

CLIENT CONFIDENTIALITY & OTHER ETHICAL ISSUES

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NEED ADVICE OR GUIDANCE?

- Wisconsin Supreme Court Rule 20:
https://www.wicourts.gov/supreme/sc_rules.jsp
- To informally and confidentially discuss an ethics question, contact the State Bar's ethics hotline at (608) 229-2017 or (800) 254-9154, Monday through Friday, 9 a.m. to 5 p.m.

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.

Competence

ABA COMMENT: “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.”

Tools of the Trade

- Wisconsin Criminal Code and Selected Traffic Statutes (\$69)
- Wisconsin Criminal Defense Manual (\$149)
- Wisconsin Judicial Benchbook Vol. 1: Criminal/Traffic (\$149)
- Rules of Evidence (\$29)
- Wisconsin Criminal Jury Instructions (\$200):

http://www.law.wisc.edu/clew/publications/jury_instructions_criminal.htm

SCR 20:1.3 Diligence

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

Diligence

ABA Comments:

- “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's work load must be controlled so that each matter can be handled competently.”
- “Perhaps no professional shortcoming is more widely resented than procrastination.”

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.

SCR 20:1.0(f) Informed Consent

“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.”

Communication

ABA Comments:

- “A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation.”
- “A lawyer who receives from opposing counsel...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.”

Communication & Decision Making

- SCR 20:1.2 states: “In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to the plea to be entered, whether to waive jury trial, and whether the client will testify.”
- The balance of the remaining strategic decisions go to the attorney.
- This is your law license, not the client’s.

SCR 20:1.6 Confidentiality

- (a) A lawyer shall not reveal information relating to the representation of a client unless...

Confidentiality

- Exceptions:
- A. Informed Consent 20:1.6(a)
- B. Implied Authorization 20:1.6(a)
- C. Crime/Fraud Disclosure 20:1.6(b)
- Discretionary Disclosure 20:1.6(c)
- Candor Towards Tribunal 20:3.3
- Fairness to Opposing Party 20:3.4

Confidentiality

ABA Comments:

“A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”

Confidentiality

Practice tips:

- Be careful of discussions in public areas, including on cell phone.
- Avoid discussions in holding cells when others are present if possible.
- Keep track of and protect your files.
- Ask yourself: “Would I want to be viewing or hearing this at another time?”

SCR 20:3.1 Meritorious Claims & 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.

SCR 20:3.3 Candor Towards Tribunal

- Don't lie to the court
- Must correct past lies or misstatement
- May not hide controlling authority
- May not offer false evidence
- Cannot enable a client to lie or create false evidence (Candor may trump confidentiality)