Some Ethical Problems That Arise in Court

SCR Chapter 20 Rules of Professional Conduct for Attorneys

Preamble: a Lawyer's Responsibilities

> [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

John Wesley Hall, Jr.'s Professional Responsibility of the Criminal Lawyer's opening chapter has a simple but, as often in cases of simplicity, true and valid checklist of rules for an ethical and profitable criminal defense practice. Rule No. 1: The lawyer should not be the one to go to jail. Rule No. 2: Whom should you trust? Never trust the client, his or her friends, witnesses, or relatives. Rule No. 3: Say nothing or do nothing that you would be afraid to read in the newspaper or in a transcript or hear in a courtroom some day. Rule No. 4: Avoid being sucked into conspiracies and other crimes. Rule No. 5: Always be fair and honest to the client, the Court, your opponent, and yourself.

1. MENTAL IMPRESSIONS OF A CLIENT

State v. Meeks 2003 WI 104, 666 N.W. 2d 859

This was an appeal of a Milwaukee County conviction for felony murder-armed robbery as a habitual criminal. After defense counsel raised the question of Meeks' competence to proceed, Meeks was found not competent and committed for treatment. In a subsequent review to see whether Meeks had regained competence the State subpoenaed an attorney, Ms. Scholle, who had represented Meeks in a different case to testify. She objected on "relevance grounds." She was overruled and ordered to testify. The Court of relates:

> ¶ 8 At the hearing Scholle testified regarding her standard practice in representing clients. She testified that she had extensive background in representing criminal defendants and that she had represented approximately 3,000 defendants. She testified that she represented a variety of individuals, including individuals with mental health issues. Moreover, Scholle testified that she had been educated about competency issues, and about what to look for to recognize incompetency in her clients, and that she understood the special concerns in determining competency in such situations. Scholle testified that: "[I]n general, if I have any question as to a person's competency, their ability to understand, to make decisions, to know the various *801 roles of the players in court, I would bring that to the attention of the court." (R. 71:12). In addition, Scholle testified that she had represented Meeks "on two separate occasions" involving three cases, between 1994 and 1997. **863 State v. Meeks, 2002 WI App. 65, ¶ 29, 251 Wis.2d 361, 643 N.W.2d 526 (Wis.App.Ct.2002). (R. 71:12). According to the records in regard to those cases, Meeks pled guilty in the 1994 case and entered an *Alford*[2] plea in another case.[3] Scholle testified that the concept of an *Alford* plea is a "sophisticated legal concept[s]...." (R. 71:19). The court asked Scholle to describe her practice in going over the guilty plea questionnaire with her clients and how she determined whether the client understood the plea. Scholle responded that she would ask her clients if they understood and if they had any questions. The record was clear that during Scholle's previous representation of Meeks, she had not raised the issue of Meeks' competency in any of those proceedings.[4]

> ¶ 9 Meeks concedes that: "Ms. Scholle did not relate in her testimony any specific words said to her by Mr. Meeks." (Pet'r Br. at 9). However, he claims that clearly implicit in her testimony was her belief that Meeks was not incompetent when she represented him.

Though not raised in the trial court, the Supreme Court considered whether an attorney's opinions, perceptions, and impressions of the former client' s mental competence are confidential communications within the meaning of Wis.Stat.§905.03 (2) and SCR 20:1.6.

It held that it did; observing that "other courts have held that a lawyer's observations are inextricably intertwined with communications between the attorney and the client, and the lawyer's opinion as to the client's competency is based upon conclusions drawn in the course of a unique attorney-client relationship." 2003 WI 104 at ¶38.

Read narrowly, the case applies to hearings on a client's competence. The principle underlying it, however, is far more broad.

The form for the waiver of the right to a preliminary hearing contains the following "Attorney' S Acknowledgment:"

> I,_____, state that I am the attorney for the above-named defendant, that:
>
> ____(the defendant personally read the questionnaire in my presence,) OR
> ____(I read the questionnaire to the defendant)
>
> I discussed and explained the contents of the questionnaire to the defendant, that the defendant acknowledged his/her understanding of each item in this questionnaire, and that I personally observed the defendant sign and date this questionnaire.

Meeks more than strongly suggests that it is violative of the attorney-client privilege and the rules of professional responsibility to inform the court of the content of the attorney' s discussion with the client and of the attorney' s mental impression of the client's understanding

Similarly, the form "plea questionnaire/waiver of rights" concludes with the following Attorneys Statement:

> I am the attorney for the defendant. I have discussed this document and any attachments with the defendant. I believe the defendant understands it and the plea agreement. The defendant is making this plea freely, voluntarily, and intelligently. I saw the defendant sign and date this document."

Again, signing the statement would be improper.

When, in a criminal case, a client chooses not to testify it is the practice of some judges to engage in a colloquy with the accused and counsel. Nothing in the law requires such a colloquy. Rather, judges view it as a prophylactic against a subsequent claim of ineffective assistance of trial counsel. To that end, they question both the accused and counsel about whether they discussed the accused's right to testify and the pros and cons of exercising that right. Often, they inquire of counsel whether counsel believes that the accused knows and understands that right. These questions ought not be answered by the accused or by counsel. Doing so would violate the attorney-client privilege and SCR 20:1.6.

2. CRIMINAL HISTORY AS EVIDENCE AFFECTING CREDIBILITY

Wisconsin Rule of Evidence 906.09 permits one to impeach a witness with evidence of a prior conviction. The federal counterpart limits the use of convictions for this purpose to those occurring no more than 10 years from the date of conviction or release from incarceration. While Wisconsin has no such limitation most judges, in the exercise of their discretion, use the federal counterpart as a guideline.

The client decides he wishes to testify at his trial; and he has four prior convictions. Two of them are more than 10 years old and two of them are not. A motion in limine is made to prevent the prosecution from inquiring into other than the two most recent convictions; and the court grants that motion. Aware that violation of the ruling could cause a mistrial, the judge cautions both attorneys to make sure that their witnesses do not revealed to the jury the two older convictions. You take your client into the hallway and you advise him that when he is asked how many prior convictions he has, the answer is "two." He looks at you and says: "so, you want me to lie?" You reply: "the judge says it's okay."

It's not.

SCR 20:3.3, "candor toward the tribunal," prohibits an attorney from offering evidence that the lawyer knows to be false. Technically, it is suborning perjury. It's just that neither the court nor the prosecutor will report it. But that doesn't make it right.

It's really all in the phrasing of the question. When the judge makes her ruling about the number of prior convictions that are relevant, tell her you are going to use a leading question to elicit the response. "You have two prior convictions, don't you?" will not run afoul of the rules.

3. CRIMINAL HISTORY AS EVIDENCE AFFECTING LIABILITY AND SENTENCING

Your client just received his third ticket for having operated a motor vehicle while intoxicated. The second offense occurred in Illinois, had been adjudicated only days before and hadn't yet been entered into Wisconsin DOT's system. So your client was charged with a second offense drunk driving. The only reason you know about the Illinois conviction is because she told you about it. After some discussion, you and the client agree that it would be best if she quickly entered a plea to the charge of second offense drunk driving before the Illinois conviction is discovered. You and the client do just that. At the time of the plea, the Dist. Atty. provide a factual basis for the plea stating that on a prior date in Wisconsin, the defendant had been convicted of operating while intoxicated. The judge turns to you and asks: "do you agree that your client has one prior conviction?"

Your client does have one prior conviction.

But he also has another one.

While you could rationalize that you told a literal truth, it would be unwise to engage in a game over the meaning of the word "one" in this context. The prosecution will most likely find out about the Illinois conviction. And if informed, the judge will report you for violating your obligation of candor toward the tribunal. SCR 20:3.3 (a) (1) prohibits a lawyer from knowingly making a false statement of fact as well as from failing to correct a false statement of material fact previously made to the tribunal by the lawyer. Additionally, SCR 20:3.1 (2) prohibits a lawyer from knowingly advancing a factual position unless there is a basis for doing so that is not frivolous.

That you know about the Illinois conviction is only because your client told you in a privileged communication. Neither the rules of evidence nor the rules of professional responsibility permit you to reveal that without your client's permission.

You can try to deflect the question by telling the judge: "I agree that the statement of facts in the complaint provides a factual basis for the plea."

If that doesn't work, you have no option other than to decline to answer the question.

4. Your client has told you that he committed the crime; that he wants a trial; and that he wants to testify at his trial

5. Your client has told you that he didn't commit the crime, that he wants a trial, and during his testimony, he begins to tell a version of events is materially different from the one he told you prior to trial.

6. You are the defense attorney in "Anatomy of a Murder", and your client is faced with a homicide charge. Without letting your client tell you what happened, you explain the state of the law, and the defenses which are available to him. You then say that you'll come by the next morning to get his version of what happened. When you come back, his story is consistent with one of the defenses you detailed the night before.

Each of these scenarios implicates SCR 20:3.3 "Candor toward the tribunal" says:

> (a) A lawyer shall not knowingly... (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.

But they also implicate SCR Chapter 20's underlying premise that a lawyer should zealously advocate for a client.

The rules of professional conduct make fairly clear what a lawyer must do when a client is untruthful.

You learned in law school, for example, that with respect to scenario 4, above, you are required to put your client on the stand but may then withdraw from asking questions; leaving your client to testify on his own and thereby signaling to all in the courtroom that you don't believe him. This is as close as one can come to assuring an adverse verdict.

The rules of professional conduct give no guidance, however, about how to determine whether one's client is being truthful.

When a client has given two versions of events, which is truthful? The first version? Or the second? Is the difference between the versions the product of mendacity, a failure of memory or a memory refreshed? Was the difference between the versions the product of a motive to protect another or to protect oneself?

Jurors may determine truth, if at all, subjectively and/or objectively. Lawyers ought resist subjective evaluation. The rules of professional conduct require zealous advocacy on behalf of the client; not the role of a 13th juror.

The difficulty for the attorney occurs when irrefutable objective facts belie the client's testimony.

Scenarios 4 and 5 are usually avoided with frank discussion with one's client prior to trial. But sometimes, even when that precaution has been taken, clients can change their mind in the midst of proceedings. When that occurs request a brief recess. Sit and think. Don't ask the advice of others; because the determination you must make is a personal one. The rule of professional responsibility prohibits you from ***knowingly*** eliciting false testimony. Ask yourself: "do I know ***for sure*** that my client is lying or is about to?" Your answer to that question will guide you.

Scenario 6 is seductive and precarious. It is seductive because you'll never know, for sure, whether your client is lying. Thus, you are free to let him testify. It is precarious because your explanation of the law may have induced a lie; and objective facts may expose the lie to a jury. That would be a failure of advocacy.

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

For Official Use

State of Wisconsin, Plaintiff,
-vs-

Plea Questionnaire/ Waiver of Rights

_____, Defendant Case No. _____
Name

I am the defendant and intend to plea as follows:

Charge/Statute	Plea	Charge/Statute	Plea
	☐ Guilty ☐ No Contest		☐ Guilty ☐ No Contest
	☐ Guilty ☐ No Contest		☐ Guilty ☐ No Contest

☐ See attached sheet for additional charges.

I am _____ years old. I have completed _____ years of schooling.

I ☐ do	☐ do not	have a high school diploma, GED, or HSED.
I ☐ do	☐ do not	understand the English language.
I ☐ do	☐ do not	understand the charge(s) to which I am pleading.
I ☐ am not	☐ am	currently receiving treatment for a mental illness or disorder.
I ☐ have not	☐ have	had any alcohol, medications, or drugs within the last 24 hours.

Constitutional Rights

I understand that by entering this plea, I give up the following constitutional rights:

- ☐ I give up my right to a trial.
- ☐ I give up my right to remain silent and I understand that my silence could not be used against me at trial.
- ☐ I give up my right to testify and present evidence at trial.
- ☐ I give up my right to use subpoenas to require witnesses to come to court and testify for me at trial.
- ☐ I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty.
- ☐ I give up my right to confront in court the people who testify against me and cross-examine them.
- ☐ I give up my right to make the State prove me guilty beyond a reasonable doubt.

I understand the rights that have been checked and give them up of my own free will.

Understandings

- I understand that the crime(s) to which I am pleading has/have elements that the State would have to prove beyond a reasonable doubt if I had a trial. These elements have been explained to me by my attorney or are as follows: ☐ See Attached sheet.

  _____

  _____

- I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: _____

  _____

- I understand that the judge must impose the mandatory minimum penalty, if any. The mandatory minimum penalty I face upon conviction is: _____

  _____

- I understand that the presumptive minimum penalty, if any, I face upon conviction is: _____

  _____

  The judge can impose a lesser sentence if the judge states appropriate reasons.

Understandings

- I understand that if I am placed on probation and my probation is revoked:
  - if sentence is withheld, the judge could sentence me to the maximum penalty, or
  - if sentence is imposed and stayed, I will be required to serve that sentence.
- I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.
- I understand that if I am convicted of any felony, I may not vote in any election until my civil rights are restored.
- I understand that if I am convicted of any felony, it is unlawful for me to possess a firearm.
- I understand that if I am convicted of any violent felony, it is unlawful for me to possess body armor.
- I understand that if I am convicted of a serious child sex offense, I cannot engage in an occupation or participate in a volunteer position that requires me to work or interact primarily and directly with children under the age of 16.
- I understand that if any charges are read-in as part of a plea agreement they have the following effects:
  - Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.
  - Restitution – I may be required to pay restitution on any read-in charges.
  - Future prosecution – the State may not prosecute me for any read-in charges.
- I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court.

Voluntary Plea

I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows: ☐ See Attached.

_____

_____

Defendant's Statement

I have reviewed and understand this entire document and any attachments. I have reviewed it with my attorney (if represented). I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty.

_____ _____

Signature of Defendant Date

Attorney's Statement

I am the attorney for the defendant. I have discussed this document and any attachments with the defendant. I believe the defendant understands it and the plea agreement. The defendant is making this plea freely, voluntarily, and intelligently. I saw the defendant sign and date this document.

_____ _____

Signature of Attorney Date

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN, *Plaintiff*

-vs-

_____, *Defendant.*

Waiver of Right to Preliminary Hearing

Case No._____

I am _____ years old.
I have completed the _____grade in school.

	Please answer CORRECT OR INCORRECT to the following:	CORRECT	INCORRECT
1.	I am the defendant in this criminal action, and I wish to waive my statutory right to a preliminary hearing in this case. I understand the following:	☐	☐
2.	I have never been committed to a mental institution as mentally ill or found to be incompetent. I do not suffer from any mental or physical disabilities which would affect my decision in this matter.	☐	☐
3.	I am not under the influence of drugs or alcohol.	☐	☐
4.	I am not under the influence of medication.	☐	☐
5.	I can read, write and understand English.	☐	☐
6.	I understand that the State would have the burden of proof at a preliminary hearing to show that a felony was probably committed by me and that I am admitting that the State could meet the burden.	☐	☐
7.	I understand that at a preliminary hearing my attorney or I could ask questions of any witnesses called by the State and I am giving up that right.	☐	☐
8.	I understand that at a preliminary hearing my attorney or I could produce evidence on my behalf and I am giving up that right.	☐	☐
9.	I understand that it is sometimes possible to discover things about my case at a preliminary hearing including possible defenses to a charge.	☐	☐
10.	I understand that if the State does not meet the burden of proof, the court may reduce the felony charge to a misdemeanor charge or dismiss it altogether and I am giving up that right.	☐	☐
11.	I understand that as a result of waiving the preliminary hearing my case will be set for further proceedings before **Branch** _____and I am not giving up my right to a trial.	☐	☐
12.	a. No one has threatened me to get me to waive my right to a preliminary hearing. b. Other than the conversations with the attorneys, no one has promised me a plea agreement or anything else to get me to waive my right to a preliminary hearing except as stated on the record.	☐ ☐	☐ ☐

I have read the above questionnaire and answered all questions truthfully.

_____ _____

(Defendant's Signature) **(Date)**

ATTORNEY'S ACKNOWLEDGMENT

I, _____, state that I am the attorney for the above named defendant, that:
(Attorney's Name-Please Print)

☐ (The defendant personally read the questionnaire in my presence,) **OR** ☐ (I read the questionnaire to the defendant), I discussed and explained the contents of the questionnaire to the defendant, that the defendant acknowledged his/her understanding of each item in this questionnaire, and that I personally observed the defendant sign and date this questionnaire.

_____ _____

080-600-01(5/03) **(Attorney's Signature)** **(Date)**

SCR 20:1.6 Confidentiality. (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

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

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

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

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

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

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

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

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.

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.

906.09 Impeachment by evidence of conviction of crime or adjudication of delinquency.

(1) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.

(2) Exclusion. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

(3) Admissibility of conviction or adjudication. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) IN GENERAL. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) LIMIT ON USING THE EVIDENCE AFTER 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) EFFECT OF A PARDON, ANNULMENT, OR CERTIFICATE OF REHABILITATION. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) JUVENILE ADJUDICATIONS. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) PENDENCY OF AN APPEAL. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.