's the time. One final thought, be aware that if the unexpected ever happens, such as the sudden and untimely death of an attorney still in practice, know that tail coverage can be obtained in the name of the deceased attorney's estate if timely pursued in accordance with policy provisions. This is why even attorneys who are

not nearing retirement should still have some basic awareness of ERE policy provisions because one just never knows.

At ALPS we understand the importance of providing you options to protect your professional work well into retirement. We've crafted unique and comprehensive policy provisions that can give you peace of mind as you contemplate exiting private practice. To learn more, email us at learnmore@alpsnet.com or call any one of our insurance specialists at 800-367-2577.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY

EXTENDED REPORTING ("TAIL") COVERAGE

APRIL 2013

Section A: Terms to know regarding Extended Reporting, or "tail," Coverage:

Bare, "going bare": Not what you do in the bathtub, but rather, a lawyer who practices for a period of time without professional liability insurance coverage.

Career Coverage: A policy or policy provisions that provide coverage for claims arising from the acts, errors or omissions of an insured when providing legal services at any law firm during or prior to the current policy period. Most professional liability policies for law firms of size only provide coverage for claims arising from work done on behalf or in the name of the insured law firm, but career coverage covers claims arising from work done at any prior point in a lawyer's career, irrespective of where the lawyer worked. Such coverage may be limited or non-existent if the lawyer is joining another firm, as that firm's insurance carrier (or the firm itself) may not wish to cover such exposure when it doesn't have to do so.

Claims-Made and Reported Coverage: Most professional liability policies are written on this basis. In order for a claim to be covered, the claim must be first made against the insured lawyer and reported to the insurance company during the policy period. Some polices may be "claims-made" forms, where the claim must be made during the policy period, but the insured's requirement to report the claim to the insurance company may extend to a time period beyond the expiration of the policy period (such as "within a reasonable period of time" or "as soon as practicable").

ERC: An acronym for extended reporting coverage. Coverage is provided for claims made and reported after the expiration of a claims-made policy, if such claims arose from acts or omissions occurring during an insured period of time, before the ERC was issued or effective.

ERP: Extended reporting period. May be used interchangeably with the term ERC, although this term more accurately refers to the length of time ERC is provided. The period of time during which a claim arising from an act or omission occurring prior to the inception date of the ERP can (in most cases) be reported and covered. Most professional liability policies provide the insureds with options to purchase ERPs of varying length.

Occurrence Coverage: A policy that provides coverage for claims arising from acts or omissions occurring during the period of time covered by the policy, regardless of when the claim is actually made. This form of coverage is very familiar to most consumers, and while it is used for many casualty insurance products (such as auto and homeowners insurance), it is rarely used for professional liability coverage.

Prior Acts Coverage: Coverage for claims arising from acts, errors or omissions occurring at some point prior to the inception date of the policy. A policy providing "full prior acts" coverage covers claims arising for work done in the name or on behalf of the insured firm without a time limitation. Some policies have a "retro date" or retroactive date, which limits prior acts coverage to claims arising for work done in the name or on behalf of the insured firm on or after the retro date. Whether or not prior acts coverage is limited only for work done on behalf of or with the named insured firm will depend upon the policy provided by the particular insurance company.
Retro Date: See Prior Acts Coverage, supra.

"Tail" Coverage: A lawyer's exposure for claims arising from work done during a particular policy period extends well past the expiration of the policy period, since such a claim may not be made for several years after the work is performed. This exposure is often referred to as "tail exposure", because it trails the attorney like a tail trails an animal. "Tail coverage" is generally referred to as the coverage for this exposure provided under an Extended Reporting Period (ERP) or ERC, supra.

Section B: FAQ's Regarding Extended Reporting Coverage, and coverage for "prior acts."

This topic may be important to you if any of the following occur during your legal career:

- You change firms;
- A law firm you work for merges with another firm;
- The lawyers in your firm decide to dissolve the firm; or
- You retire from practice, or permanently leave the practice of law.

What is extended reporting coverage (ERC), sometimes referred to as an extended reporting period (ERP) or "tail" coverage?

As with most forms of errors and omissions insurance, almost all lawyers' professional liability insurance (LPL) is written on a claims-made basis. With many policies, in order for a claim to be covered, the claim has to be first made against the policyholder *and* reported to the insurance company during the policy period (claims-made and reported coverage). If a policy expires, and a claim is thereafter made, the lawyer or firm will not have coverage under that policy. Some policies will provide coverage for claims made during the policy period, provided that the claim is reported within a reasonable time after the policy expiration date. These policies are known as "claims made" policies. ERC provides coverage for claims arising from work performed prior to the expiration of the policy period that are made and reported after the time in which to report a claim has expired.

Why is this coverage sometimes referred to as "tail" coverage?

Lawyers' professional liability insurance is often called a "long-tail" line of insurance. An act or omission may take place today, but a claim arising from that act or omission may not be discovered or made against the lawyer for a considerable period of time, sometimes years later. Compare such claims to the typical auto accident or property damage insurance claims. The vast

majority of those claims are reported to an insurance company within a relatively short period of time after the event giving rise to the claim. A significant percentage of LPL claims are not made, and therefore not reported, for some time after the act or omission giving rise to the claim, hence the term "long-tail" line of insurance.

Is such coverage automatically provided after a claims-made and reported policy expires?

The answer to this question depends upon the specific policy language. Many policies provide a *limited* period of time in which to report a claim after a policy expiration date, usually between 30 to 60 days. Some polices offering such coverage require that the claim be first made before the expiration date of the policy, but provides additional time after expiration to report the claim to the insurer. A few policies will provide "free" ERC to an insured for a much longer period of time, provided certain conditions are met. These conditions usually include a certain number of years insured by the given insurer, and retirement from law practice by the lawyer. Such policies are by far the exception, not the rule.

Most insurers will, for additional premium paid at the time of exercise, offer an optional ERC. The insured typically may purchase ERC for a period of one year, two years, three years, five years, and, under some policies, an unlimited time period. The cost is generally a multiple of the last annual policy premium, and depends upon the length of time selected for the ERC.

Furthermore, most insurers require the purchase of ERC to take place within a certain number of days from the date of policy expiration, or the option to purchase this coverage will be lost.

Some policies require that ERC be purchased, if at all, by the law firm, and it is not available to individual attorneys

If a lawyer leaves a law firm for other employment, how can the lawyer be certain that she or he remains covered for what she/he did while working for the law firm?

If the law firm remains an ongoing entity, the lawyer is usually covered as a former member or employee of the firm for claims arising from services rendered while she/he was with the firm, assuming the firm retains its claims-made coverage. However, if the firm divides or dissolves at some point thereafter, and does not buy ERC for the firm upon its termination, then there may be no coverage for the lawyer for any claim made thereafter.

If a lawyer leaves one firm and joins another, is it possible to purchase coverage for acts or omissions that occurred prior to joining the new firm, thus avoiding any issue with respect to having ERC for prior acts or omissions?

In most cases, the new firm's insurance policy will by its terms cover only the lawyer's acts on behalf of the new firm. Most carriers will *not* agree to provide coverage for claims arising from acts or omissions of the lawyer prior to joining the firm ("career coverage"), even if the new firm wishes to secure this coverage for its new attorney. There are exceptions to this rule, however, with some commercial insurers and state bar-related insurers either providing career coverage in

the policy form or willing to endorse the policy (with or without additional premium) to provide such coverage. The lawyer may also be able to cover prior acts or omissions by purchasing ERC when leaving a firm, if the option for an individual ERC is available in the prior firm's policy.

Example: Lawyer Jones leaves law firm Blood, Swet & Howe and joins firm Silver & Gold. The policy for Blood, Swet has no provision for the purchase of an individual tail. The insurer for Silver & Gold only agrees to cover claims arising from acts or omissions of Jones after joining that firm. "Career coverage" for Lawyer Jones is not available with Silver & Gold. In the event that Blood, Swet dissolves or merges with another firm without purchasing ERC that covers lawyers in the firm or formerly in the firm, Jones may have no coverage for any claim later made arising out of her work while employed with Blood, Swet.

A lawyer wishes to purchase ERC, but the cost is prohibitive. Are there possible options to assist with the purchase?

Some insurers may allow the premium for the ERC to be paid in installments over time. If an installment premium is not paid, the ERC will be cancelled. It may also be possible to purchase an ERC with lower limits of liability than was provided by the expiring policy, thus reducing the cost of the ERC. Of course, the lawyer or law firm should determine if it is prudent to do so. This option may not be widely available, but some insurers are willing to negotiate such modification of limits.

If a lawyer does work after the ERC is in place, and a claim arises from the services performed after the claims-made and reported policy expiration or termination date, but within the ERC period, is that claim covered by the ERC?

No. The ERC only covers claims arising for professional services rendered prior to the expiration or termination of the policy that are made and reported subsequent to the policy expiration or termination date and prior to the end of the ERC termination date.

Can a lawyer buy his/her own ERC coverage when leaving a firm, or at some point after leaving the firm, if it becomes necessary to have ERC in place for services rendered while with the firm?

The answer depends in part upon what the firm's policy provisions allow. Most often, the lawyer will not be able to buy his/her own ERC when leaving the firm (unless the attorney thereafter ceases to practice law, discussed below), in part because the insurer continues to cover the lawyer under the firm's policy, and to provide additional coverage to the lawyer could create additional exposure for the insurer for a claim, when no such additional exposure was contemplated. Insurers may sell some form of individual ERC to a departing lawyer, but this coverage may be conditioned upon the lawyer's retirement from private practice, disability, or death. Some policies may also provide for individual ERC if the lawyer leaves the private practice of law, such as becoming a judge, or becoming employed in a non-legal or "in-house" capacity.

Furthermore, ERC is generally not commercially available to a lawyer or law firm as a "stand alone" insurance product. As a rule, ERC is only available in conjunction with a previously issued claims-made policy. There are select markets that may provide stand-alone ERC, but this is not common, and typically applies to larger law firms facing dissolution or merger.

A lawyer decides to leave a law firm, but do some limited amount of solo private practice. Can that lawyer purchase coverage for his/her prior acts or omissions while with the firm?

There may be several options for a lawyer to secure coverage for his/her prior acts in this particular circumstance. *First*, it should be remembered that for so long as the lawyer's prior firm remains covered under a typical claims made policy, that lawyer will have coverage for claims arising from work performed while at that firm. *Second,* a lawyer leaving a firm and going solo may be able to purchase his/her own "prior acts" coverage in connection with a policy issued to cover his/her solo activities (see below). Some insurers that provide "prior acts" coverage in these cases may refuse to do so, if the lawyer left a large law firm where a self-insured retention, or deductible amount, was very high, often six-figures or possibly even greater. The new insurer may consider such retention to be the equivalent of having been uninsured. *Third,* there may be an option under the lawyer's former firm's policy to purchase an individual ERC.

Some insurers may offer a "part-time" policy to lawyers who are doing a limited amount of work. Even though the policy is issued on a part-time basis, at least one state bar-related insurer will cover full-time prior acts under such a policy.

Example: Lawyer Smith leaves a law firm, and begins his own solo practice. Whether or not his prior firm maintains coverage for claims arising from acts or omissions while with the firm, Lawyer Smith may be able to find insurance coverage that will cover claims arising from acts or omissions prior to the start of the solo practice. Note a possible exception: where prior acts coverage is conditioned upon the insurer having provided coverage for the prior firm.

Is the length of ERC always limited in time to a certain number of years, or can such coverage be purchased that never expires?

The answer to this question depends upon the policy purchased. Many insurers will provide an option of ERC for a limited period of time, but some also provide the option of an "unlimited" period of time in which a claim can be reported. In other words, the ERC never terminates.

A lawyer has practiced "bare," or without insurance, for a period of time. Can that lawyer buy a claims-made policy that will cover prior acts or omissions, in a sense, ERC, even if they have not been previously insured?

Most insurers will not agree to cover claims arising from services performed during a period of time for which the lawyer had no insurance in place. There may be exceptions to this general rule.

DUTIES TO TRIBUNALS – WISCONSIN'S DISCIPLINARY RULES

Timothy J. Pierce

SCR 20:1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ABA COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

SCR 20:1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. 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. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Model Rules for Lawyer Disciplinary Enforcement R. 28 (2002) (providing for court appointment of a lawyer to inventory files and take other protective action in

absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

SCR 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.

WISCONSIN COMMITTEE COMMENT

Paragraph (a)(4) differs from the Model Rule in that the words "by the client" are added for the sake of clarity.

ABA COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with

the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

SCR 20:3.1 Meritorious claims and contentions

(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;

(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.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in deprivation of liberty, may nevertheless so defend the proceeding as to require that every element of the case be established.

WISCONSIN COMMITTEE COMMENT

This Wisconsin Supreme Court Rule differs from the Model Rule in expressly establishing a subjective test for an ethical violation.

ABA COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

SCR 20:3.2 Expediting litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

ABA COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

SCR 20:3.3 Candor toward the tribunal

(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;

(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.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

WISCONSIN COMMITTEE COMMENT

Unlike its Model Rule counterpart, paragraph (c) does not specify when the duties expire. For this reason, ABA Comment [13] is inapplicable.

ABA COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[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.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false

evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this

Rule or as otherwise permitted by Rule 1.6.

SCR 20:3.4 Fairness to opposing party and counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ABA COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common-law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

SCR 20:3.5 Impartiality and decorum of the tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule the matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

WISCONSIN COMMITTEE COMMENT

Paragraph (b) differs from the Model Rule in that it expressly imposes a duty promptly to notify other parties in the event of an ex parte communication with a judge concerning scheduling.

ABA COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[2] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[3] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

A LAWYER'S ETHICAL DUTY TO COMMUNICATE WITH CLIENTS

Timothy J. Pierce

The Wisconsin Supreme Court has adopted Supreme Court Rule ("SCR") 20:1.4, which outlines a lawyer's duties to communicate with clients. The former Rules of Professional Conduct for Attorneys (the "Rules") contained a similar version of SCR 20:1.4, but the current SCR 20:1.4 is expanded by the addition of several subsections. It may therefore appear that SCR 20:1.4 expands a lawyer's substantive duty to communicate with clients. This is not the case. The new subsections are a result of the drafters' logical desire to consolidate communications duties formerly found in other Rules in the communication Rule.[14] The Rule thus does not expand the scope of a lawyer's substantive duties to communicate with clients, which essentially remain the same.

Despite the stated intention of consolidating duties in SCR 20:1.4, other Rules do contain communication duties, which will be discussed herein along with the obligations imposed by SCR 20:1.4.

The full text of SCRs 20:1.4 and 20:1.5 and Comments are appended to this outline.

1) A lawyer is required to promptly inform the client of any decision or circumstance requiring the client's informed consent.

ARTICLE 1 - SCR 20:1.4(a)(1), which imposes this duty, refers to "informed consent" as defined by SCR 20:1.0(f). SCR 20:1.0(f) defines informed consent as follows:

> *"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.*

"Informed consent" is thus a term of art in the Rules and replaces the former concept of "consent after consultation." It is the standard that lawyers must meet when requesting a client's permission with respect to certain important decisions. Some examples of actions requiring the client's informed consent are limiting the scope of a representation [SCR 20:1.2(a)], revealing confidential information [SCR 20:1.6(a)], waiving various conflicts of interest (SCR 20:1.7, SCR 20:1.9, SCR 20:1.10, SCR 20:1.11, SCR 20:1.12, SCR 20:1.13, SCR 20:1.18, SCR 20:6.5), entering into business transactions with clients [SCR 20:1.8(a)], allowing a third party to pay a client's legal fees [SCR 20:1.8(f)] and performing certain evaluations for third persons [SCR 20:2.3(b)].

[14] Wisconsin, like most states, bases its' Rules on the ABA Model Rules, and SCR 20:1.4 is identical to ABA Model Rule 1.4 with the exception of a minor, non-substantive variation in SCR 20:1.4(a)(4).

Because informed consent is specifically defined by Rule, obtaining a client's informed consent may be a complicated act of communication in and of itself. The Comment [6] and [7] to SCR 20:1.0(f) helps to clarify what is required when obtaining a client's informed consent:

> *[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.*
>
> *[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).*

As defined by SCR 20:1.0(f) and its Comment, informed consent may be viewed as having four essential elements. For the sake of example, informed consent to a waiver of a conflict will be assumed:

A. An adequate explanation of facts and circumstances requiring the person's informed consent. This would normally involve a plain language explanation of the facts giving rise to the conflict and the specific nature of the conflict. As noted in the Comment, a sophisticated corporate client with in-house counsel assisting may require a different degree of explanation than a relatively uneducated individual with no prior experience with lawyers. The important point here is that

the lawyer has the burden of providing an explanation appropriate and sufficient for the person whose informed consent is sought.

B. An explanation of the material risks and disadvantages of agreeing to the proposed course of conduct. This is perhaps the most important aspect of informed consent because it was not explicitly required by the old "consent after consultation" standard. Thus, the lawyer must explain in plain language that the possible downside to the client of agreeing to waive a conflict. In the case of a material limitation conflict, it may be that the agreeing is agreeing to forego a possible course of action that the lawyer may not pursue because of duties to another client. In the case of consent to multiple representation, it may involve explaining the lack of confidentiality and privilege between co-clients, the possibility that an unwaivable conflict may develop and the lawyer would thus be precluded from continuing to represent anyone, etc. While lawyers are accustomed to advising clients with respect to foreseeable risks, this puts the lawyer in the possibly uncomfortable situation of advising the client of the risks of agreeing to a course of conduct the lawyer desires.

C. An explanation of reasonably available options and alternatives. This step may be relatively simple and straightforward. In the case of a conflict waiver, it may often simply be waiving the conflict or seeking other, conflict-free counsel elsewhere. Nonetheless, clients and other have a right to refuse to grant informed consent and should be so advised.

D. If necessary, written confirmation of the person's informed consent, signed if necessary. While some situations requiring informed consent, such as the disclosure of confidential information under SCR 20:1.6(a), require neither written conformation nor a client's signature, all conflict waivers must be in writing, and with the exception of SCR 20:1.18, must be signed by each affected client. Even when not specifically required by a Rule, a lawyer wishing to follow best practices may wish to confirm informed consent in writing.

Thus, in order to fulfill their duties under SCR 20:1.4(a)(1), lawyers must be aware of what situations require the informed consent of a client or third person and what is required to obtain that person's informed consent.

2) A lawyer must reasonably consult with a client about the means by which the client's objectives are to be accomplished. This duty imposed by SCR 20:1.4(a)(2) mirrors a nearly identical requirement of consultation with respect to means found in SCR 20:1.2(a). Clients determine the objectives of a representation, such as settlement within a certain financial range, and lawyers generally determine the means, such as specific negotiation strategies, trial tactics, what motions to file, etc. to accomplish those objectives. While lawyers normally have discretion to choose means, that does not relieve the lawyer of the obligation to consult with the client about tactical options and decisions. Comment [3] to SCR 20:1.4 explains as follows:

> *[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on*

both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

It is important to understand here that the requirement is *reasonable* consultation with the client. Thus when time is not necessarily a factor, such as with respect to the decision as to whether to hire a respected but expensive expert or a discussion about trial strategy weeks before a scheduled trial, a lawyer should consult with a client. However, in the heat of trial, a lawyer need not stop to consult with a client before making an objection. It is worth noting here, that although means are usually for the lawyer to decide, for matters that are likely to incur significant expense or adversely affect third persons, lawyers should normally defer to the wishes of the client. *See* SCR 20:1.2, Comment [2].

3) A lawyer must keep a client reasonably informed about the status of a matter. This obligation, imposed by SCR 20:1.4(a)(3), is a frequent source of disciplinary action. Lawyer's must keep clients informed of all significant events in a matter, and lawyers often run into trouble with disciplinary authorities when they hesitate or fail to give clients bad news about their matters. Some examples include:

- Informing the client of a motion filed by the opposing party. See *Disciplinary proceedings against Harman, 221 Wis.2d 238, 584 N.W.2d 537 (1998)*
- Inform a client of the dismissal of a matter. See *Disciplinary Proceedings against O'Keefe, 237 Wis.2d 243, 613 N.W.2d. 890 (2000).*

- Informing a client of a decision not to pursue an appeal. See *Disciplinary Proceedings against Henke, 121 Wis.2d 689, 359 N.W.2d 924 (1985).*

- Informing a client of the lawyer's suspension. See *Disciplinary Proceedings against Wentzel, 204 Wis.2d 285, 554 N.W.2d 669 (1996).*
- Informing a client of the lawyer's error which may give rise to a malpractice action. See *Wisconsin Ethics Opinion E-82-12* and *In re Higginson, 664 N.E.2d 732 (1996).*

- Informing a client of a pending dismissal, even if the client had previously indicated an intention to abandon the claim because the client still may change mind. See *In re Rosenthal, 446 A.2d. 1198 (1982).*

Lawyers usually have no difficulty in providing clients with prompt notice of positive developments, but the duty to keep clients informed of the status of matters applies with equal force to negative events. Lawyers must promptly and truthfully inform clients of significant adverse events, including the lawyer's own material errors.

4) Lawyers must promptly comply with clients reasonable requests for information. This obligation, imposed by SCR 20:1.4(a)(4), is also frequently seen in disciplinary decisions, normally as a lawyer's failure to return numerous client phone calls. See *Disciplinary Proceedings against Winter, 187 Wis.2d 309, 522 N.W.2d 504 (1994).* SCR 20:1.4, Comment [4] explains as follows:

> *[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.*

The failure to respond to a client's requests for information is frequently caused by the fact that the lawyer has bad news. The failure to respond to a client's reasonable requests for information simply compounds the problem for the lawyer.

It is important to note, however, that the Rule requires the lawyer to promptly respond to a client's *reasonable* requests for information about a matter – the Rule does not require that the lawyer meet the client's unreasonable demands, as long as the lawyer otherwise keeps the client reasonably informed about the status of the matter. Therefore, a lawyer who fails to meet a demanding client's expectation of daily telephone contact when there is nothing to discuss [*In re Walker, 647 P.2d 648 (Or. 1982)]* or a three week delay in responding a client's phone call, when the lawyer otherwise kept client reasonably informed about the matter [*In re Schoeneman,777 A.2d 259 (D.C. 2001)*]., does not constitute misconduct.

As a practical matter, few things are as likely to generate a grievance against a lawyer as a client who feels ignored. If there are likely to be significant periods of time with no news, the client should be so informed. If the lawyer cannot immediately respond to a request for information, the client should be informed when the requested information will be supplied.

5) A lawyer must consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance prohibited by the Rules of Professional Conduct or other law. This duty imposed by SCR 20:1.4(a)(5) is again fairly self-evident. It is not surprising that a lawyer must explain to clients that a lawyer may not assist the client in suborning perjury, filing false affidavits or meeting with represented parties in a matter. This duty, however, takes on particular importance when a lawyer is faced with situations in which the lawyer may be required to reveal otherwise confidential information, such as when the client intends to commit a crime or fraud likely to inflict substantial injury on the person or property of another [SCR 20:1.6(b)], or to rectify the consequences of a client's fraud upon a court (SCR 20:3.3).

6) A lawyer must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the matter. This obligation, imposed by SCR 20:1.4(b) is entwined with all of a lawyer's communications obligations to clients. Lawyers are agents of

clients and must look to clients for important decisions, and thus have a duty to ensure that clients have sufficient information on which to base those decisions. Comment [5] and [6] provide guidance:

> *[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).*
>
> *[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.*

This duty takes on particular importance when considering the ramifications of a decision the client must make. Generally, lawyers must advise a client of the reasonably foreseeable risks and consequences of a proposed course of conduct. For example, lawyers have been disciplined for;

- Failing to adequately explain the implications of pleading to a DWI charge. See *In re Snyder, 793 A.2d 515 (Md. 2002).*

- Asking a client to sign a worker's compensation settlement without explaining the legal affect of the settlement. See *In re Morse, 470 S.E.2d 232 (Ga. 1996).*

- Failing to explain the possible risk of criminal prosecution arising from an action recommended by the lawyer. See *Disciplinary Proceedings against Winkel, 217 Wis.2d 339, 577 N.W.2d 9 (1998).*

It is apparent that from the above cited cases that a lawyer must be sufficiently knowledgeable (i.e. competent – see SCR 20:1.1) in order to fulfill the lawyers duty to adequately explain a matter to

a client. Lawyers who are insufficiently versed in a particular body of law may be unable to inform clients of the reasonably foreseeable risks and consequences of a proposed action.

7) A lawyer who represents a client with diminished capacity must communicate adequately and appropriately with that client. SCR 20:1.14 governs a lawyer's responsibilities with respect to clients with diminished capacity (e.g. mental illness, infirmities of aging, etc.) and that Rule first imposes a duty to maintain, as far as reasonably possible, a normal lawyer-client relationship. This means that the duty to communicate with such a client is not necessarily abridged, but rather that communication should be appropriate to the client – see SCR 20:1.4, Comment [6]. Some clients may not be able to fully comprehend the legal details of a matter, but nonetheless are entitled to be informed of the status of a matter in general terms and to have their questions answered. In some matters, the client may be incapable of any communication or may have a legally appointed representative, such as a guardian. In cases where the client has such a representative, the lawyer should communicate with the representative who acts on behalf of the client, but should still afford the client appropriate attention.[15]

8) Lawyers have a duty to make reasonable efforts to communicate with missing or non-responsive clients. This question generally arises with respect to the client who "disappears" in the midst of a matter and ceases responding to the lawyer or who moves without telling the lawyer. Under such circumstances, the lawyer does not have an ongoing duty to send letters to a client who is gone, but the lawyer must make reasonable efforts to locate the client. See *New York State Ethics Op. 787 (2005)* and *Alaska Ethics Op. 2004-3 (2004).* What actions a lawyer should take when a client goes missing is beyond the scope of this outline.

9) Lawyers may use support staff to assist in communicating with client, but may not delegate the lawyer's duty to support staff. It is entirely appropriate and ethically permissible for lawyers to use support staff to communicate with clients, particularly with respect to routine matters, but a lawyer may not wholly delegate to support staff the duty to communicate with clients. For example, lawyers may not allow all client communication to flow to support staff and not provide the client with any opportunity to meet with the lawyer – see *Mays v. Neal, 938 S.W.2d 830 Ark. 1997).* Nor is providing the lawyer's phone number and then having clients meet with support staff sufficient – see *In re Flack, 33 P.3d 1281 (Kan. 2001).*

10) A lawyer may communicate through intermediaries with the client's informed consent. As discussed above, SCR 20:1.6(a) requires that a lawyer obtain the client's informed consent to reveal information relating to the representation to a third party. This means that a lawyer must have the client's informed consent to rely on a third party to communicate with the client. While this practice may be appropriate in certain circumstances, such as when the client is incarcerated, the lawyer must be careful not to allow the third party to direct the representation [see *People v.*

[15] This brings up the question of SCR 20:1.4 as it applies to guardians ad litem (GALs). Because GALs do not represent persons as individuals, and are not bound to follow the wishes of their wards, GALs do not have "clients" with whom to communicate. See SCR 20:4.5.

Rivers, 933 P.2d 6 (Colo. 1997] or relay unreasonably on an intermediary to communicate with the client [see *In re Dreier, 671 A.2d 455 (D.C. 1996)*].

It also is permissible for a third party to hire and pay for a lawyer [see SCR 20:1.8(f)] the lawyer must not let that third party, rather than the client, direct the representation. Further the lawyer's duty to communicate is with the client, and while a lawyer may convey information to a client's family or others with the client's consent, significant communications should be with the client directly.

11) A lawyer must convey all offers of settlement to clients. An offer of settlement is clearly a significant event in a matter and conveying such an offer is part of a lawyer's duty under SCR 20:1.4(b). However, offers of settlement merit special mention because lawyers are bound to abide by a client's decision with respect to offers of settlement by SCR 20:1.2(a), and therefore lawyers have a heightened duty with respect to offers of settlement.

12) In certain limited circumstances, a lawyer may temporarily withhold information from a client when it is in the interests of the client to do so. Lawyers in most circumstances are obligated to provide client with all relevant information about a matter. However, Comment [7], allows a lawyer to withhold information in certain circumstances:

> *[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.*

Here it is important to note that a lawyer may only temporarily withhold information to serve the client's interests, not the lawyer's interests. Therefore a lawyer may not delay providing bad news to a client simply to avoid provoking the ire of the client The only examples of acceptable circumstances in which to temporarily withhold information from a client appears to be that of a psychiatric diagnosis that may be difficult for a client to accept. See SCR 20:1.4 Comment [7] and *North Dakota Ethics Op. 97-12 (1997).*

There also may be circumstance in which a lawyer may be forbidden by law from sharing certain information, such as child pornography which is evidence in a criminal case, with a client.

13) Lawyers are required to communicate with their clients about fees. The Rule governing fees**,** SCR 20:1.5, now imposes specific requirements with respect to the information that lawyers must convey to their clients about fees. For any matter in which it is reasonably foreseeable that the total cost of the representation to the client will exceed $1000, the SCR 20:1.5(b)(1) requires that certain information about fees and costs be transmitted to the client**.** The Rule does not use the term "fee agreement," but SCR 20:1.5(b)(1) does require that certain information with respect to fees and expenses be transmitted to the client in writing whenever the total cost to the client is likely to exceed $1000. This writing must include:

A. The scope of the representation. This should be a clear description of the services and matter for which the lawyer has been retained. The Rule does not require a set degree of specificity, but simply "legal representation" would likely be suspect, whereas "legal representation through trial in connection with the pending OWI 3rd Offense criminal charges in Grant County" should suffice. Best practice may involve informing client of what is not covered.

B. The basis or rate of the lawyer's fee. Again, the Rule sets no specific standard, but the clear intent of the Rule is that this information be sufficient to enable the client to understand how the fee will be calculated and should be transmitted in a clear and readily understood manner.

C. The expenses for which the client will be responsible. If the client will be charged for copying costs, experts, travel time, medical records, etc., that information must be included in the agreement. If known at the time, the amount charged for such expenses should also be in the agreement.

If it is not reasonably foreseeable that the total costs of the information to the client will exceed $1000, the above discussed information must still be conveyed to the client, but need not be in writing. Lawyers are also required to explain the purpose and effect of any advanced payment of fees or retainers must be explained to the client [SCR 20:1.5(b)(2)] and to respond promptly to a client's request for information about fees and expenses [SCR 20:1.5(b)(3)]. Note that, unlike SCR 20:1.4(a)(4), SCR 20:1.5(b)(3) does not require that the clients request for information about fees be reasonable.

Before the new fee Rule came into effect on July 1, 2007, lawyers were required to communicate with clients about fees and expenses, but the explicit language of the new SCR 20:1.5 emphasizes the importance of communication about fees.

14) The Rules do not impose a specific duty to communicate with former clients, but in some circumstances, lawyers have an obligation to provide information to former clients. There is no Rule imposing a duty on lawyers to communicate with former clients, and, generally, lawyers are not obliged to do so. However, lawyers do have a duty to take reasonable steps upon the termination of a representation to protect the interests of a client [SCR 20:1.16(d)], and in Wisconsin, SCR 20:1.4 has been interpreted to require a lawyer to respond to successor counsel's reasonable requests for information about the representation of the client [see *Disciplinary Proceedings against Winkel, 217 Wis.2d 339, 577 N.W.2d 9 (1998)]*. This reading of SCR 20:1.4 is consistent with a lawyer's duty to take reasonable steps to protect a client's interests upon termination. This situation will most frequently arise with respect to appellate counsel's questions to trial counsel for information about a matter. A lawyer may not refuse to answer such requests as long as they are reasonable.

15) When a lawyer represents multiple clients in a single matter, the lawyer owes an equal duty to communication to each client. Lawyers who represent multiple clients have communication duties to each client. Normally this does not pose a problem, but one client's insistence on secrecy with respect to important information can create a conflict between a lawyer's duties of confidentiality and communication and require that the lawyer withdraw from

representing all clients. For example, if a lawyer represents a married couple on estate planning matters, one spouses insistence that the other spouse not be informed of a material fact will require the lawyer to withdraw from the representation [see *Florida Ethics Op. 95-4 (1997)]*. There is some authority, however, which holds that if a lawyer carefully explains to joint clients at the outset of the representation that there will be no confidentiality between the clients, the lawyer may not withhold information if one client later changes his mind [*D.C. Ethics Op. 327 (2005)*]. This emphasizes the importance of the lawyer carefully explaining the implications of multiple representation to each client at the beginning of the representation.

CONFIDENTIALITY

I. **"CONFIDENTIAL" IS VERY BROADLY DEFINED**. The lawyer's duty to protect a client's confidential information is stated in SCR 20:1.6 *(a lawyer shall not reveal information relating to the representation of a client. . .).* It is

A. compulsory *(**shall not** reveal)* ; and

B. very broad in its coverage (all ***information relating to the representation of a client**).*

C. applies to all information relating to the representation of a client, whatever its source. (Comment, paragraph [4]).

D. the Rule does differentiate between (or classify) confidential and non-confidential information; all information that relates to the representation of a client is required to kept confidential.

It would be hard to draft a definition of confidentiality that is broader than in SCR 20:1.6(a)1.

II. ***BUT*, THAT BROAD DEFINITION OF CONFIDENTIALITY IS CONSTRAINED BY NUMEROUS EXCEPTIONS (BOTH REQUIRED AND PERMISSIVE)**.

The real key to understanding the confidentiality Rule and applying it in real world situations is in the numerous *required and permissive exceptions.* The exceptions to the broad duty of confidentiality (while varying from state to state) generally fall into four categories:

A. disclosures that are impliedly authorized to carry out the representation

B. situations involving risks of preventable physical harm to persons;

C. particular situations involving preventable or reparable harms flowing from client frauds or deceptions; and

D. situations where relief from the duty of confidentiality protects a legitimate interest of the lawyer.

[1] Despite this broad definition in every state the employs some version of the Model Rules, the Restatement (Third) of the Law of Lawyering offers a looser standard of "confidential client information" which is "information relating to the representation of a client other than information that is generally known", Restatement § 59 and then prohibits revelation of confidential information *only if* "there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information", Restatement § 60(a)(1). This less absolutist standard of the Restatement permits a certain amount of talking about one's cases with others so long as it doesn't harm the client. It may be more practical and a more realistic reflection of lawyers' actual practice. But, if the Restatement position were cited in a grievance filed by a client upset about a lawyer "talking about my case in the community," that lawyer shouldn't count on a disciplinary agency ignoring the plain language of the promulgated confidentiality rule.

REQUIRED EXCEPTIONS TO CONFIDENTIALITY

A lawyer **shall reveal** confidential information:

A. To a tribunal:

(1) To correct a knowingly false statement of material fact or law the lawyer made to a tribunal. **SCR 20:3.3(a)(1)**

(2) Legal authority in the controlling jurisdiction known by the lawyer to be directly adverse to the client's position and that has not been disclosed by opposing counsel. **SCR 20:3.3(a)(2)**

(3) If a lawyer comes to know[1] that the lawyer, the lawyer's client or a witness called by the lawyer has offered false material evidence and the lawyer cannot otherwise take reasonable remedial measures. **SCR 20:3.3(a)(3)**

(4) If a lawyer knows that *any* person has, is or is going to engage in criminal or fraudulent conduct relating to a proceeding before a tribunal in which the lawyer represents a client and the lawyer cannot otherwise take reasonable remedial measures **SCR 20:3.3(b)**

B. To comply with a proper pre-trial discovery request by an opposing party **SCR 20:3.4(d)**

C. When disclosure is necessary to avoid assisting a criminal or fraudulent act by a client *unless* disclosure is prohibited by **SCR 20:1.6. SCR 20:4.1(a)(2).**

Note: The restrictions on disclosure in **SCR 20:4.1(a)(2**) imposed by the phrase "unless disclosure is prohibited by **SCR 20:1.6**" must be read in conjunction with the exceptions to confidentiality contained in **SCR 20:1.6(c).** A disclosure permitted by **SCR 20:1.6(c)** is **not** a disclosure "prohibited by **SCR 20:1.6**." Thus, in a situation covered by **SCR 20:4.1(a)(2)**, permissive disclosures under SCR 20:1.6 become *mandatory.*

The mandatory disclosures of SCR 20:1.6(b) *(see paragraph D, below)* are likewise not -disclosures prohibited by **SCR 20:1.6."**

[1]In Wisconsin, the definition of -know" in regard to this specific rule has been read to be limited to information based on an affirmative statement by the client that the client intends to perjure himself State v McDowell, McDowell, 681d N.W.2nd 500 (2004).

D. **[THE MAJOR WISCONSIN DIFFERENCE FROM THE MODEL RULES ON CONFIDENTIALITY]** To the extent reasonably necessary, to prevent a client from committing a crime or fraud the lawyer reasonably believes is likely to result in death, substantial bodily harm, or substantial economic injury to another. **SCR 20:1.6(b)**

E. All fiduciary account records under SCR 20:1.15 upon request of the office of lawyer regulation or direction of the Supreme Court. SCR 20:1.15(f)(7).

F. To cooperate with the Office of Lawyer Regulation SCR 20:8.4(h).

PERMITTED EXCEPTIONS TO CONFIDENTIALITY

A lawyer may reveal confidential information:

A. With the client's informed consent. **SCR 20: 1.6(a)**

B. If disclosure is impliedly authorized to carry out the representation. **SCR 20:1.6(a)** The most obvious implied authorization is revealing confidential information to persons assisting the lawyer in representing the client.

and to the extent the lawyer reasonably believes necessary

C. To prevent reasonably likely death or substantial bodily harm. **SCR 20:1.6(c)(1)** [Wisconsin substitutes likely for the term "certain" found in Model Rules]

D. To prevent, mitigate, or rectify substantial economic injury to another that is reasonably certain to result or have resulted from a client's commission of a crime or fraud in which the client has used or is using the lawyer's services. **1.6(c)(2)**

Lawyers must also consider **SCR 20:1.2(d)** which prohibits a lawyer from counseling or assisting a client in criminal or fraudulent conduct. **Comment 10** notes that when a lawyer discovers that a client's conduct originally thought to be legally proper is discovered to be criminal or fraudulent, the lawyer has a duty to withdraw from the representation, but that withdrawal may not be sufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm prior statements, opinions or documents ("noisy withdrawal").

E. To secure legal advice about compliance with these Rules. **SCR 20:1.6(c)(3)**.

F. To establish or defend a claim in a dispute with a client (including a fee dispute), to defend a criminal charge, disciplinary complaint, or civil claim based on conduct in which a client was involved, or to respond to allegations made in any proceeding regarding the lawyer's representation of a client. **SCR 20:1.6(c)(4)**

G. To comply with a court order or other law[1] requiring disclosure. **1.6(c)(5)**

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[1]The Rules, their Comments and even commentary on the Rules are not at all clear what "other Rules requiring disclosure" are meant. Is it Sarbannes-Oxley, state rules requiring reporting of child abuse, the latest 'version of homeland security reporting requirements? Is it laws that specifically require lawyer's to disclose or and general disclosure requirement? And what is a "law"— a statute, an administrative regulation, an executive order, something else? This exception to the duty of confidentiality (new in the 2003 Model Rules) does not require lawyer disclosure, but permits it (like compliance with a court order). But if a lawyer find herself being pressured by a government agency that wants access to client information, she is certainly deprived of her former argument that my lawyer's duty of confidentiality says I can't reveal that information; now that lawyer more likely must say "I can reveal that information, but I just don't choose to."

H. To prevent substantial injury to an organization that a lawyer represents caused by someone in the organization acting, intending to act, or refusing to act in violation of law, ***but only after*** the lawyer's best efforts to inform the organization's highest authority does not result in the organization preventing such action or refusal to act. **SCR 20:1.13 (b) and (c).** Wisconsin makes plain that lawyers who represent organizations must observe the duties imposed by **SCR 20:1.6(b) SCR 20:1.13(h)**.

I. 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. **SCR 20:1.6(c)(6).** ABA Comment [13] provides guidance as to when such disclosures would not be appropriate.

J. When a lawyer reasonably believes a client with diminished capacity is at risk of substantial physical, financial, or other harm unless action is taken and the lawyer cannot adequately act in the client's interest, the lawyer may consult with others or take other reasonably necessary protective action. **SCR 20:1.14(b).**

K. When appointed as a Guardian Ad Litem, a lawyer represents *the best interests* of the individual and the individual and all information relating to the representation may be revealed if the guardian ad litem reasonably determines that is in the best interests of the individual. **SCR 20:4.5**

III. **ANY DISCLOSURE OF CONFIDENTIAL INFORMATION MUST BE MADE ONLY AS IS NECESSARY**. The required or permitted disclosure of confidential information are not open-ended. A lawyer may reveal only ***to the extent the lawyer reasonably believes necessary to prevent*** whatever harm the exception is designed to avoid or accomplish the stated purpose of the exception. Even when that phrase does not appear, similar language in the Rule, commentary, or best practices insist that the *only* permitted or required disclosure is one which is only to extent necessary to secure the exception's purpose. This is crucial to remember when making required disclosures that are likely to adversely affect a client e.g. **SCR 20:3.3**.

IV. SOME CONSIDERATIONS IN MAKING A PERMITTED DISCLOSURE OF CONFIDENTIAL INFORMATION. The Rules and their Comments offer little guidance to lawyers about handling situation in which disclosure of confidential information is permitted (but not required). One option is not disclose any confidential information unless required to do so. In deciding whether to exercise the discretion that the Rules vest, a lawyer should assess the effect disclosure or non-disclosure on clients, the legal system, the public interest, and others. Lawyers also may consider, as humans tend to do, the effect on their own interests and afford to that its appropriate weight. The discretion lawyers are vested with may create potential liability for consequences that flow from the choice to disclose or not disclose. Lawyers also should look to determine if other law requires disclosure or silence. Specific aspects of the client relationship including past discussions, practices or understandings regarding the handling of confidential information should also be considered. Lawyers can fall into the binary decisional trap of disclosing or not disclosing. But, intermediate courses of action that may yield better results. In all practicable instances, a lawyer should consult with and obtain the client's perspective about the decision to disclose (or even non-disclosure), even though the lawyer is not bound by the client's perspective. If a lawyer has decided that disclosure is necessary, the client may benefit from self-disclosure and generally should be afforded that opportunity. The Rules anticipate that in some instances the final decision will balance on a lawyer's own ethical standards. Sound ethical training and experience as a professional should elevate a lawyer's capacity for making wise choices.

V. **WHEN INFORMATION IS DISCLOSED FOR A PERMISSIBLE PURPOSE, THAT INFORMATION DOES NOT LOSE ITS PROTECTED STATUS.** When a lawyer discloses information relating to the representation of a client for a permissible purpose, the information is still "information relating to the representation' of the current or former client and thus is still protected under the Rule. *Disclosure does not mean that the information is no longer "confidential."* This is a crucial difference between confidentiality and privilege. As a general rule, once privilege is waived, the information loses its privileged status forever and for all purposes. That is not the case with confidentiality.[16]

[16] Courts have held that permissible disclosure of confidential information that is also privileged does not waive its privileged status. See e.g. *Newman v. Maryland*, 863 A.2d 321 (Md. 2004).

VI. **DON'T TELL YOUR CLIENT THAT "EVERYTHING YOU TELL ME IS CONFIDENTIAL" -*BECAUSE IT'S NOT*.** Confidentiality is subject to numerous exceptions — some of which *permit* a lawyer to disclose confidential information and some which may ***require*** a lawyer to do so. Some lawyers say little or nothing initially to clients about confidentiality. The problem is that clients may have expectations about the extent to which what they tell a lawyer is confidential. That expectation may have formed from an earlier encounter with a lawyer or from watching television. Some lawyers who do talk to their clients about confidentiality tell them that everything that is said will be held in confidence. But that is not accurate. Remember that lawyers have the duty to explain legal representation to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. SCR 20:1.4(b).

VII. CONFIDENTIALITY IS *NOT* THE SAME AS THE ATTORNEY-CLIENT PRIVILEGE.

Some lawyers mistakenly refer to confidentiality and the attorney/client privilege interchangeably. The lawyer's duty of confidentiality (an ethical duty derived from the common law) is not the same as the client's right to assert the attorney client privilege (a statutory rule of evidence preclusion). *The duty of confidentiality is much broader.* The attorney/client privilege extends only to communications between lawyers and clients relating to legal services and which the client reasonably believes is confidential. Any disclosure may waive the attorney/client privilege as to other otherwise protected matters; not so with the duty of confidentiality. The privilege applies only to limiting testimony in a legal proceeding. The duty of confidentiality limits voluntary disclosures anywhere.

VIII. LAWYERS MUST ACT COMPETENTLY TO PROTECT INFORMATION RELATING TO THE REPRESENTATION OF CURRENT AND FORMER CLIENTS.

SCR 20:1.6(d) (effective 1/1/17) imposes a black letter duty on lawyers to take reasonable measures to prevent the inadvertent disclosure of or unauthorized access to information relating to the representation of a client. While this duty is not new, its inclusion in the black letter of the disciplinary rule is recent, and was part of a package of amendments to the Rules designed to provide guidance to lawyers' in connection with the use of technology. Thus, the new Rule is intended to caution lawyers to think about the security of client information, whether in physical or electronic form, and take appropriate precautions to safeguard that information. This takes particular importance in connection with cloud-based data storage or computing systems and electronic communications with clients, such as e-mail.[17] This duty however, is not limited to electronic client information – it applies to many of the inadvertent disclosures a lawyer may make without thinking, for example: discussing a client's matter with the client's family or roommate without the client's consent; identifying clients in a firm brochure or a website without the first obtaining the clients' permission; discussing a client matter in an elevator or other public place where others may overhear the conversation; reviewing a

[17] For detailed guidance regarding these issues see Wisconsin Ethics Op. EF-15-01 and ABA Formal Opinion 477R.

client's file or documents in a coffee shop or elsewhere where others may be able to see client information; or discussing a client matter with a family member or friend.

ABA Comment [18] emphasizes that unauthorized access to or the inadvertent or unauthorized disclosure of information relating to the representation of a client **does not constitute a violation of the rule "if the lawyer has made reasonable efforts to prevent the access or disclosure."** The comment identifies a number of factors to be considered in determining the reasonableness of the lawyer's efforts. These factors "include, but are not limited to:

a. the sensitivity of the information,
b. the likelihood of disclosure if additional safeguards are not employed,
c. the cost of employing additional safeguards,
d. the difficulty of implementing the safeguards, and
e. the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."

Note: Wisconsin Formal Ethics Op. 15-01 adds additional factors.

Similarly, ABA Comment [19] requires a lawyer, when transmitting a communication that includes information relating to the representation of the client, to take reasonable precautions to prevent the information from coming into the hands of unintended recipients.

a. Special security measures are not required if the method of communication affords a reasonable expectation of privacy.
b. Special circumstances, however, may warrant special precautions.
c. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

IX. SOME *USES* OF CONFIDENTIAL INFORMATION THAT DO NOT INVOLVE DISCLOSURE ARE PERMITTED

. The Rules permit a lawyer to use confidential information provided that such use does not involve disclosure of the information.

A. A lawyer may use, without disclosing, confidential information if it is not to the disadvantage of the client or if the client provides informed consent. **SCR 20:1.8(b)**.

In representing clients, lawyers learn such things as government procedures, business practices, community information, technology, or other knowledge that may be useful in future representations. This information may be sophisticated, not widely known, and even highly valuable. While such information falls within the definition of confidential in **SCR 20:1.6(a)** ("information relating to the representation") lawyers may use such information for the benefit of subsequent clients, so as long as that use is not adverse to the interests of the former client.

Some information, such as investment information, may also be of value to the lawyer. While other law, such as securities and general agency law would restrict the use of such proprietary client information, this Rule does not appear to do so unless the use is adverse to the client.

B. A lawyer who has formerly represented a client (or that lawyer's firm) may use confidential information that is adverse to the former client in a matter as the Rules permit or require **or** when that information has become generally known. **SCR 20:1.9(c)(1)**

It is important for lawyers to bear in mind that "generally known" is not equivalent to "publically available" or" previously disclosed." In order to be considered "generally known," the information must be within the basic understanding and knowledge of the public. Obscure but publically available information, such as documents available in most courts files, are not "generally known." See e.g. *Fallon v. Reggio*, 2006 WL 2466854 (D.N.J., 2006).

X. **A LAWYER'S DUTY IN POTENTIAL CLIENT CRIME OR FRAUD SITUATIONS IS TRICKY**. Conflicting obligations arise between a lawyer's duty of confidentiality and diligence and the public's interest in lawyers not assisting client crimes or frauds or not revealing information to avoid foreseeable and avoidable harm stemming from a client's unlawful conduct. A lawyer may risk assisting client wrongdoing by (a) providing a client with advice that, without the lawyer's knowledge, is used unlawfully; (b) failing to recognize clear signs that a client's intends to engage in unlawful conduct; (c) recognizing, but failing to act on, clear signals that a client intends to engage in unlawful conduct; or (d) knowingly assisting a client in unlawful conduct.

Deciding amid these conflicting obligation involves assessing and harmonizing the duty of confidentiality [**SCR 20:1.6(a)**] and the obligations described in seven inter-connected Rules of Professional Conduct. They are:

- **SCR 20:1.2(d)** (counseling or assisting clients);
- **SCR 20:1.6(c)(1)** and (2) (exception to duty of confidentiality for certain criminal or fraudulent acts)
- **SCR 20:4.1(a)(2)** (disclosures necessary to avoid assisting a crime or fraud);
- **SCR 20:1.13(b)** and (c) (unlawful actions by organizational clients); 20:3.3(a)(3) (offering false testimony before a tribunal);
- **SCR 20:8.4(c)** (prohibiting dishonesty, fraud, deceit or misrepresentation); and
- **SCR 20:1.16(a)(1)** and (b)(3) (withdrawal from representation).

Among the questions that arise when analyzing a lawyer's duty under these Rules are the following. Is the client's act a crime or fraud? Does the Rule require "knowledge," - reasonable belief' or some other standard to trigger disclosure? Does the Rule(s) "require' or "permit" disclosure? Is the fraud or crime a potential, ongoing or completed act? Is the matter before a tribunal? Have the lawyer's services been used to further the crime or fraud? Will any disclosure prevent mitigate or remedy any crime or fraud? Can the avoidance of harm be accomplished without disclosure (e.g. by client consultation) or if disclosure is required, how limited can the disclosure be to accomplish the public purpose? Beyond the Rules is there any other law requiring disclosure?

XI. **CONFIDENTIALITY AMONG CO-CLIENTS**. Lawyers may represent two or more clients in the same matter if there is either no conflict of interest among them or the parties have appropriately waived any conflict. Sharing information among co-clients is the norm. It is assumed that clients accept that their communications with their common lawyer will be shared with their co-client, but kept in confidence as to all others.

XII. **CONFIDENTIALITY HAS A LONG TIME LINE**. A lawyer's duty of confidentiality begins when a person first seeks representation or advice from a lawyer even though the lawyer has not yet agreed to represent or even determined whether to represent the client. SCR 20:1.18(b). The duty of confidentiality continues after the lawyer-client relationship ends and does not extinguish with any passage of time, the client's death, or in the case of an organization client, its dissolution.

XIII. **CAN A LAWYER TALK TO FAMILY AND FRIENDS ABOUT THEIR CLIENTS?** The Rules forbid any disclosure that does not fall within one of the enumerated exceptions. That may not recognize lawyers live outside the office or human nature. The Restatement of the Law Regarding Lawyers permits disclosures that offer no reasonable prospect of adversely affecting a material client's interest and for which the client has not instructed the lawyer to hold in confidence. The safest practice, of course, is for lawyers to never discuss anything relating to their clients with even their most intimate life partners. But, over a lifetime such a closed and compartmentalized life can exact a toll on psyches and relationships. Perhaps, it may be more reasonable to govern these discussions by a scrupulous assurance of anonymity standard - some discussions happen, but with generality and anonymity sufficient to assure that a client or the particular circumstances of their matters are protected from possible identification.