

**Rules of Professional Conduct For  
Attorneys**

**Wisconsin Supreme Court Rule 20**



**“Read It, Know It, Live It”**

**Presented by Mark Gumz with the assistance of  
Hannah Schieber**

## SCR 20: More than just 40+ pages of fine print



- You don't have to memorize it, but you do need to know where it is when you need it, print version or online.
- 2. Got a specific question-maybe its been asked? How about the Bar web page opinion list-  
[WWW.WISBAR.ORG](http://WWW.WISBAR.ORG)
- 3. Call the toll free Bar ethics hotline:  
**1.800.444.9404, ext. 6168.**
  - Tim Pierce is the current guru, available Monday through Friday, 9 a.m. to 5 p.m.
- 4. REMEMBER: THESE ARE RULES OF REASON!  
[Preamble, 14]

## COMPETENCE, COMMUNICATION, CONFIDENTIALITY, CONFLICTS



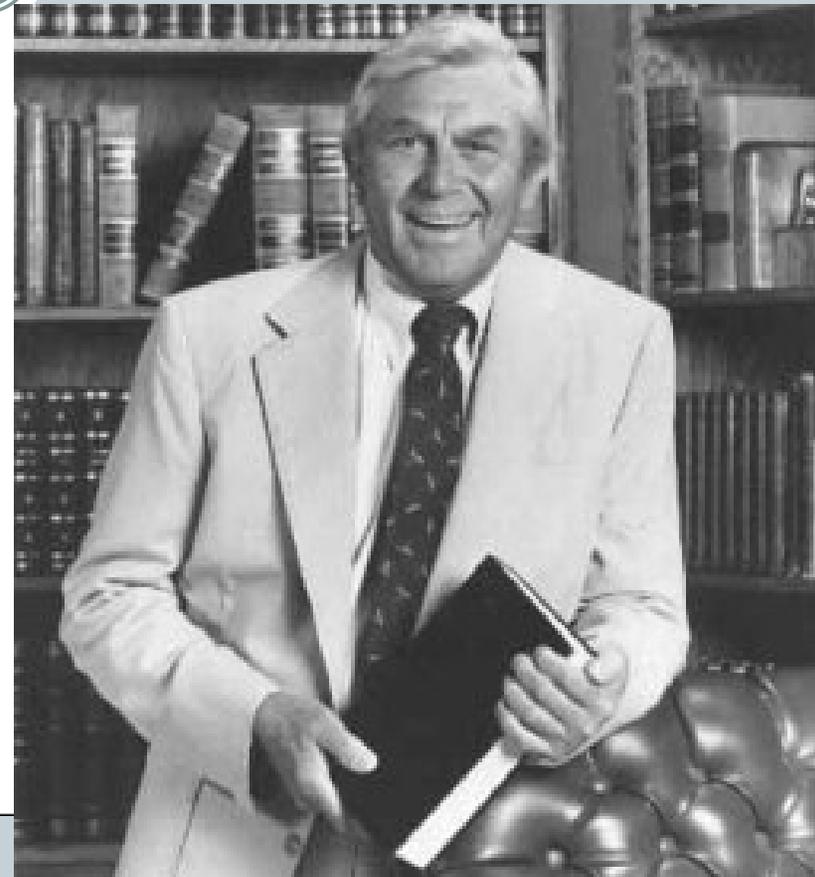
- **SCR 20:1.1 Competence:**
  - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the (zealous) representation.

# COMPETENCE



- **ABA COMMENT: Legal Knowledge and Skill.** “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.”

# COMPETENCE



[http://supak.com/simpsons/wavs/lionel\\_hutz\\_bad-court-thingy.wav](http://supak.com/simpsons/wavs/lionel_hutz_bad-court-thingy.wav)

## 4<sup>th</sup> Level of Ignorance Hell



**knowing  
&  
knowing that you  
know**

**not knowing  
&  
knowing what you  
don't know**

**knowing  
&  
not knowing what you  
know**

**not knowing  
&  
not knowing or  
admitting what you do  
not know**

# CLIENT CONFIDENTIALITY



- The art of keeping your mouth shut...
- SCR 20:1.6(a):
  - A lawyer shall not reveal information relating to representation of a client unless...

# CLIENT CONFIDENTIALITY



- **EXCEPTIONS:**
- **A. Informed Consent** 20:1.6(a)
- **B. Implied Authorization** 20:1.6(a)
- **C. Crime/Fraud Disclosures** 20:1.6(b)
- **D. Discretionary Disclosures** 20:1.6(c)
- **E. Candor Towards Tribunal** 20:3:3
- **F. Fairness to Opposing Party/  
Counsel** 20:4.4

# CLIENT CONFIDENTIALITY



- Ask yourself: “Would I want to be viewing this or hearing this at another time?”

# CLIENT CONFIDENTIALITY



- **MISCELLANEOUS TIPS:**
  - **A. Be careful discussing in public areas, including on a cell phone**
  - **B. Avoid discussions in a holding cell when others are present, or nearby, if possible**
  - **C. Keep track of and protect your files**
  - **D. Presume that the internet is not the most secure information**
- **ASSUME NOTHING**

# COMMUNICATION & DECISION MAKING

Representative/Advisor/Advocate/Negotiator/Evaluator



- **IF IT IS A MAJOR DECISION, LAY IT OUT IN WRITING FOR THE CLIENT-**
- Go to trial?
- Should I testify?
- Jury or bench trial?
  
- The balance of the remaining strategic decisions go to the attorney.
- This is your license, not the client's.
- If there is a conflict with a client and you are unsure how to proceed, ask someone!

# HONESTY, SCR:20.3



- **SCR 20:3.1(a): Generally disallows frivolous claims and contentions of law or fact...but....**
- **20:3.1(b): Special exception for defense attorneys at trial!**
- **20:3.3- Candor Towards Tribunal**
  - Don't lie to the court
  - Must correct past lies or misstatements
  - May not hide controlling authority
  - May not offer false evidence
  - Cannot enable a client to lie or create false evidence
    - ✦ Candor may trump confidentiality

# HONESTY



- **Candor toward 3<sup>rd</sup> Parties:**
  - You can't lie to non-judges either, but...
  - You may supervise others with respect to “lawful investigative activities.”

## E-86-6 Duty of lawyer to be candid with court even though it may result in jail sentence for client



- **Facts:** A first offense of operating a motor vehicle while intoxicated (OMVWI) may result in a forfeiture and/or suspension of a driver's license for an appropriate period of time. A second offense within five years constitutes a crime and requires a mandatory jail sentence. (*See County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982).) A defendant is charged with a second OMVWI offense or with two OMVWI offenses simultaneously.
- **Question:** Does a lawyer have an affirmative duty to disclose to a court that his or her client has had a prior OMVWI conviction within the previous five years or that the client is pleading guilty to a second offense under the guise that it is a first offense?

## E-86-6 Duty of lawyer to be candid with court even though it may result in jail sentence for client



**Opinion:** The discovery of the truth is a primary function of the court and is a fundamental purpose of the adversary system. *See, e.g., U.S. v. Havens*, 446 U.S. 620 (1980). For this reason, the Code of P.R. places an affirmative duty on a lawyer to be absolutely honest and candid in his or her dealings with a court even though the client's interests may seem to dictate a contrary course of action. *See* SCR 20.34 and 20.36. Although a lawyer has a duty to "represent his or her client zealously," that duty may only be exercised "within the bounds of the law, which includes disciplinary rules and enforceable professional regulations."

Nevertheless, if the prosecution and court fail to raise the issues of prior convictions or pending multiple offenses, the Ethics Committee does not believe that the defense attorney has an affirmative duty to disclose them to the court, unless active misrepresentation by the defendant or defendant perjury is involved. *See* SCR 20.36(1)(d) and 20.36(2)(a). Of course, the defense lawyer may not "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent." SCR 20.36(1)(g). *See also* SCR 20.04(4), 20.35(1)(c) and (2)(b).

## E-86-7 Duties of public prosecutors with knowledge of witnesses helpful to defendants



- **Facts:** A public prosecutor is prosecuting a defendant for a crime. During the course of the prosecution, the prosecutor becomes aware of a witness who may be helpful to the defendant. The witness contacts the prosecutor and asks if he or she should talk to the defendant's lawyer or investigator.
- **Question 1:** Does the public prosecutor have an ethical duty to encourage the witness to talk to the defendant's lawyer or investigator?

## E-86-7 Duties of public prosecutors with knowledge of witnesses helpful to defendants



- **Opinion:** It is unprofessional conduct for a prosecutor to discourage or obstruct communication between prospective witnesses and defense counsel or to advise any person to decline to give any information to the defense. *State v. Simmons*, 57 Wis. 2d 285, 292-93, 203 N.W.2d 887 (1973). See Wisconsin Supreme Court Rule (hereinafter SCR) 20.37(2); SCR 20.43; and *Disciplinary Proceedings Against Zapf*, 126 Wis. 2d 123 (1985). This ethical duty derives from a prosecutor's constitutional duty to provide exculpatory information to the defense. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963). The committee concludes that although the prosecutor has no ethical duty to actively encourage a witness to talk with the defense, the prosecutor has a duty under SCR 20.37(2) to timely disclose to the defense the existence and whereabouts of the potential witness so that the defendant has the opportunity to contact him or her. All lawyers, including prosecutors, are prohibited from advising or causing persons to be unavailable as witnesses. SCR 20.43(2). These ethical duties are necessarily subject to section 971.23, Wis. Stats., and the constitutional duty of disclosure upon which the Committee is not able to comment. See *State v. Calhoun*, 67 Wis. 2d 204, 226 N.W.2d 504 (1975) (there is no requirement to provide exculpatory evidence which is not within the exclusive possession of the state and does not surprise or prejudice the defendant).

## E-86-7 Duties of public prosecutors with knowledge of witnesses helpful to defendants



- **Facts:** A public prosecutor is ordered by the court to disclose the name of a witness to the defense, who was involved in the same matter as the defense counsel's client. The witness presently is being prosecuted by the public prosecutor (or has recently been convicted). The defense attorney has informed the court that he or she has heard that the witness is afraid to testify for fear of reprisal by the state.
- **Question 2:** May the public prosecutor ethically write a letter to the witness and advise that he or she does not have to talk to the defense?

## E-86-7 Duties of public prosecutors with knowledge of witnesses helpful to defendants



- **Opinion:** See opinion to Question 1. In addition, the following rule, upon which the committee expresses no opinion, should be considered: When communicating with a potential witness, a prosecutor must inform the witness that there is no legal obligation to grant an interview but that it is in the interest of justice to cooperate and that the lawyer may have a duty to interview all potential witnesses.
- *See, e.g.,* Federal Rule of Criminal Procedure 16.

# COMMUNICATION



- **SCR 20:1.4**
  - Keep the client in the loop on decisions
  - Consult with client on the means by which the client's objectives can be accomplished
  - Keep the client reasonably informed about the status of the matter
  - Promptly comply with reasonable requests for information

# CONFLICTS OF INTEREST



- **SCR 20:1.7:**
  - A client's trust in you should never, ever come back to bite him.
  - If you feel that a conflict may exist, it likely does.
  - Ask people if you suspect a conflict.
  - Don't let money make your decision.

# ADVERTISING, SCR 20:7.2



- Advertising is allowed. Should we use our best judgment?
- [http://www.youtube.com/watch?v=y1Qk6QPzuIc&feature=player\\_embedded](http://www.youtube.com/watch?v=y1Qk6QPzuIc&feature=player_embedded)