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The Road to Retirement

June 2017

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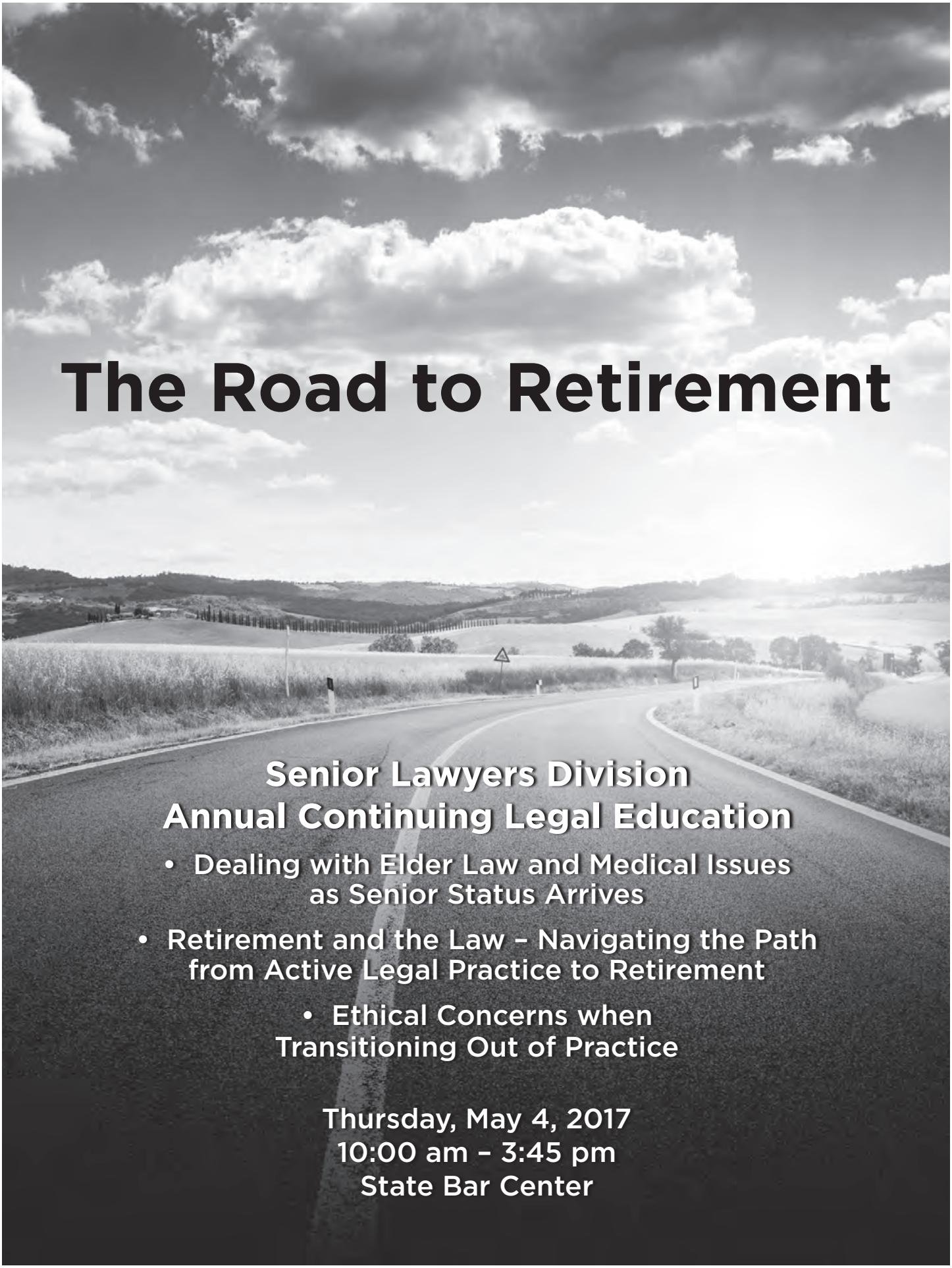

The Road to Retirement

Senior Lawyers Division
Annual Continuing Legal Education

- Dealing with Elder Law and Medical Issues as Senior Status Arrives
- Retirement and the Law – Navigating the Path from Active Legal Practice to Retirement
- Ethical Concerns when Transitioning Out of Practice

Thursday, May 4, 2017
10:00 am – 3:45 pm
State Bar Center

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2017 SENIOR LAWYERS DIVISION CONTINUING LEGAL EDUCATION PROGRAM

PROGRAM SCHEDULE

10:00 AM Morning Session
Dealing with Elder Law and Medical Issues as Senior Status Arrives

- Margaret Hickey, Becker, Hickey & Poster SC
- Heather B. Poster, Becker, Hickey & Poster SC

12:00 PM Lunch (on your own)

12:30 PM Afternoon Session 1
Retirement and the Law – Navigating the Path from Active Legal Practice to Retirement

- Afternoon Panelists
  - Steven A. Bach, Pines Bach LLP
  - John E. Rashke, DeWitt Ross & Stevens SC
  - Joshua J. Kindkeppel, Eustice, Laffey, Sebranek & Auby SC
  - John "Jack" Sweeney, Melli Walker Pease and Ruhly (Retired)
  - Harvey L. Wendel, Murphy Desmond SC
  - Anne Taylor Wadsack, DeWitt Ross & Stevens SC

1:55 PM 10 Minute Break

2:05 PM Afternoon Session 2
Ethical Concerns when Transitioning Out of Practice

- Dean R. Dietrich, Ruder Ware LLSC
- Steven R. Sorenson, von Briesen & Roper SC

3:35 PM Program Concludes

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PROGRAM DESCRIPTION: MORNING SESSION

DEALING WITH ELDER LAW AND MEDICAL ISSUES AS SENIOR STATUS ARRIVES

This program will deal with the various issues facing Senior Lawyers and their families as regards Medicare, Medicaid, Health Insurance, CBRF's, Spousal liabilities, other assistance programs. Senior lawyers are often the family go to person on these issues but many of us have no idea what all the programs involve from a legal perspective as well as from a practical perspective. There are some of us who practice in metropolitan areas but our families are in rural areas where the rules may be different so there is a need to know as much as we can and where to turn when there is any area that is new to us. Just filing a Medicare claim or responding the reams of documents that are sent out way when the magic "golden years" arrive for us or our parents can be a challenge.

Our panelist have developed a boutique practice that has a state wide reach which gives them the unique insight that we need to fully appreciate the problems or potential problems. They have the experiences that will help the seminar attendee develop his or her own road map to knowledge and success. They will give attendees a look into the world of health care and assistance that is a head for all of us. They will be available to answer questions and provide roadmaps to find the answers or the assistance that it needed. So bring all of your questions and discover the path way out of this "Medical Maze" that all seniors and their families will ultimate face or are currently navigating.

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SPEAKER BIOGRAPHIES

DEALING WITH ELDER LAW AND MEDICAL ISSUES AS SENIOR STATUS ARRIVES

Margaret Wrenn Hickey practices in the areas of divorce, family law, and elder law including trusts for the disabled, title 19 and guardianship. She is a shareholder in the law firm of Becker, Hickey & Poster, S.C., Milwaukee, and received her B.A. from Marquette University (1982, *summa cum laude*), where she was *Phi Beta Kappa*, and her J.D. from the University of Wisconsin Law School (1986, *cum laude*).

Margaret served as Chair of the Family Law and Elder Law Section Boards of Directors. She is a past President of the Milwaukee Bar Association (2004-05) and served on the Board of Directors from 1999-2005. Margaret served on the State Bar of Wisconsin Board of Governors (District 2, 2005-2015, Chair 2006-07, Treasurer 2009-11.) She also served on the Board of Directors of the Legal Aid Society, and public radio station WUWM. Margaret lectures frequently on elder law and family law at local, state and national bar meetings and to community groups and other professionals.

Margaret is a member of the American Bar Association, the State Bar of Wisconsin, the Milwaukee Bar Association, the Waukesha Bar Association, the National Academy of Elder Law Attorneys, the Association for Women Lawyers and she is a Fellow of the American Bar Foundation and the American Academy of Matrimonial Lawyers (President for the Wisconsin Chapter, 2005- 06.) She is named in the Best Lawyers in America for family and elder law and has been named as a "Super Lawyer," as one of the top ten lawyers in the State of Wisconsin in 2012, as one of the top 25 women lawyers in the state and a super lawyer in elder law in past issues and as a "Woman in the Law 2011." She is also a member of the American College of Family Trial Lawyers.

Heather Burgess Poster (B.A. with distinction, University of Wisconsin, 1999; J.D. with honors, Marquette University Law School, 2002), is a shareholder with the law firm of Becker, Hickey and Poster, S.C., Milwaukee, Wisconsin. Her practice focuses on the representation of the elderly and disabled in matters such as family law, estate planning, public benefits and advanced directives/guardianship.

Heather is a current member of the Wisconsin Chapter of the National Academy of Elder Law Attorneys' Board of Directors. She is a board member and the chair elect of the State Bar of Wisconsin's Elder Law Section Board. She is a former member (2005-2014) of the Board for WisPACT, Inc., the non-profit organization that oversees pooled and community trusts for the elderly and disabled and current serves on its Attorney Advisory Committee.

She lectures extensively on public benefits and long term care planning for the disabled and elderly, special needs and pooled trusts, guardianship and capacity issues. She will present on dementia and capacity issues as part of the International Academy of Law and Mental Health at Charles University in Prague.

INCOME AND HEALTH PROGRAMS FOR SENIORS

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I. Programs you need to know about as you reach 65:

A. Supplemental Security Income (SSI; Title XVI):

(1) SSI is a means-tested program for people over 65 or with disabilities who have very limited means that pays benefits based on financial need. SSI is designed to supplement the income of individuals who have little to no income. Those who qualify for SSI either do not have a sufficient work history to qualify for Social Security Disability benefits or whose Social Security Disability benefits are below the maximum Federal SSI benefit rate.

(2) What is the test?

(a) The Social Security Administration (SSA) uses a two-part test to determine SSI financial eligibility:

(b) First, an SSI recipient may not possess resources whose value exceeds $2,000 for an individual or $3000 for a married couple.

(c) The second test is an income test. Monthly benefits are determined by deducting the applicant's countable income from the current benefit rate.

(d) Both earned and unearned income reduce the SSI benefit and may cause ineligibility. Countable resources/assets above the limit cause ineligibility.

(3) Are all resources/assets counted?

(a) Many resources/assets are excluded from the calculation of the resource limit.

(b) Excludable or exempt resources include, but are not limited to: Home, automobile, household goods and

personal effects, term life insurance policies, burial spaces and burial funds, property essential for self-support, resources necessary for approved plan to achieve self support (PASS) plan, certain irrevocable trusts and state or local relocation assistance payments.

(c) Gifting or transferring of resources/assets and/or income for less than fair market value in return (divestment) will cause a period of ineligibility with limited exceptions. For those not yet on SSI, but who may consider applying in the future, the divestment lookback period is 36 months.

(d) The maximum Federal SSI benefit rate (2017) is $735.00 per month. In Wisconsin, residents who receive at least one dollar of Federal SSI benefits will get a State SSI or SSI-E supplement ($95.99 or $179.99).

B. Medical Assistance = Medicaid = "MA" = "Title XIX":

(1) MA is the companion program to SSI. Medicaid is a state-run program that provides hospital, medical coverage, prescription and long term care coverage for people with low income and for the elderly, blind and disabled.

(2) Eligibility is based on age, disability or family status, and financial need.

(3) A person who receives SSI will automatically receive MA card services.

(4) MA has relatively minor co-pays.

NOTE: If a person has both Medicare and MA coverage, MA acts as a Medicare supplement.

(5) MA programs for the poor such as Badgercare, Wisconsin Well Woman and Wisconsin Family Planning Waiver as well as all programs for disabled children such as Katie Beckett, Children's Long Term Care Waivers Programs and the Family Support Program *impose income tests only*. For children's program, only the income of the child is considered.

(6) MA programs for the elderly, blind and disabled, such as the MA

deductible program, Medicaid Purchase Plan ("MAPP"), long term care waivers (i.e. IRIS, Family Care) and the institutional (nursing home) program *impose income and asset limits*. Most card services programs impose a countable asset limit of $2,000 for individuals with the exception of MAPP which has $15,000 asset limit.

(7) Long term care program such as the institutional MA and waivers programs have spousal impoverishment protections. This means that recipients with a qualified community spouse get a much higher countable asset limit (between $52,000 and $119,000). In addition, many married recipients will be able to keep additional income for the support of their spouse and other dependents.

(8) The exempt/excluded assets for those MA programs imposing an asset limit are similar to those of the SSI program with a few exceptions.

(9) Long term care MA programs such as the institutional (nursing home) program and waivers programs (i.e. Family Care, IRIS) *impose a penalty period for transfer of assets* and/or income without receipt of fair market value in return (divestment). There are limited exceptions. The MA divestment lookback period is 60 months. ***Card services programs do not test for divestment***.

(10) Recipients of long term care MA program also receive MA card services.

C. Social Security Disability

(1) Social Security Disability (SSD or SSDI):

(a) SSD is an insurance program that is available to qualified workers with disabilities regardless of their resources. SSD pays benefits to individuals and certain members of their family if they are "insured," meaning that they worked long enough and paid Social Security taxes.

(b) Social Security pays benefits to people who cannot work because they have a medical condition that is expected to last at least one year or result in death.

(c) Federal law requires a very strict definition of disability.

While some programs give money to people with partial disability or short-term disability, Social Security does not. To qualify for benefits under SSD, your disability must prevent you from doing any substantial gainful work, and it must last or be expected to last a year or to result in death.

(d) Certain family members of disabled workers can also receive money from Social Security (i.e. minor children and adult disabled children with a disability onset before the age of 22).

(e) What is the test?

(i) An applicant must have accumulated a certain number of work credits before they can qualify for SSD disability benefits. An individual can earn up to four credits per year of employment. How many credits are needed to qualify for disability depends on the age the individual becomes disabled.

(ii) In general, to get disability benefits, you must meet two different earnings tests:

1) A "recent work" test based on your age at the time you became disabled; and

2) A "duration of work" test to show that you worked long enough under Social Security.

D. Social Security Retirement

(1) One can apply for retirement benefits or benefits as a spouse if they:

(a) Are at least 61 years and 9 months old;

(b) Are not currently receiving benefits on their own Social Security record;

(c) Have not already applied for retirement benefits; and want their benefits to start no more than 4 months in the future.

(d) Benefits may also be available to the recipient's spouse, widow or adult disabled child.

(2) A proportion of the recipient's income from employment will offset or reduce the recipient's Social Security benefits until the

age of 70.

E. Medicare

(1) Medicare is our country's health insurance program for people age 65 or older. The program helps with the cost of health care, but it does not cover all medical expenses or the cost of most long-term care services.

(2) Medicare is the companion program to Social Security.

(3) Retirees are eligible for Medicare depending on their birth year with most individuals qualifying between the ages of 65 and 67. Although a retiree may opt to receive Social Security retirement benefits as early as age 62, Medicare will not start until their normal retirement age.

(4) An individual can get Medicare coverage automatically after they have received Social Security disability benefits for two years.

(5) Other individuals who do not qualify for Social Security Disability benefits but who certain illnesses such as kidney failure or renal disease can also qualify for limited Medicare services with no waiting period.

(6) Dependents such as disabled adult children will also become qualified for Medicare services based on their receipt of Children's Insurance Benefits.

(7) Medicare has substantial deductibles and co-pays.

(8) Many disabled individuals under the age of 65 who receive Medicare benefits will apply and qualify for MA benefits (making them dually eligible) to help offset Medicare's substantial deductibles and co-pays.

(9) Medicare has four parts:

(a) Part A: Hospital insurance (Part A) helps pay for inpatient care in a hospital or skilled nursing facility (following a hospital stay), some home health care and hospice care. Most people age 65 or older who are citizens or permanent residents of the United States are eligible for free Medicare hospital insurance (Part A). You are eligible at age 65 if:

i. You receive or are eligible to receive Social Security benefits; or

ii. You receive or are eligible to receive railroad retirement benefits; or

iii. Your spouse receives or is eligible to receive Social Security or railroad retirement benefits; or

iv. You or your spouse (living or deceased, including divorced spouses) worked long enough in a government job where Medicare taxes were paid; or

v. You are the dependent parent of a fully insured deceased child.

If you do not meet these requirements, you may be able to get Medicare hospital insurance by paying a monthly premium. Usually, you can sign up for this hospital insurance only during designated enrollment periods.

(b) Medical insurance (Part B) helps pay for services from doctors and other health care providers, outpatient care, home health care, durable medical equipment and some preventive services. Anyone who is eligible for free Medicare hospital insurance (Part A) can enroll in Medicare medical insurance (Part B) by paying a monthly premium.

(c) Medicare Advantage plans (Part C). People with Medicare Parts A and B can choose to receive all of their health care services through a provider organization under Part C. If you have Medicare Parts A and B, you can join a Medicare Advantage plan. Medicare Advantage plans are offered by private companies that Medicare approves.

(d) Prescription drug coverage (Part D) helps pay for the costs of prescription drugs. Anyone who has Medicare hospital insurance (Part A), medical insurance (Part B) or a Medicare Advantage plan (Part C) is eligible for prescription drug coverage (Part D).

See attached Medicare 101: Used with permission of Attorney Kate Schilling of

the Greater Wisconsin Agency on Aging Resources

II. Long Term Care Issues: One of the most difficult aspects of planning for one's financial security, whether in one's working years or in retirement, is how to deal with the possibility of becoming totally and permanently disabled.

A. Social security disability benefits will provide some financial security if the illness permits one to continue to live at home.

B. If one needs more care than the family can provide, one may need supplemental care providers at home or out of home care.

C. How does one provide for this kind of potential need, other than saving at a very high rate and denying oneself to an extreme degree presently in order to provide for a circumstance that may never occur?

D. What does one do when it is no longer possible to increase one's savings to cover a health condition that Medicare and insurance will not cover?

E. Even relatively high net worth individuals may spend down substantial assets providing for nursing home care.

F. Public benefits planning (Title 19) or long-term care insurance to pay for care may be part of the solution.

III. Elder law: involves every kind of legal issue for individuals over age 65, ranging from public benefits law to traditional estate planning, but most notably associated with Title 19 or Medicaid law (also called Medical Assistance). The interaction of Medicaid eligibility rules and estate tax planning has caused much discomfort for clients and practitioners.

IV. Title 19 or Medicaid has long been the program of last resort for those who need long term care, i.e., care in a nursing home or at home care for one who has lost the ability to engage in the activities of daily living, such as getting out of bed and moving to a chair, bathing oneself, dressing oneself, feeding oneself, using the toilet, and continence.

A. For those already poor, there is little difficulty in qualifying for long term care Medicaid.

B. For those with more resources, qualifying for Medicaid has now become more difficult.

C. Wisconsin recently changed the rules for qualifying for long term care under Medicaid, especially the right of the state to get paid back after death (estate recovery.)

V. Opportunities for Medicaid Planning in Wisconsin for long term care.

A. Exempt Assets.

1. Single Person.

a. One automobile if used to transport owner.

b. $1,500 face value whole life insurance policy.

c. $3,000 irrevocable burial trust with interest also irrevocable.

d. "burial spaces," head stone, plot, casket, vault, crypt and other paid up funeral expenses; or burial insurance.

CAUTION: limit of $8,000 for items (b) through (d) may be imposed.

e. Personal property and furnishings of reasonable value.

f. $2,000 in liquid assets (e.g. bank account)

g. home if applicant lives in or intends to return to it (home equity limited to $750,000).

2. Married Person.

a. Each spouse can each own the exempt assets listed above except that they can own only one (1) home (unlimited equity value if spouse lives in it) and one (1) car.

b. Personal property can be of unlimited value.

c. The community spouse's retirement funds are not counted.

d. Plus they can own between $52,000 and $122,900 (adjusted annually) of other assets when they apply (Community Spouse Asset Share). Asset share is determined by taking 1/2 of assets as of nursing home admission date with minimum of $50,000 and maximum of $120,900 plus

$2,000 for NH spouse).

e. Designated burial assets unlimited but cost must be documented with funeral home Statement of Goods and Services.

3. Assets in a trade or business held for self support may be exempt.

4. Some assets may not count because they are “unavailable.”

B. Divestment is disposal of assets for less than fair market value. Withdrawal from joint account is divestment unless one withdrawing deposited the money in the account.

C. Immediate annuities can be used to preserve assets without divesting.

D. Look back period is 60 months for divestments on or after 1/1/09 with no limit on penalty/waiting period.

E. Trusts have a look back period of 60 months regardless of when it was set up.

F. Divestment penalty period equals number of months obtained by dividing total divested amount by average nursing home cost statewide (currently $6,554/mo for pre-2009 and $259.08/day currently). Penalty for pre-1/1/09 divestments starts when divestment was made, but for post-1/1/09 divestments starts when one is otherwise eligible for T. 19 (in NH, only exempt and unavailable assets).

G. Payments to relatives (services contracts) are allowed under certain circumstances. Must be in writing with signatures notarized in advance of services if amount paid exceeds 10% of maximum amount of Community Spouse Asset Share and must specify services and payment and be a reasonable amount.

H. Community Spouse Income Allocation allowed from nursing home spouse to bring community spouse's monthly income up to $2,670.00. No cash subsidy from government. (Excess shelter allowance possible for expenses that exceed $801.00, up to total of $3,022.50/month.)

VI. Planning Techniques Still Available.

A. Use of immediate annuities, if they meet the T-19 legal requirements.
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B. Purchase of exempt assets.

C. Use of services contracts

D. Use of promissory notes, but limited in use by changes in the law..

E. Funding of special needs and pooled trusts.

VII. WATCH OUT FOR ESTATE RECOVERY

A. Liens on homesteads.

B. Claims in probate estates.

C. Claim against funds in joint or pay on death bank accounts.

D. State has expanded laws to recover from other nonprobate transfers. Estate planning for the community spouse must be considered along with effect on her future Title 19 eligibility.

E. There have been recent changes to estate recovery law in Wisconsin. These changes are complex and require a consultation with an elder law attorney for an explanation

VIII. Advance Directives such as Powers of Attorney (for health care and finances) are *crucial*.

A. The state form for power of attorney for finances is found at Wis. Stat. Sec. 244.61. However, it is wise to get this document drafted by a knowledgeable elder law or estate planning attorney because the choices and options that need to be in the document are specific to each individual.

B. The state form for the power of attorney for health care is found at Sec.

155.30. The state form is fine for most individuals. See also: https://www.dhs.wisconsin.gov/forms/advdirectives/f00085.pdf for the State Form. (Last reviewed on April 19, 2017)

C. The state form for a Declaration to Physicians, sometimes called the living will is found at Wis. Stat. Sec. 154.03. This should not conflict with the Health Care Power of Attorney. See also: https://www.dhs.wisconsin.gov/forms/advdirectives/f00060.pdf for the State Form. (Last reviewed on April 19, 2017)

D. Do Not Resuscitate Orders are defined by Wis. Stat. Sec. 154.17-29. These are more limited than most people would expect.

E. Authorization for Final Disposition of remains is found at Wis. Stat. Sec. 154.30 and a form is available at Sec. 154.30(8). See also: https://www.dhs.wisconsin.gov/forms/f0/f00086.pdf for the State form. (Last reviewed on April 19, 2017)

IX. Long Term Care Insurance Partnership.

A. The **Long Term Care Insurance Partnership,** "LTCIP," allows a person with a qualified long-term care insurance policy to have assets disregarded in the Medicaid eligibility determination, while at the same time protecting those assets from Medicaid estate recovery. Under the LTCIP, assets are disregarded when determining eligibility for Elderly Blind and Disabled Medicaid programs, or any of the programs for Medicare beneficiaries, up to the total amount of long-term care services paid by the qualified WI LTCIP policy on or after January 1, 2009. The amount paid out by the qualified LTCIP policy on or after January 1, 2009 is not counted toward the WI Medicaid asset limit, nor is it recoverable under the estate recovery program.

B. The maximum amount that can be disregarded for the purpose of Medicaid eligibility, or protected from estate recovery, is the verified amount of benefits paid out by the qualified WI LTCIP policy on or after January 1, 2009.

C. The disregarded asset amount is still counted in the Asset Assessment when

determining the Community Spouse Asset Share in a Spousal Impoverishment case. However, the disregarded asset amount is not counted in the individual's eligibility determination.

D. The disregarded amount is exempt from divestment policies, i.e., transferring assets for less than fair market value up to the LTCIP payout amount will not result in a divestment penalty. However, a divestment may result in a reduction or elimination of the Medicaid eligibility and estate recovery protections under the LTCIP.

E. A "qualified LTCIP policy" must meet all relevant requirements of federal and state law. Qualified LTCIP policies are certified by the Wisconsin Office of the Commissioner of Insurance (OCI). OCI certification of the policy must be verified by assuring that the policy is listed on the OCI website, accessible via the following link: http://oci.wi.gov/oci_home.htm

F. The insured must have been a Wisconsin resident when the qualified LTCIP policy was issued. This must also be verified. In addition, the amount paid out by a qualified LTCIP policy must be verified before it can be disregarded for Medicaid eligibility or estate recovery purposes. The qualified LTCIP policy carrier must document the amount paid for benefits on or after January 1, 2009 using the appropriate OCI approved form (OCI 26-114) and provide verification of the pay out amount upon request.

WARNING: The information in this outline is in brief summary form and is current as of the date presented. Title 19 law historically has changed drastically, frequently, and rapidly. It is imperative that you check back with us about the law and your eligibility before making application for Title 19 to ensure that you will be eligible for Title 19 when you apply. This outline is not intended to be legal advice and the reader should not rely upon the information in it.

MEDICARE 101

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Exhibit to outline of Margaret W. Hickey and Heather B. Poster

Medicare 101 - 2016 Numbers

Medicare

Medicare is health insurance for people age 65 and older. People under the age of 65 can qualify for Medicare after they have received Social Security Disability (SSDI) benefits for 24 months. People with End Stage Renal Disease are eligible for Medicare after 3 months of dialysis treatments.

People who take Social Security early retirement benefits prior to age 65 will receive their Medicare Parts A and B card in the mail automatically a couple of months prior to their 65th birthday. If a person is not receiving Social Security early retirement benefits, then the person will have to affirmatively apply for Medicare by making an appointment at the local Social Security office or by logging in online at the Social Security website (https://www.ssa.gov/myaccount/).

There are 4 parts to Medicare:

Part A is inpatient hospital coverage and skilled nursing facility coverage
Part B is outpatient medical coverage, durable medical equipment, lab tests, & most ambulance rides
Part C is optional, Advantage plans (privatized HMO or PPO)
Part D is drug coverage (privatized)

There is no income or asset criteria for Medicare. A common misconception is that a person needs to have a certain amount of work quarters to qualify for Medicare; however, that is not a requirement for eligibility. Rather the work quarter component determines if a person receives Medicare Part A for free or with a premium. To receive Medicare Part A, a person or their spouse must have worked and paid taxes to Medicare for at least 10 years (40 quarters of credit). A majority of people receive Medicare Part A for free. Those who do not receive it for free pay $411 or $226 per month, depending on the number of work quarters of credit they have.

Everyone pays a premium for Medicare Part B. In 2016, the Medicare Part B premium is $104.90 or $121.80 per month. Typically, everyone pays the exact same Medicare Part B premium, but since there was no cost of living adjustment for Social Security in 2016, the beneficiaries who were already on Medicare and receiving Social Security prior to 2016 were not subject to the premium increase. Assuming there is a cost of living adjustment for 2017, everyone will pay the same Part B premium again.

In addition to Medicare Part A and B, many people choose to supplement their Medicare coverage by adding a **Medigap plan** (also called Medicare supplement) or a **Medicare Advantage plan**. A Medicare supplement is additional coverage through a private insurance carrier, and it wraps around Medicare A and B to fill in the coverage gaps. Medigap plans cover anything Medicare covers—essentially they are not stand alone insurance coverage, so they do not make independent insurance coverage determination. If Medicare covers the item or service, then the Medigap plan will cover it. If Medicare does not cover the item or service, the Medigap plan will not cover it. Medicare supplements sold in the state of Wisconsin are mandated by law to provide an additional 30 days of skilled nursing facility coverage above and beyond what Medicare itself will cover. No prior 3 day hospital stay is required to access the additional 30 days of SNF coverage. But the person must require skilled therapies such as OT, PT, or SLP five days per week to qualify for skilled care. Custodial care in a SNF is not covered by Medicare at all.

Another option is a Medicare Advantage plan, formerly called Medicare Plus Choice. Medicare Advantage plans are a way to combine and privatize one's Medicare Part A, B, and often Part D. Advantage plans are usually a PPO, HMO, or PFFS plan with strict provider networks. Coverage outside of the network is typically only available for emergencies. Advantage plans typically charge additional monthly premiums, in addition to the Part B monthly premium which must continue to be paid. In exchange for the beneficiary agreeing to only see doctors in a strict provider network, the beneficiary receives an annual cap on out-of-pocket expenses (limit is typically between $3,000-$6,700, depending on the plan).

Anyone that is a U.S. citizen or lawful permanent resident will qualify for Medicare. (Non-citizens must have resided in the U.S. for 5 consecutive years prior to the month of enrollment; however, it is not necessary that the person be a lawful permanent resident for the entire 5 years.)

People must generally enroll in Medicare within three months of turning age 65, or within 8 months of leaving active employer coverage to avoid a late enrollment penalty. Health insurance extending into retirement does *not* count as active employer coverage. For those who did not sign up for Medicare when they were first eligible, there is an annual open enrollment period to join Medicare A and B from January 1 to March 31st each year, with enrollments starting on July 1st.

Every year, there is a fall open enrollment period in which people must re-examine drug coverage options under Part D. This occurs between October 15-December 7th, with enrollment changes starting on January 1st. Even if a person stays within the same plan,

the drug formulary, copays, deductible, premium, and out-of-pocket costs can vary from year to year. Name recognition is the worst way to choose a plan. Medicare has a "planfinder" tool online that allows consumers to enter their medications, preferred pharmacies, and zip code, and the planfinder will show the most cost-effective drug plans. Studies typically reflect that 80% of Medicare beneficiaries enroll in the wrong drug plan!

Note: There are Medicare Savings Programs to help low-income people pay for Medicare costs. Go online to https://access.wisconsin.gov/ or visit a local Aging and Disability Resource Center for help determining eligibility for these programs.

Note: A person can have Medicare and also have EBD Medicaid (such as MAPP, LTC Medicaid, or SSI-MA); however a person *cannot* have Medicare and BadgerCare.

Medicare Enrollment Periods

Like other health insurance products, Medicare depends on the support of healthy people to be enrolled and pay premiums. To prevent adverse selection, Medicare has strict enrollment periods when people must sign-up for Medicare. People who do not sign-up when they are first eligible are subject to late-enrollment penalties and restrictive re-enrollment periods for Parts B and D. Below are some enrollment guidelines:

Description	Referred to as	Timeframe
Newly eligible for Medicare at age 65	Initial Enrollment Period	7 month window. Sign up 3 months before your 65th birthday, the month you turn 65, or within the 3 months following your 65th birthday. The month you sign up determines how soon your Medicare starts
Under age 65; newly eligible for Medicare due to disability	Initial Enrollment Period	Eligible to start Medicare on the 24th month after SSDI starts. Can sign up between months 21-28 after SSDI eligibility.
You or a spouse is actively working and you are covered under health	Active employment SEP	Must enroll in Medicare within 8 months of either stopping active

insurance through that active employment		employment, or losing health insurance through active employment, whichever is *first.*
Medicare Part B—did not sign up when first eligible	General Enrollment Period	January 1 – March 31st every year. Coverage starts July 1st. (Note: coordinating Part D enrollment period is April through June.)
Re-evaluate Part D and coverage annually. Change Part D plans, add, drop or change Medicare Advantage plans	Annual Enrollment Period or Open Enrollment Period	October 15-December 7. Changes are effective January 1st.
Medicare Advantage Disenrollment Period	Advantage plan drop/disenrollment period	One way ticket out of an Advantage plan and back into Original Medicare; coordinating Part D SEP

Other SEP's throughout the year to change Part D and/or Medicare Advantage plans:

- Move to a different county
- Move into, out of, or reside within an institution (NH, SNF)
- Released from jail
- Dual eligible or loss of Medicaid
- On Extra Help or Low-Income Part D subsidy
- Leaving drug coverage from employer
- Involuntarily lose other creditable drug coverage
- SeniorCare changes (SPAP SEP)
- 5 star Medicare Part D plan

Medicare and Employer Coverage

Generally *optional* to take Medicare if:

- you/spouse are employed **and** have health insurance through active employment; **and**
- your employer has *more* than 20 employees

**Most people get Part A for free, so some people enroll in Part A and wait to take Part B until they retire.*

- Enroll anytime while actively working

- Must enroll in Medicare within 8 months of:
  - Stop work (quit or retire), or
  - Lose health insurance through work

Warnings:

- Late enrollment penalties and restrictive enrollment periods apply to Part B and Part D.
- COBRA, retiree coverage ≠ active employer coverage
- If < 20 employees, you **MUST** take Medicare at age 65, even if still working!
- If enrolled in employer high-deductible health plan and health savings account (HSA), **CANNOT** be enrolled in Medicare *or* take Social Security benefits.

Late enrollment penalty

- Late enrollment penalty for Part B
- 10% premium increase for every year not enrolled
- Must wait for next annual general enrollment period to enroll

*Enroll between **January 1-March 31** annually → coverage starts **July 1***

Resources:

OCI has some great resources on Medicare
https://oci.wi.gov/Documents/Consumers/PI-002.pdf

See also DHS website:
https://www.dhs.wisconsin.gov/guide/medicare.htm

Board on Aging and Long-Term Care—Medigap helpline publications
http://longtermcare.wi.gov/

Social Security Program Operations Manual System (POMS)
https://secure.ssa.gov/apps10/

2017 Medicare Basics

Medicare is health insurance for people age 65 or older and people under age 65 who have been determined disabled by the Social Security Administration. Coverage options vary in cost depending on the plan, coverage, and the services used.

Option #1

Original Medicare Plan

Together these parts are traditional Medicare

Part A: covers Hospital	Part B: covers Medical
Has a $1,316 deductible per spell of illness (60 days) ▶ Cost: free for most people. Otherwise, $227/mo if 30-39 qtrs of work, $413/mo if under 30 qtrs of work	*Basically* covers 80% of costs after deductible of $183/yr ▶ Cost: $104.90 or $121.80 or $134/mo taken out of Social Security check. *(higher if income > $85,000/yr)*

You have your choice of doctors, hospitals, or clinics that accept Medicare.

+

Prescription Drug Plan

Choose one – can have both

Medicare Part D	SeniorCare
The federal Medicare-approved drug plans provided by private insurance companies. Plans differ in coverage and co-pays. ▶ Cost: monthly prem. plus plan co-pays (some also have deductibles).	The prescription drug program available only in Wisconsin. Funded by state and federal dollars. SeniorCare coverage is based on income level. ▶ Cost: $30/yr plus co-pays and possible deductible

NOTES:

+

Medigap / Supplement Policy

All Supplements work where Medicare does

Traditional Medigap policies are offered by private insurance companies to cover payment of the 20% Medicare does not cover. Optional riders are available to cover additional costs such as deductibles, excess charges, foreign travel emergencies, and additional home health care visits.

▶ Cost: Varies by policy and company. The cost of a basic policy for a 65-year-old is around $200 per month.

OR Medicare is supplemented by a **Retiree/Employee insurance** plan

▶ Cost: varies based on terms of policy.

NOTES:

OR

Option #2

Part C: Medicare Advantage Plans

Medicare Advantage plans are private companies that provide the same benefits as Medicare Part A and B. Using Medicare monies, private companies make arrangements with hospitals/doctors/clinics to provide care for their clients at reduced rates. **Co-pays** are assigned to most medical procedures and need to be paid by insured client. Most plans have maximum out of pocket caps on co-pays that range from $3000 to $6700/yr.

▶ Cost: Medicare and Plan premiums + Co-pays.

3 basic types of Advantage Plans

HMO: Health Maintenance Organization; must use medical providers who are in plan's network.

PPO: Preferred Provider Organization; pay less if using providers in network, more if out of network.

With the above plans, you must get your prescription coverage either from the plan, Senior Care, or the Veteran's Administration.

PFFS: Private Fee for Service; you can use any provider that accepts the plan, and you can get your prescription coverage with a separate Part D plan.

With Advantage plans:

→ Doctors/Hospitals/Clinics MUST accept terms and conditions of plan or you do not have coverage

→ Referrals do not guarantee insurance payment

→ **Doctors/Hospitals, and other providers can terminate their coverage arrangements with each other at any time**

→ Often plans do not offer coverage outside regional area, except for emergencies/urgent care

→ Plans can not drop insured clients for any reason other than non-payment of premium, but plans can leave an area

→ Client no longer uses Original Medicare

Medicare Cost Plans

Cost plans are offered by some HMOs who agree to provide Medicare benefits. Cost plans will only pay supplemental benefits if you use network providers. If you use a non-network provider, Medicare will still pay its share of covered charges, but you will pay the deductibles and co-pays. Prescription coverage can either be with the cost plan, a separate Part D plan, Senior Care or the Veteran's Administration.

The Parts of Medicare

Part A Services:

-Inpatient Hospitalization
-Skilled Nursing Facility Care
-Home Health Care
-Blood
-Hospice Care
-Inpatient Mental Health Services

Part B Services:

-Outpatient Hospital Services
-Doctor's visits
-Durable Medical Equipment, including Oxygen
-Lab work
-X-Rays, Scans, and MRIs
-Physical, Occupational, Speech, and Cardiac Rehabilitation therapies
-Chemotherapy and injectable drugs
-Ambulance
-Emergency room and urgent care
-Diabetes supplies (except insulin and syringes→ Part D)
-Mental Health Services (outpatient)

Part C Services:

-Another name for Medicare Advantage plans.

Part D Services:

-Prescription medications, Insulin, syringes, and the Shingles Vaccine

Some Things to Remember:

-Each year individuals have a chance to review and change their Medicare Part D or Medicare Advantage plan during Medicare's open enrollment, **October 15-December 7.**

-You cannot have an HMO or PPO Advantage plan and a separate Part D Plan together. You can have Senior Care with either plan.

-You can change supplement policies any time if you can find another company who will accept you.

Special thanks to the Dunn County Elder Benefit Specialist for allowing permission to reprint this publication.

UNDERSTANDING YOUR MEDICARE OPTIONS

While Medicare can be a confusing program with many options, it provides essential medical coverage for most Americans age 65 and over and many individuals with disabilities. Before making any decisions about Medicare coverage, it is a good idea to take some time to understand how it works and what it can do for you. There are four different parts to Medicare—Parts A, B, C, and D—and each covers a different healthcare need. Some parts will even penalize you if you don't enroll at a specific time, so it's best to know what you need to do and when.

This brochure will help you to understand the different options available to you and explain some of the benefits and drawbacks of each. Whatever decisions you make, you should keep two things in mind. First, without insurance, healthcare costs are probably much higher than you think. Second, if you need help choosing healthcare coverage, there are always people who can help. Resources to help you make these decisions are listed on the back of this brochure.

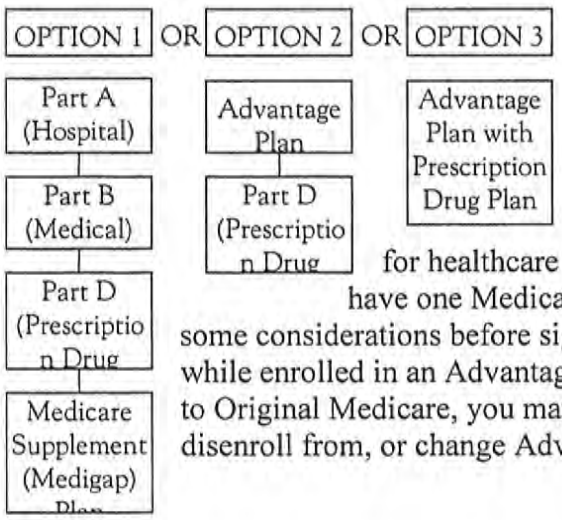
A BASIC OVERVIEW OF MEDICARE AND EMPLOYMENT

Here is how Medicare works: Medicare Part A covers hospital expenses; Medicare Part B covers medical expenses, such as physicians' and lab services; Medicare Part C (or "Advantage") consists of private companies, providing Part A and Part B coverage; and Medicare Part D provides prescription drug coverage.

You may get health insurance through your (or your spouse's) current employer. However, when you (or your spouse) retire, that may change. Your former employer may continue to offer the same plan, it may require you to change to a retiree healthcare plan, or it may discontinue your coverage altogether. In any of these cases (even if you do not retire at 65), you are eligible for Medicare coverage at age 65. That is why it is important for you to understand how your employer's coverage coordinates with Medicare and when that coverage will end. Make sure you know what will change when you retire and when you turn 65.

If you are not working, chances are you must sign up for Medicare between the three months before and three months after your 65th birthday. If you delay enrolling, you may have to pay premium penalties when you decide to enroll at a later date.

TIPS ABOUT MEDICARE ADVANTAGE PLANS



Medicare Advantage (or "Part C") plans are provided by private companies that are approved by the Centers for Medicare and Medicaid Services (CMS). If you enroll in an Advantage plan, you will receive your Medicare Part A and Part B coverage through that company and not through Medicare.

In the chart to the left, you'll see that there are three basic options for healthcare coverage. While it may seem less expensive and more convenient to have one Medicare Advantage (or "Health") plan take care of everything, there are some considerations before signing up. (1) Beneficiaries cannot receive any Medigap coverage while enrolled in an Advantage plan. After enrolling in an Advantage plan, if you decide to return to Original Medicare, you may be ineligible for a Medigap policy. (2) You can only enroll in, disenroll from, or change Advantage plans during a specific time. (3) Advantage plans may be

cancelled if the private insurer fails to turn a profit. (4) Advantage plans can limit which providers you may use, and your plan may not cover any services in other parts of the country. (5) In addition to possible Part C premiums, you will still have to pay your Part B premium. (6) Advantage plan premium amounts do not necessarily reflect actual costs; out-of-pocket expenses may be greater with an Advantage plan. (7) There are many different kinds of Advantage plans, including Medicare Savings Accounts, HMOs, and others. For these reasons, you should contact your Benefit Specialist or the Medigap Helpline before enrolling in an Advantage plan.

THE DIFFERENT PARTS OF MEDICARE:

Medicare Part A

Coverage: Hospitals, skilled nursing facilities, hospice care, some home health care services.
Premium: $0/month for most people. *
Deductible: $1,316 per coverage period for first 60 hospital days (for 2017).
Provider Restrictions: Any provider accepting Medicare.
Late Enrollment Penalties: Only for people who have to pay a Part A premium.
Eligibility: Age 65 or older or Social Security Disability recipient for 24 months.
Enrollment Periods:
Initial: 7-month period that begins 3 months before the month that you turn 65.
General: Jan. 1 to Mar. 31 each year. Coverage begins July 1.

* Based on 40 or more work credits. If you have fewer, you will have to pay a premium of $413 or $227 per month.

Medicare Part B

Coverage: Medical services, outpatient procedures, ambulances, emergency room, tests, durable medical equipment.
Premium: $134 per month for 2017.
Deductible: $183 per year for 2017.
Additional Costs: Usually 20% of the Medicare-approved cost of services.
Provider Restrictions: Any provider who accepts Medicare.
Late Enrollment Penalties: For each 12-month delay in enrollment, add 10% to your monthly premium (unless you qualify for a special enrollment period).
Eligibility: Age 65 or older or Social Security Disability recipient for 24 months.
Enrollment Period:
Initial: 7-month period that begins 3 months before the month that you turn 65. You are automatically enrolled when you are enrolled in Part A. If you keep your original Medicare card, you are keeping and agreeing to pay for Part B.
General: Jan. 1 to Mar. 31 each coverage year. Coverage begins July 1.

Medicare Advantage ("Health" or "Part C") Plan

Coverage: Private provider coverage that is equal to or greater than coverage under Medicare Parts A and B and may include prescription drug coverage.
Premium: Differs by plan. You must pay the Part B premium (and Part A premium – if you have one) in addition to any Advantage plan premiums.
Deductible: Differs by plan.
Additional Costs: Co-pays differ by plan.
Provider Restrictions: Depending on the type of the plan, different restrictions may exist.

Eligibility: Must have Medicare Part A and B.
Enrollment Period:
Initial: 7-month period that begins 3 months before the month that you turn 65.
General: Oct.15 to Dec. 7 each year. Coverage begins Jan. 1.

Medicare Part D

Coverage: Private provider coverage of prescription drugs. Formularies (covered drugs lists) differ by plan.
Premium: Between $17.00 and $155.70 (for 2017 plans).
Deductible: Up to $400 (for 2017 plans).
Additional Costs: Co-pays for prescription drugs differ by plan.
Provider Restrictions: In-network pharmacies, except in emergencies.
Late Enrollment Penalties: Add 1% of base beneficiary premium (to current premium) for every month you could have had Part D but did not (unless you had other creditable coverage).
Eligibility: Must have Medicare Part A or B.
Enrollment Period:
Initial: 7-month period that begins 3 months before the month that you turn 65.
General: Oct. 15 to Dec. 7 each year. Coverage begins Jan. 1.

Medicare Supplement ("Medigap") Plan

Coverage: Private provider coverage for deductibles and coinsurance. Medigap plans will coordinate payment only with Medicare Parts A and B, not Medicare Advantage plans. However, if you already have a Medigap plan, you are entitled to keep it even if you have a Medicare Advantage plan. You may want to do this to ensure that you do not lose your ability to obtain a Medigap plan in the future.
Premium: Differs by plan.
Deductible: None.
Provider Restrictions:
Standardized Medigap policies: Any Medicare provider.
Select Medigap policies: Specific hospitals and doctors.
Late Enrollment Penalties: Provider may decline to offer policy.
Eligibility: Must have Medicare Parts A and B.
Enrollment Period:
Initial: First six months after you are 65 and enrolled in Part B. During this period, you must be issued a Medigap plan regardless of age, prior claims, health, or preexisting conditions.
Other: Any time. However, after the initial 6-month enrollment period, your option to buy a Medigap policy.

Medicare Tips

- Call (800) MEDICARE / (800) 633-4227 (toll free) to obtain a free copy of "Medicare & You." This publication provides detailed and current information about Medicare, including all the Part C and Part D plans in Wisconsin. For information on Medicare Supplement policies, call the Medigap Helpline at (800) 242-1060 (toll free).
- You may be given the opportunity to allow a Part C or Part D carrier to automatically deduct your premiums from your Social Security checks. While this may be easier than mailing checks, it could result in overpayments. Unfortunately, if an overpayment occurs, it could take several months to resolve.

NEED MORE HELP?

Below is a directory of resources available to you free of charge.

Medicare: www.medicare.gov
(800) MEDICARE / (800) 633-4227 (toll free)
Get answers to common questions and/or help finding Part D plans and Medicare publications.

Access Wisconsin: www.access.wisconsin.gov
(800) 362-3002 (toll free)
Find out all the state and federal benefits you are entitled to, including: FoodShare, Medicaid, and SeniorCare.

Medigap Helpline: www.dhs.wisconsin/gov/aging/boaltc/medigap
(800) 242-1060 (toll free)
Trained counselors help you compare Medicare Supplement, Medicare Advantage, and employer-related coverage plans.

Prescription Drug Helpline:
(855) 67PART D / (855) 677-2783 (toll free)
Trained counselors help you compare Medicare Part D plans and other prescription drug coverage.

Disability Drug Benefit Helpline:
(800) 926-4862 (toll free)
For individuals on Medicare-based on disability, trained counselors help you compare Medicare Part D plans and other prescription drug coverage.

If you have any questions, contact your tribal or county benefit specialist.

GWaar
Greater Wisconsin Agency on Aging Resources, Inc.

1414 MacArthur Road
Suite A
Madison WI 53714
Ph. 608.243.5670
Fax. 866.813.0974

STATE BAR OF WISCONSIN
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PROGRAM DESCRIPTION: AFTERNOON SESSION 1

RETIREMENT AND THE LAW – NAVIGATING THE PATH FROM ACTIVE LEGAL PRACTICE TO RETIREMENT

During this session, each distinguished panelist will share his or her unique experience and background as it relates to retirement and the law. Then, Attorney Harvey Wendel will delve deeper into the transitions to retirement, exploring areas that professionals in the field have found to be problematic about retirement, and offering possible solutions and/or ideas to consider in dealing with these issues. The last portion of this session will include a Q&A with the full panel.

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SPEAKER BIOGRAPHIES

RETIREMENT AND THE LAW – NAVIGATING THE PATH FROM ACTIVE LEGAL PRACTICE TO RETIREMENT

Steven A. Bach | Pines Bach LLP

Steven A. Bach has practiced family law since 1974, when he graduated from the University of Wisconsin Law School.

He is a member of the American Academy of Matrimonial Lawyers, The Fellows of the Wisconsin Law Foundation, the Collaborative Family Law Council of Wisconsin, and the State Bar of Wisconsin. He has published articles in various professional publications and is a contributing author to the State Bar of Wisconsin's Guardian ad Litem Handbook.

Mr. Bach is currently in a transitioning phase. After having been a partner in the law firm, Cullen Weston Pines & Bach from 1986 to 2013 (now Pines Bach LLP), he has taken an "of counsel" status while remaining employed on a slightly than half-time basis. He continues to participate in various pro bono activities including the Dane County Bar Associate Case Mediation Program and the Family Law Assistance Program.

John Rashke | DeWitt Ross & Stevens SC, Semi-Retired

If John Rashke is not out fishing, he can be found on the Wisconsin Ice Age Trail performing maintenance, building benches, or raising funds to preserve this natural treasure.

Mr. Rashke concentrated his legal practice in the area of qualified and non-qualified retirement plans, cafeteria and fringe benefit plans, and other forms of compensation planning. He had extensive experience with professional practices, including formation of entities, mergers acquisitions, and reorganizations in Wisconsin and numerous other states.

Additionally, Mr. Rashke served as counsel for a mutual fund family, including acquisition of another fund family and the reorganization thereof. He has represented numerous large manufacturers in the design, implementation, and administration of their qualified retirement plans, and he helped form and advise an internet B2B start-up company.

Mr. Rashke is the founder and past President of Madison Pension Counsel, a member of the State Bar of Wisconsin and the Iowa, American and Dane County Bar Associations. He received his law degree from the University of Iowa in 1967 and a B.A. degree from Northwestern University in 1964.

He is still "half-a-step" from complete retirement and goes to the office on an as-needed basis, as well as occasionally working from home.

Continued

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Joshua J. Kindkeppel | Eustice, Laffey, Sebranek & Auby S.C.

Josh Kindkeppel has been involved with the Dane County Mentorship Program (now known as the Joseph A. Melli Mentorship Program) since its inception. Mr. Kindkeppel has been in private practice in Dane County since 2003, and is currently a shareholder at Eustice, Laffey, Sebranek & Auby, S.C. where he focuses on business, real estate, and employment matters. He served as President of the Dane County Bar Association and currently sits on its Board, co-founded the Sunshine Legal Clinic – a free legal clinic in Sun Prairie, and is the president-elect of the Sun Prairie Rotary Club.

Mr. Kindkeppel is admitted to practice law in Wisconsin and Minnesota. He is a Fellow of the Wisconsin Law Foundation and recognized as a "Rising Star" in Wisconsin Super Lawyers.

John "Jack" Sweeney | Retired

John R. Sweeney graduated from Notre Dame Law School in 1973. He worked for legal services and the EEOC in Chicago before coming to Madison where he worked for the Department of Justice for over 25 years. He then spent 10 more years in private practice at Melli Walker Pease and Ruhly, where he primarily focused on civil litigation.

Mr. Sweeney has served as the President of Dane County Bar Association and was a strong supporter of the concept and implementation of the Dane County Mentorship Program. He has served as a mentor in the program since 2009.

Harvey L. Wendel | Murphy Desmond S.C.

Harvey L. Wendel is of counsel at the Madison law firm of Murphy Desmond S.C. He has over 50 years of experience representing clients in real estate development and financing, including sales and acquisitions. He received his B.B.A. from the University of Wisconsin-Madison and his J.D. from the University of Wisconsin Law School.

Mr. Wendel served as a member of the State Bar of Wisconsin Board of Governors and has been board liaison to many State Bar of Wisconsin sections and committees. He is a member of the State Bar of Wisconsin Committee on Resolution of Fee Disputes (District 9) and a Board member of the Dane County Senior Lawyers Section. In addition, he has served as an arbitrator as a member of the Board of Neutrals of the American Arbitration Association.

Mr. Wendel is the past president of the State Bar of Wisconsin's Senior Lawyers Division. He was appointed by the Supreme Court to the Board of Administrative Oversight which monitors fairness, effectiveness, and efficiency of the Attorney Regulation System. Mr. Wendel served on the Board for eight years. He has also served as the Chair of the Law for the Public Committee, as is currently an officer and member of the Dane County Bar.

Continued

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Anne Taylor Wadsack | DeWitt Ross & Stevens SC

Anne Taylor Wadsack is well respected among Family Lawyers statewide for her understanding of business and tax matters in family law matters. When faced with a divorce where there are ownership interests in closely-held businesses, professional practices, traditional partnerships or limited partnerships, hundreds of clients have turned to Anne over the years for her sound advice and experience. She is a senior member in the Firm's Family Law group based in the Madison office, and over the last several years has restricted her practice to consulting on such matters with her colleagues inside the firm and from outside the firm.

Her reputation in business aspects of family relationships has resulted in her preparation of marital property agreements, both in the form of pre-nuptial agreements and as part of general estate planning for married couples.

Ms. Wadsack is a University of Wisconsin-Madison Law School graduate, with a B.A. from Connecticut College with a major in English and a minor in music. She is a member of the American Bar Association, the Dane County Bar Association, President of the Euterpe Club of Madison, immediate Past President of Bach Dancing & Dynamite Society, and as a member of the State Bar of Wisconsin, she serves on the Senior Lawyers Division Board of Directors.

STATE BAR OF WISCONSIN
SENIOR LAWYERS DIVISION

MAY 4, 2017

TRANSITIONS TO RETIREMENT FROM LAW PRACTICE

SPEAKER: HARVEY L. WENDEL

As a result of a stroke or heart attack, or in response to decreasing effectiveness due to age-related problems, most older professionals will eventually need to think about retirement or some reduction of duties at work. This is a difficult topic to approach, particularly if the older person does not see the need to make adjustments. I would like to explore areas that professionals in the field have found to be problematic about retirement, and offer possible solutions and/or ideas to consider in dealing with these issues.

Planning as an Individual:

Whether a partner in a firm or a solo practitioner, each person needs to make realistic plans for his or her retirement as an individual, apart from any provisions made in the workplace. This planning involves addressing personal, as well as financial issues that affect the individual and (if applicable) his or her spouse.

Planning Through the Firm:

The best way to smooth the transition is for a firm to have a plan in place before death, disability or retirement become issues. Partners should consider what they would do if one of them were to die or become disabled, and how they would like to handle retirement. The need to plan for the future security of firm members is a growing concern among young and old alike. In structuring a program, a firm must deal with the sensitive issues of determining the age of retirement; whether retirement should occur through a gradual phasing-out period or as a strict cut off; the amount of retirement benefits; and what, if any, perquisite should be made available to the retiring partner." (Maskaleris, Stephen N., "Survey of Retirement, Death, Withdrawal, and Disability Partnership Agreement Clauses of Twenty Major United States Law Firms", The Lawyers Guide to Retirement, ed. David A. Bridewell, p. 82.)

What the plan will entail must be determined by the specific firm, but making a plan is essential for the good of the firm and the individual. Some methods that firms have used to structure retirement policies include:

- Voluntary retirement - usually starting at age sixty with a requirement that thy partner has been with the firm for a set number of years.

- Mandatory retirement - usually imposed on partners by their seventieth birthday, unless they are given permission to continue as active partners by a vote from the remaining partners.

- Gradual reduction of duties leading to full retirement - for example, a four-step phasing out period starting at age sixty-five and continuing over a three year time span. During the three years the person's partnership interest would be decreased as well as his or her workload.

If you are planning to retire from solo practice or leave your present firm, it is essential that you let your clients know of your decision. It is imperative that clients be informed that they are free to make a choice to either stay with your existing firm, someone you recommend, or leave and go with a new lawyer or firm.

I. What To Do If You Decide To Retire From

A. Your Firm

B. Your Solo Practice

II. What Financial Obligations Are Required

A. To Your Firm

B. To Your Clients

III. What Other Obligations Are Required

A. To Your Firm

B. To Your Clients

IV. Letter Of Notification To Clients

A. You Are Going To Retire

B. The Firm Is Going To Dissolve

C. The Firm Is Going To Merge

D. Who Will Be Taking Over Your Law Practice

E. Answering Questions

1. From Clients
2. From The Community

F. Sample Form Letter A - Retirement From Firm (see attached)

G. Sample Form Letter B - Retirement From Sole Practice (see attached)

V. What To Do If You Decide To Retire

A. Concealing Plans To Retire And Leave The Firm

B. When To "Spring" The News

C. Ethical Obligations To Your

1. Clients

2. Partners/ Shareholders

VI. Work To Achieve A Smooth Transition

A. Best To Have Cooperation On All Sides

1. Don't Try To Keep Clients When You Are Retiring

2. Letter OfNotification To Clients

3. Ethical Considerations

4. When You Retire, Clients Must Be Informed That They Are Free To Leave Your Firm Or Go With A New Lawyer Or Firm

VII. Transitioning Clients To A New Lawyer Or Firm

A. Referral Issues

B. Administrative Issues

1. Conflict Questions (SCR 20:1.7-13)

2. Trust Accounts

3. Protecting Client Interests

VIII. "Selling" Your Practice

A. Not Possible

B. May Only Sell Assets Which Enable The "New" Owner To Send An Announcement Or Letter To Existing Clients Informing Them Of The Change, But Giving Them The Right To Make Their Own Decision About Staying On Or Leaving (SCR 20: 1.17)

C. Client Must Consent To Revealing Confidential Information (SCR 20: 1.6)

D. Seek Court Order Authorizing Transfer Of File Where Clients Do Not Respond Or Cannot Be Given Actual Notice

E. Questions To Ask:

1. What Is In The Best Interest Of Your Clients

2. Do Your Clients Have Adequate Representation

3. What Is In Your Best Interest

4. What Ethical Rules Apply

a. Conflict of Interest, SCR 20: 1.7

b. Purchase of Practice of a Deceased Lawyer, SCR 20:5.4(a)(2)

c. Restrictions on Right to Practice, SCR 20:5.6

d. Advertising, SCR 20:7.2

IX. Liability Insurance

A. "Tail" Coverage

B. "Letting Go"

X. Good Luck

XI. What To Do After You Retire

A. Many things can happen over the course of a legal career, both to an individual as well as a firm. So that whatever may happen, be sure to remember that your first duty is to your clients before your own personal needs, and that your actions are always subject to the rules of professional conduct, both as to your clients as well as to your solo law practice or firm.

B. The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over, the retiring lawyer or firm may obtain compensation for the reasonable value of the practice a may withdrawing partners of the firm (see SCR 20:5.4 and SCR 20:5.6).

4818-0076-1096, v. 1

RETIREMENT FROM LAW PRACTICE

Sample Form Letter A – Retirement From Firm:

[DATE]

[CLIENT]

Dear [CLIENT]:

I am writing to inform you that I will be retiring from law practice as an attorney (and partner at [FIRM]) effective [DATE]. The Lawyers Code of Professional Responsibility assures that every client has the right of continued representation by a lawyer of the client's choice, and, to that end, you may choose to have continuing representation by [NAME OF NEW LAWYER OR FIRM] with whom I have made arrangements to have my files transferred upon my retirement.

I believe that [NEW ATTORNEY OR FIRM] will be able to serve your needs as well as the needs of all of [MY] clients.

If you decide to continue with [NEW ATTORNEY OR FIRM], the terms of your representation should be addressed with [NEW ATTORNEY OR FIRM] so that you will know the hourly rate at which you are being charged and the manner in which your file and future representation will be handled by [NEW ATTORNEY OR FIRM].

You are, of course, entitled at any time to terminate my representation of you although I hope you will continue to allow [NEW ATTORNEY OR FIRM] to work with you regarding your immediate and long term legal needs.

Please make your choice by selecting one of the options listed at the foot of this letter and signing your name. A duplicate of this letter and a self-addressed stamped envelope is enclosed for that purpose.

If you have any questions, please feel free to contact me. Whatever choice you make, I will take whatever steps are necessary so as to assure continued representation of your needs and interests without interruption.

Thank you for your trust and faith over the years. As always, you may feel free to contact me at any time if you have any questions or concerns.

Sincerely,

[NAME]

_____ Please provide continued representation for me by [ATTORNEY/FIRM]. I authorize transfer of my files to the [NEW ATTORNEY OR FIRM].

_____ Please transfer my files to another attorney, [NAME].

_____ Please call me with further instructions.

Dated this _____ day of _____, _____.

_____ _____

[CLIENT] [CLIENT]

Again, please remember that your first duty is always to your clients before your own personal needs and your actions are always subject to the Rules of Professional Conduct both as to your clients as well as to your solo law practice or firm.

Sample Form Letter A

4811-9887-1302, v. 1

RETIREMENT FROM LAW PRACTICE

Sample Form Letter B – Retirement From Solo Practice:

[DATE]

[CLIENT]

Dear [CLIENT]:

Effective [DATE], I am retiring from law practice and have made arrangements with [INDIVIDUAL ATTORNEY] with the firm of [NEW FIRM], [ADDRESS], telephone [NUMBER] to assist me in taking over my law practice.

In the past, I have worked on your files and represented your interests. The Lawyers Code of Professional Responsibility assures every client the right of continued representation by the lawyer of the client's choice. You may choose to have continuing representation by [INDIVIDUAL ATTORNEY] at the [NEW FIRM] law firm or to have your representation and files transferred to an attorney of your choice.

Please select one of the options listed at the foot of this letter and sign your name. A duplicate of this letter and a self-addressed, stamped envelope is enclosed for that purpose. If you have any questions, please feel free to contact me. Whichever choice you make, I will take the steps necessary to assure continued representation of your interests without interruption.

Sincerely,

[NAME]

_____ Please provide continued representation by [NAME]. I authorize transfer of my files to [ATTORNEY], [NEW FIRM].

_____ Please transfer my files to (another attorney).

_____ Please call me with further instructions.

Dated this _____ day of _____, _____.

_____ _____

[CLIENT] [CLIENT]

ETHICS AND THE DEPARTING LAWYER: SOME CONSIDERATIONS

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One of the most frequent questions asked of me on the State Bar's Ethics Hotline is "I'm leaving my firm for a job at another firm – what are my ethical responsibilities?" This question also comes from the other side – i.e. what are the ethical responsibilities of the firm the lawyer is leaving, and likely wanting to take clients. A review of the Rules of Professional Conduct will provide little guidance at first blush. There are no Rules that specifically address the situation from either perspective, and there is seemingly little indirect guidance. There is also little guidance from Wisconsin case law, as there are no Wisconsin disciplinary cases outlining a lawyer's ethical responsibilities when leaving a firm, or a firm's ethical responsibilities when a lawyer departs.

There is however, a significant collection of ethics opinions from various jurisdictions, including Wisconsin and the ABA, that reach a general consensus on a lawyer's ethical responsibilities when leaving a firm. This outline makes recommendations based upon that consensus and I include a list of ethics opinions and cases upon which I draw. Every Wisconsin lawyer should review Wisconsin Ethics Opinion E-97-2, a copy of which is attached. I also highly recommend that ABA Formal Opinion 99-414 be reviewed, as this opinion is widely relied upon and provides a relatively comprehensive discussion of the topic. It should be remembered, however, that ethics opinions, including Wisconsin opinions, are advisory only and are not binding on any court or the Office of Lawyer Regulation. I should also note that the recommendations I make are advisory only.

Please also note that because this is an outline for a rather brief presentation, it only addresses lawyers' responsibilities under the Rules of Professional Conduct, and only briefly touches upon other areas of law which may be relevant, such as the law of partnerships and business torts. Some questions not addressed herein, such as whether a departing lawyer may take forms which the lawyer developed, may be primarily answered by reference to these other bodies of law.

Finally, the Rules of Professional Conduct referenced herein are the new Wisconsin Rules that become effective on July 1, 2007. The analysis and recommendations I make, however, are equally valid under the present Rules.

A. GENERAL PRINCIPLES FOR ALL LAWYERS

1. **NOBODY "OWNS" A CLIENT:** Neither a departing lawyer or the firm have a "right" to any client. Clients have a right to counsel of their choice and may fire their lawyer at any time, with or without cause. A lawyer who fails to withdraw when terminated violates SCR 20:1.16(a).

2. **THE CLIENT OWNS THE FILE:** The file is the property of the client and must be provided upon request. Trying to fight with a former client or their lawyer about a file is almost always a losing proposition for a Wisconsin lawyer.

3. **LAWYERS HAVE A DUTY TO PROVIDE ACCURATE AND NON-MISLEADING INFORMATION TO CLIENTS:** This applies when a lawyer leaves a firm. The prohibitions contained in SCR 20:8.4(c), and in some circumstances SCR 20:4.1, apply to information provided to clients about a lawyer's departure from a firm.

B. SOME CONSIDERATIONS FOR THE DEPARTING LAWYER

1. **A lawyer departing a firm, and the firm, have a duty to notify current clients of the lawyer's departure:** Under SCR 20:1.4(a)(3), a lawyer has a duty to keep current clients reasonably informed about the status of their matters. The departure of a lawyer who has primary or substantial responsibility for a client's matter is a significant event in the representation, impacting the client's right to choose their own counsel, and thus lawyers have an ethical duty to notify current clients of the lawyer's departure. This responsibility is shared by the firm. This is not to say that every current client of a departing lawyer must receive two notices – one from the lawyer and one from the firm. This simply means that a both the firm and the departing lawyer have an ethical duty to ensure that the affected clients receive timely notice.

2. **The duty to notify is limited to current clients:** A lawyer leaving a firm does not have a duty to notify former clients of the lawyer's departure, nor does the lawyer have a duty to notify clients for whom the lawyer performed only remote or incidental services. For example, a lawyer who performs a few hours of document review or drafted a memo on an evidentiary issue

need not notify the client of the lawyer's departure. If a client would reasonably look to a lawyer as "their" lawyer (or one of "their" lawyers), and if the lawyer has direct or principal responsibility for the client's matter, then notice should be given to that client.

3. **Such notice to current clients of the departing lawyer is not impermissible solicitation:** SCR 20:7.3(a)(2) explicitly allows a lawyer to solicit, in-person or by telephone, professional employment from persons with whom the lawyer has a prior professional relationship, and a lawyers' present professional relationship also allows for such solicitation. Such in-person or telephonic solicitation is not permitted with respect to person with whom the lawyer has *no* professional relationship.

4. **The notice may be in-person, by telephone or any other reasonable form of communication:** There is no required format for the notice to clients, although both the lawyer and the firm are well advised, for their own protection, to provide the notice in writing.

5. **The notice to current clients should contain sufficient information to allow the clients to make an informed decision about the matter:** The primary purpose of the notice to clients is to allow the clients to make an informed decision about their legal representation and the information in the notice should be geared towards assisting the client in this decision. It is generally recommended that the notice to clients contain the following;

    - The fact of and date of the lawyer's departure from the firm.
    - The notice may indicate the willingness of the departing lawyer to continue to represent the client at the lawyer's new firm, but the lawyer *should not* urge the client to end the client's relationship with lawyer's current firm.
    - The departing lawyer should be ready to provide relevant information (e.g. firm size, capabilities, etc.) about the lawyer's new firm should the client request.
    - The notice should make clear that the client alone has the right to decide whether to a) follow the departing lawyer, b) remain with the firm or c) seek other counsel entirely (See Restatement § 14, Comment h.).
    - The notice should be neutral in tone, must not disparage the lawyer's former firm and must not contain any false, misleading or deceptive statements.

6. **Timing of the notice:** Because the fact of the lawyer's departure is material information that the lawyer has a duty to communicate to the client, the lawyer should provide the notice sufficiently in advance of the lawyer's departure so that the client has time to make a considered decision. It is not always possible to give clients ample advance notice, but even in cases

where notice can only be provided contemporaneously with the lawyer's departure, the above guidelines should still be followed. If the lawyer reasonably anticipates that the notice to the firm will result in immediate termination, that should be taken into account when determining when to provide notice to the clients.

7. **Notice to the lawyer's present firm:** There is nothing in the Rules of Professional Conduct that requires that the lawyer provide notice to the lawyer's firm before providing notice to current clients. As noted *supra*, the notice to clients is not impermissible solicitation and is necessary to fulfill the lawyer's duty to communicate with the clients, and a lawyer does not violate any other Rules by providing notice to clients first.

   That being said, other bodies of law may pose hazards for the departing lawyer if the lawyer actively solicits clients prior to notifying the firm. There is case law from other jurisdictions finding viable civil causes of action against departing lawyers for soliciting firm clients before notifying the firm of the lawyer's departure.[1] These cases are based upon bodies of law other than legal ethics, such as agency, partnership, contracts, business torts and property, usually deal with fairly egregious facts and tend to draw a distinction between "notice" and "solicitation."[2] It is unlikely that a lawyer simply notifying clients, in a neutral manner, of the lawyer's pending departure runs much risk of civil liability. It is also worth noting that the Restatement (Third) of the Law Governing Lawyers, §9, takes the position that a departing lawyer may not "solicit" clients until providing adequate and timely notice to the firm.

   As this outline deals with the Rules of Professional Conduct and not other areas of law, I will not discuss these other cases. But I do want to point out that there is some tension between the law of "ethics," as defined by the Rules of Professional Conduct, and other bodies of civil law. The safest course for the departing lawyer is notify the firm before notifying clients, but the Rules of Professional Conduct do not mandate this course.

8. **After departing the firm, the lawyer may contact clients of the firm as any other lawyer:** A lawyer who has left the firm may contact clients of the lawyer's former firm subject to the same strictures as any other lawyer. 20:7.3 governs lawyer's contacts with prospective clients. SCR 20:7.3(a)(2) allows a lawyer to directly contact, for purposes of soliciting legal employment, any person with whom the lawyer has had a "prior professional

[1] *See e.g.* Shein v. Myers, *394 Pa. Super. 549, 576 A.2d 985 (Pa. 1990);* Siegel . Arter & Hadden, *85 Ohio St. 3d 171, 707 N.E. 853 (Ohio Sup. Ct. 1999);* Dowd & Dowd v. Gleason, *181 Ill.2d 460, 693 N.E.2d 358 (Ill. 1998);* Meehan v. Shaughnessy, *404 Mass 419, 535 N.E.2d 1255 (1989);* Graubard, Mollen, Dannett & Horowitz v. Moskovitz, *653 N.E.2d 1179 (N.Y. 1995).*

[2] This distinction is usually framed as the difference between telling a client "I'm leaving this firm and thought you should know" and "I'm leaving this firm and I would like you to commit to come with me to my new firm."

relationship." Thus the lawyer may directly contact client who the lawyer has previously represented. SCR 20:7.3(c) allows a lawyer contact any person via written, recorded or electronic communication, for purposes of soliciting professional employment, provided that the materials are clearly marked as "Advertising Materials" and a copy is filed with the Office of Lawyer Regulation. All lawyers are prohibited from engaging in solicitation under the circumstances outlined in SCR 20:7.3(b). Further, advertisements that do not constitute solicitation, such as general announcements of the lawyer's new firm affiliation, are permissible provided they comply with SCR 20:7.1 and SCR 20:7.2.

C. SOME CONSIDERATIONS FOR THE FIRM

1. **A firm may contact the clients whose cases are being handled by the departing lawyer and indicate willingness to continue to represent the client:** Absent unusual circumstances, clients normally retain the firm rather than an individual lawyer. However, as discussed *supra*, departing lawyers may notify clients and indicate their willingness to continue to represent clients at the new firm. The best case scenario is always for a joint notice, from both the departing lawyer and the firm. This goes a long way towards protecting everybody – the lawyers are more comfortable is being able to see what is being said to the clients by the "other side" and the clients are more likely to receive accurate and neutral information that respects their right to counsel of their choice. However, should the departing lawyer refuse to participate in such joint notice, the firm is certainly free to plainly inform the client of the firm's willingness to continue the representation, provided the firm follows the guidelines laid out in 5, *supra.*

2. **The firm also has a duty to notify clients of the departure of the lawyer who has responsibility for that client's matter:** As noted above, the departure of the lawyer is a significant event, of which the departing lawyer and the firm have an obligation to inform the client. In some circumstances, a lawyer may leave a firm suddenly or not provide the required notice to affected clients. The firm then must provide the required notice to the affected clients. The content of this notice will vary depending on circumstances, for example when the lawyer is leaving for non-legal or government employment and cannot continue to represent clients in the new employment the notice will be different than if the lawyer is leaving for a different private firm. Again, the guidelines outlined in 5, *supra*, should be followed.

3. **The firm may not refuse to provide the file to a client who requests it:** As noted above, the file is the property of the client and the lawyer or firm who holds the file is obligated by SCR 20:1.16 and SCR 20:1.15 to provide the file when the client requests it. This holds true with respect to requests

for the file that come from a former client's successor counsel. The existence of an "attorney's lien" on a file has never been recognized in Wisconsin and the firm may not withhold a file to coerce payment of fees and/or costs. Likewise, in most circumstances, the client may not be billed for copying expenses. For further discussion, see *Wisconsin Ethics Opinion E-00-03.*

4. **The firm has an obligation to provide accurate and non-misleading information to current and former client who wish to contact a lawyer who has left the firm:** If a former client contacts the firm attempting to contact a lawyer who has left the firm, the firm may not refuse to provide the lawyer's new contact information. The firm may inquire as to whether the firm may assist the former client, but may not refuse to provide the information or falsely tell the former client that the lawyer's whereabouts are unknown. For discussion of this issue, see *Philadelphia Bar Association Ethics Opinion 94-30.*

5. **The firm may not impose restrictions on departing lawyer's right to practice elsewhere:** SCR 20:5.6(a) prohibits any lawyer from making or participating in an employment, partnership or similar agreement that restricts a lawyer's right to practice. The most obvious from of prohibited agreements are non-competes, but the restrictions also apply to financial penalties imposed upon departing lawyers. There is a limited exception with respect to retirement benefits. For further information see *ABA Formal Opinion 06-444.*

SOME RESOURCES RELIED UPON IN PREPARATION OF THIS OUTLINE

Wisconsin Ethics Opinion E-97-2 (attached)
ABA Formal Opinion 99-414 (available for a fee at abanet.org)
DC Bar Ethics Opinion 273 (available at www.dcbar.org)
Phil. Bar Ethics Opinion 99-100 (available at www.philadelphiabar.org)
Kentucky Bar Assoc. Ethics Opinion E-424 (available at www.kybar.org)
Ohio Ethics Opinion 98-5 (available at www.sconet.state.oh.us/BOC)
Pennsylvania and Philadelphia Joint Ethics Op. 2007-300 (2007)
Restatement (Third) of the Law Governing Lawyers, § 9

Wisconsin Ethics Opinion E-97-2: Obligations of a lawyer and a law firm when a lawyer terminates association with a law firm

Question

What are the obligations of a lawyer and a law firm (either a partnership or a corporation) when a lawyer who has been responsible for client matters decides to leave the firm prior to the completion of work on such matters?

Opinion

It is generally recognized that absent a special agreement, a client retains a law firm to provide legal services rather than a particular lawyer in the law firm. ABA Committee Informal Opinion 1428 (February 1, 1979). Therefore, subject to the contrary wishes of the client, a law firm is obligated to continue to handle matters that were handled by a departing lawyer. If the law firm is unable or unwilling to continue to handle the matters that were the responsibility of the department lawyer, the law firm must assist the client to obtain other legal representation. ABA Committee Informal Opinion 1428.

If the client decides not to continue representation by the law firm, the law firm is required by SCR 20:1.16(d) to take reasonable steps to protect the interests of the client, including preserving timelines and filing obligations and surrendering papers and property to which the client is entitled. See Formal Opinions E-82-7 (Copying client's files) and E-95-4 (Lawyer self-help in enforcing fee agreement with clients). If the client decides to retain another lawyer for continuing representation, there may be an agreement for a division of fees between that other lawyer and the law firm. SCR 20:1.5(e).

Before departing a law firm, a lawyer has obligations to the clients for whom the lawyer has been responsible for handling legal matters. Under SCR 20:1.3, a lawyer must act with reasonable diligence and promptness in representing a client, and under SCR 20:1.4, a lawyer is obligated to keep a client reasonably
informed about the status of a matter. Consequently, a departing lawyer must communicate the fact that the lawyer is departing the law firm to all clients for whom the lawyer has been responsible for handling legal matters within a reasonable period of time after the decision to depart the law firm has been made.

The communication, whether written or by personal contact, should be accomplished in a professional and non-inflammatory manner, and should not be

disparaging of either the departing lawyer or the law firm. Unless the understanding of the original contract of employment was that the client desired to hire the specific attorney rather than the law firm, the communication should state that the law firm is obligated to continue to represent the client or to assist the client in securing counsel should the client desire not to continue representation with the law firm, or should the firm be either unable to or unwilling to continue representation. The communication should indicate that the client has the right to decide who will represent the client both in pending and further legal matters. The communication should not request that the client sever the relationship with the law firm, but may indicate a willingness on the part of the departing lawyer to represent the client. After departing the firm, communications between the lawyer and clients of the lawyer's former firm which are made for the purpose of obtaining employment must comply with the requirements of SCR 20:7.3.

If a departing lawyer joins another law firm, both the lawyer and the new firm must take note of conflicts of interest that might be created with clients of the lawyer's former firm because of the lawyer's move from one firm to another. See SCR 20:1.7; 20:1.9; 20:1.10. For further clarification, see ABA Formal Opinion 96-400.

The Committee notes that its opinion is limited to ethical issues relating to the departure from a law firm of an attorney who has been responsible for client matters, and does not purport to address legal issues relating to such a departure. See generally, The Lawyer's Manual on Professional Conduct 91:701.

Formal Opinion E-80-18 is hereby withdrawn.

FORMAL OPINIONS E-97-2

STATE BAR OF WISCONSIN
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PROGRAM DESCRIPTION: AFTERNOON SESSION 2

ETHICAL CONCERNS WHEN TRANSITIONING OUT OF PRACTICE

This discussion will address the ethical questions and concerns lawyers face when transitioning out of the practice of law.

Make better retirement decisions with answers to your questions about closing a practice, succession planning, cognitive concerns, and the ethical side of retirement including:

- Planning concerns or topics for joining or merging firms
- Ethical issues regarding disclosure of clients and files
- Client consent (informed consent)
- Succession in death, disability or health
- Ethical requirements or advice to assure continuity of service to clients – solo attorneys contingency plan
- Cognitive impairment
- Ethical concerns when giving “cocktail party” and information advice in retirement

STATE BAR OF WISCONSIN
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SPEAKER BIOGRAPHIES

ETHICAL CONCERNS WHEN TRANSITIONING OUT OF PRACTICE

Dean R. Dietrich, shareholder with Ruder Ware, L.L.S.C., has practiced in the areas of labor relations and employment law, representing public and private sector employers in many aspects of employment law and labor relations.

He has represented attorneys in matters before the Wisconsin Supreme Court and the Office of Lawyer Regulation and has consulted with numerous law firms and lawyers regarding compliance with the Rules of Professional Conduct. He serves as Chair of the State Bar Committee on Professional Ethics in addition to past service on the Committee appointed by the Wisconsin Supreme Court to review changes to Supreme Court Rules Chapter 20, the Rules of Professional Conduct for Attorneys.

In addition, Dean is a member of the ABA's Center for Professional Responsibility and the Association of Professional Responsibility Lawyers. Dean regularly publishes articles on the topic of ethics in the *Wisconsin Lawyer* magazine. He is a graduate of Marquette University Law School.

Dean is a Fellow and past president (2008-2014) of the Wisconsin Law Foundation.

Steve R. Sorenson is a Shareholder at von Briesen & Roper, S.C. with more than 35 years of experience helping clients with a wide range of legal issues. He provides counsel on corporate law, business succession planning and estate planning. He also represents municipalities and with regard to real estate he counsels on land use, zoning, smart growth, water front litigation and nonmetallic mining. He is a Fond du Lac County Court Commissioner and serves as a mediator and arbitrator in real estate and labor disputes.

Widely known and respected by his peers, Steve has served in many capacities with the State Bar of Wisconsin, including terms as President (1997-1998) and Secretary (1994-1996), as well as chairing several of their Standing Committees, including the Finance, Solo and Small Firm, Communications, Convention and Entertainment Committees. He was also President of the National Conference of Bar Presidents (2007-2008) and a member of the American Bar Association House of Delegates.

He is a member of the Oshkosh Area Community Foundation Board and the Green Lake County/Ripon Area Foundation Board. He is the President of the Ripon Main Street Development Board of Directors and an Adjunct Professor of Business and Politics and Government at Ripon College. He is a member of the Board of Directors of Badger Boys State. Steve is a frequent lecturer on Legal Ethics, Real Estate law and Waterfront rights. He served as Chairman of the

Continued

Board of Directors for Community Health Network (CHN) and remains active in health care organizations.

Steve is a Fellow of both the Wisconsin Law Foundation and the American Bar Foundation. He is a member of the State Bar of Wisconsin.

Wisconsin State Bar
2017 Annual Senior Lawyers Division
Continuing Legal Education Program

May 4, 2017

Ethical Concerns when Transitioning Out of Practice

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Planning concerns or topics for joining or merging firms

SCR 20:1.7 Conflicts of interest current clients

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

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

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

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

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in a writing signed by the client.

SCR 20:1.9 Duties to former clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

SCR 20:1.10 Imputed disqualification: general rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 unless:

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition arises under SCR 20:1.9, and

(i) the personally disqualified lawyer performed no more than minor and isolated services in the disqualifying representation and did so only at a firm with which the lawyer is no longer associated;

(ii) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written notice is promptly given to any affected former client to enable the affected client to ascertain compliance with the provisions of this rule.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by SCR 20:1.6 and SCR 20:1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in SCR 20:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by SCR 20:1.11.

SCR 20:1.2 Scope of representation and allocation of authority between lawyer and client

(a) Subject to pars. (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. 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 a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer has been retained by an insurer to represent an insured pursuant to the terms of an agreement or policy requiring the insurer to retain counsel on the client's behalf, the representation may be limited to matters related to the defense of claims made against the insured. In such cases, the lawyer shall, within a reasonable time after being retained, inform the client in writing of the terms and scope of the representation the lawyer has been retained by the insurer to provide.

SCR 20:5.1 Responsibilities of partners, managers, and supervisory lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

SCR 20:5.3 Responsibilities regarding nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

SCR 20:5.4 Professional independence of a lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of SCR 20:1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

SCR 20:5.6 Restrictions on right to practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

SCR 20:7.5 Firm names and letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates SCR 20:7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of SCR 20:7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Ethical issues regarding disclosure of clients and files

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.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Client consent – Informed consent

SCR 20:1.3 Diligence

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

Succession in event of death, disability, or health conditions

SCR 20:1.16 Declining or terminating representation

(a) Except as stated in par. (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in par. (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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.

Ethical requirements or advice to assure continuity of service to clients – solo attorneys contingency plan

Cognitive impairment – telling about lawyer with medical condition

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.

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.

Ethical concerns when giving "cocktail party" and information advice in retirement

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.

SCR 20:1.18 Duties to prospective client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as SCR 20:1.9 would permit with respect to information of a former client.

(c) A lawyer subject to par. (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in par. (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in par. (d).

(d) When the lawyer has received disqualifying information as defined in par. (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

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.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

This document provides information of a general nature regarding legislative or other legal developments. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations, or issues, and additional facts and information or future developments may affect the subjects addressed.

State Bar of Wisconsin
Senior Lawyers Division

May 4, 2017 - Madison

Ethical Concerns When Transitioning Out of Practice

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- Ethics of Selling A Law Practice

- Planning Concerns For Joining or Merging Firms

- Ethical Issues Regarding Disclosure of Clients and Files

- Client Consent – Informed Consent

- Succession In Event Of Death, Disability, or Health

- Ethical Requirements Or Advice to Assure Continuity OF Service To Clients – Solo Attorneys Contingency Plan

- Cognitive Impairment – Telling About Lawyer With Medical Condition

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.

SCR 20:1.2 Scope of representation and allocation of authority between lawyer and client

(a) Subject to pars. (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. 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 a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer has been retained by an insurer to represent an insured pursuant to the terms of an agreement or policy requiring the insurer to retain counsel on the client's behalf, the representation may be limited to matters related to the defense of claims made against the insured. In such cases, the lawyer shall, within a reasonable time after being retained, inform the client in writing of the terms and scope of the representation the lawyer has been retained by the insurer to provide.

SCR 20:1.3 Diligence

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

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 20:1.9 Duties to former clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

SCR 20:1.10 Imputed disqualification: general rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 unless:

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition arises under SCR 20:1.9, and

(i) the personally disqualified lawyer performed no more than minor and isolated services in the disqualifying representation and did so only at a firm with which the lawyer is no longer associated;

(ii) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written notice is promptly given to any affected former client to enable the affected client to ascertain compliance with the provisions of this rule.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by SCR 20:1.6 and SCR 20:1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in SCR 20:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by SCR 20:1.11.

SCR 20:1.16 Declining or terminating representation

(a) Except as stated in par. (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in par. (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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.

SCR 20:1.18 Duties to prospective client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as SCR 20:1.9 would permit with respect to information of a former client.

(c) A lawyer subject to par. (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in par. (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in par. (d).

(d) When the lawyer has received disqualifying information as defined in par. (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

SCR 20:5.1 Responsibilities of partners, managers, and supervisory lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

SCR 20:5.3 Responsibilities regarding nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

SCR 20:5.4 Professional independence of a lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of SCR 20:1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

SCR 20:5.6 Restrictions on right to practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

SCR 20:7.5 Firm names and letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates SCR 20:7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of SCR 20:7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

PLANNING CONCERNS FOR JOINING OR MERGING FIRMS

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

ETHICAL ISSUES REGARDING DISCLOSURE OF CLIENTS AND FILES

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.

Wisconsin Ethics Opinion EF-16-03
The Ethical Obligation of the Lawyer to Surrender the File upon Termination of the Representation
December 29, 2016[1]

Though maintained in the lawyer's office, the client's file is the client's property and SCR 20:1.16(d) requires a lawyer to surrender the file at the request of the client or successor counsel upon termination of the representation. The lawyer must honor a request for the file from a client or successor counsel, unless the client has instructed that the file not be provided to successor counsel. When a client requests that documents be provided in an electronic format and the lawyer has maintained those documents electronically, the lawyer should provide those documents in the electronic format. A lawyer may have to convert electronic files to paper format if the client lacks the technological expertise or financial means to access digitized images, but a lawyer normally is not required to provide both a hard copy and an electronic copy of the former client's documents.

The fact that the lawyer may have previously provided copies of documents to the client during representation does not relieve the lawyer of the duty to provide the client with the complete file when representation is terminated. Further, the duty to surrender the file is not conditional and the lawyer may not withhold a file to coerce payment of fees, or for other reasons that benefit the lawyer. A lawyer may retain a copy of the client file for the lawyer's own records, but because copying the file is for the lawyer's benefit, a lawyer who chooses to retain copies of documents surrendered to a client may not charge the client for the duplication costs.

Wisconsin Formal Ethics Opinions E-00-03, E-84-5, E-82-7 and Memorandum Opinion 4/78 B are withdrawn.

Introduction

A lawyer's duty to promptly surrender the file upon termination of the representation is well established, yet questions often arise about the scope of this duty. In this opinion, the State Bar's Standing Committee on Professional Ethics (the "Committee") addresses the following questions regarding the duty to surrender the file upon termination of the representation:

1. What materials must a lawyer include when a former client requests the file?
2. Does a law firm have a duty to provide, at the former client's request, a copy of the former client's file in an electronic format?
3. If a lawyer has provided copies of all materials to the client during representation, is the lawyer required by SCR 20:1.16(d) to provide, at the lawyer's expense, duplicate copies to the former client when representation is terminated?
4. May a lawyer retain client papers to secure payment of the lawyer's fee?
5. May a lawyer charge the former client to copy the file?
6. How should a lawyer respond to a request from successor counsel for a former client's file?

[1] This opinion was amended on March 8, 2017 to clarify that the duty to surrender the file arises only when the file is requested by a client or successor counsel.

This opinion addresses the ethical duties of a lawyer pursuant to the Wisconsin Rules of Professional Conduct for Attorneys (the "Rules").[2]

I. What materials must a lawyer include when a former client requests the file?

The Committee has previously recognized that the client's file is the client's property even though it is maintained in the lawyer's office.[3] This view is widely shared by other jurisdictions as well.[4] This duty to surrender the file arises when the client or successor counsel requests the file upon or after termination of the representation. Although the duty to provide a former client with the file is rarely disputed, what materials must be included in the file has been the subject of debate. Consequently, acknowledging that the client owns the file and that the lawyer has a duty to provide the client with the file does not answer the question of what comprises the file.

SCR 20:1.16(d)[5] governs the lawyer's duties when representation ends and is the Rule primarily applicable when a former client requests the file.[6]

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.[7]

Two portions of paragraph (d) are particularly relevant to our opinion.

First, the Rule requires a lawyer to take steps that are "reasonably practicable to protect a client's interests." "Reasonably" is defined in SCR 20:1.0(k) as "the conduct of a reasonably prudent and competent lawyer." ABA Comment [9] to SCR 20:1.16(d) cautions that a lawyer must take all reasonable steps to mitigate the consequences of withdrawal, even if the lawyer has been unfairly discharged by the client.

Second, paragraph (d) mandates that the lawyer surrender "papers and property to which the client is entitled." The Rule does not define "papers and property to which the client is entitled," and

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[2] This opinion does not address a client's property rights or other legal rights to the file or materials in the file. Nor does this opinion address the obligations of a lawyer when a discovery demand is made for some or all of a client file.

[3] See Wisconsin Ethics Opinion E-00-03 (2000).

[4] See, e.g., Colorado Ethics Opinion 104 (1999); Michigan Ethics Opinion RI-203 (1994); Kansas Ethics Opinion 92-05 (1992); Alaska Ethics Opinion 95-6 (1995).

[5] ABA Model Rule 1.16(d) is identical to SCR 20:1.16(d).

[6] SCR 20:1.15(d)(1) also requires that a lawyer shall promptly deliver to the client other property to which the client is entitled. This would include original documents provided by the client. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 471 (2015).

[7] The Rule uses the term "client" rather than "former client," despite the fact that most requests for the file come from former clients. For that reason, the use of the term "client" in this opinion encompasses requests from former clients.

jurisdictions differ in how they interpret this duty. While discipline is frequently imposed for failing to surrender a file, the Wisconsin Supreme Court has never defined what "papers and property" the lawyer must surrender upon termination.[8]

SCR 20:1.16(d) requires a lawyer to take steps to the extent reasonably practicable to protect a client's interest and to mitigate the consequences to the client of the termination of the representation. It is important to bear in mind this purpose – protection of the client's interests – in considering what materials must be provided to the client.

With that purpose in mind, we reaffirm the conclusion reached in prior opinions that lawyers have an obligation to surrender the file, with certain exceptions, upon termination of the representation, and, given the variety of formats in which information is stored today, we also provide the following guidance concerning certain types of materials (or information) that normally comprise the lawyer's "file" on a matter.

Materials that the Lawyer Must Provide to the Former Client

The following materials that must be provided to the former client, unless prohibited by other law:

- Any materials that were provided to the lawyer by the client;[9]
- Legal documents filed with a tribunal or those completed, ready to be filed, but not yet filed;[10]
- Discovery, including interrogatories and their answers, deposition transcripts, expert witness reports, witness statements, and exhibits;[11]
- Orders and other records of a tribunal;[12]
- Executed instruments such as contracts, wills, trusts, corporate records, and similar records prepared for the client's actual use;[13]
- Correspondence issued or received by the lawyer in connection with the representation of the client on relevant issues, including emails, texts, and other electronic correspondence that have been retained according to the firm's document retention policy;[14]
- Legal opinions issued at the request of the client;[15]

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[8] Many jurisdictions follow either "entire file" or "end product" approaches in considering this question, with a majority of jurisdictions following the "entire file" approach. See ABA Formal Ethics Opinion 471. When considering either an "entire file" or "end product" approach, the Committee notes that it has been suggested that differences between the two approaches "may not be substantial." See *In re ANR Advance Transp. Co.*, 302 B.R. 607 (E.D. Wis. 2003). Therefore, the Committee did not consider it useful to label the approach taken in this opinion as either "entire file" or "end product."

[9] ABA Formal Op. 471.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

- Third-party assessments, evaluations, investigative reports or records paid for by the client;[16]
- Legal research and drafts of documents that are relevant to the matter[17]; and
- Any materials for which the client has been billed, either directly or through lawyer or staff time.

This does not represent an exclusive list, but rather materials that commonly comprise a client's file on a matter. The fact that some type of material is not listed above does not mean that lawyers may not have an obligation to provide the material if it is necessary to protect the interests of the client. Lawyers should err on the side of providing the complete file.

Materials that the Lawyer May Withhold from the Former Client

The following materials may be withheld:

- Materials that would violate a duty of nondisclosure to another person, such as when the lawyer uses the document of another client as a model;[18]
- Materials containing information, which, if released, could endanger the health, safety, or welfare of the client or others;[19]
- Materials that could be used to perpetrate a crime or fraud; [20]
- Materials containing only internal firm communications concerning the client file, such as conflicts checks, personnel assignments,[21] and advice the lawyer receives concerning the lawyer's own conduct, such as compliance with the Rules;[22] and
- Materials containing the lawyer's assessment of the client, such as personal impressions and comments relating to the business of representing the client.[23] If a lawyer's notes contain

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[16] *Id.*

[17] This should not be construed as a requirement that lawyers must preserve all drafts of all documents. Rather, if lawyers have preserved drafts, they should be provided to clients who request the file.

[18] *Id.* A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld. *See, e.g.* Utah Ethics Op.06-04 (2006)

[19] *Id.*

[20] Utah Ethics Op.06-04 (2006); District of Columbia Ethics Op. 350 (2009); *Restatement (Third) Law Governing Lawyers* (2000) §46 cmt. C (2000) (no duty to surrender document if lawyer reasonably believes that client would use it to commit a crime).

[21] *Id.*

[22] An increasing number of jurisdictions have recognized an "intra-firm privilege" for communications with counsel representing the law firm. See e.g. *Stock v Schnader Harrison Segal & Lewis LLP*, 142 A.D.3d 210, 35 N.Y.S.3d 31 (2016). While Wisconsin is yet to recognize such a privilege, in the event that the intra-firm privilege is recognized in Wisconsin, this category would cover materials protected by such a privilege.

[23] Restatement (Third) Law Governing Lawyers (2000) §46 cmt. C (2000) ("The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide.").

both factual information and personal impressions, the notes may be redacted or summarized to protect the interests of both the lawyer and the client.

Unfortunately, when discussing documents that may be withheld, some ethics opinions and other authorities refer to "personal attorney work product."[24] This term most often refers to the materials containing internal firm communications and the assessment of the client and is consistent with this opinion. That term, however, led to confusion with the evidentiary notion of "work-product," which is entirely different. Therefore we do not use the phrase "personal attorney work product" as a category of materials that may be withheld.

II. Does a law firm have a duty to provide, at the client's request, a copy of the former client's file in an electronic format?

Yes, with exceptions. Lawyers have an obligation to provide the file in a format that is usable by the client. If the lawyer keeps the file in electronic format, and the client or successor counsel request that it be provided in that format, the lawyer must comply. A lawyer may also be obligated to convert an electronic file to hard copies if the client lacks the ability to access the file in electronic format. Lawyers do not, however, have an obligation to convert file from one format that is usable by the client to another simply for the convenience of the client or successor counsel.

Competent representation includes organized file-keeping practices. These practices safeguard the documentation of information necessary for the lawyer to readily retrieve the information required for the representation and to be adequately prepared to handle the client's matter.[25] The standards for keeping files in electronic format are the same as the standards for keeping files in paper format. Moreover, a lawyer must exercise competent legal judgment when deciding which format, electronic or paper, is the most appropriate for the retention of the file. [26] Regardless of the format in which the file is kept, in order to protect the interest of the client upon termination of the representation, the file must be provided to the client in a format that is usable to the client.

Many former clients or successor counsel prefer to receive the file in an electronic format: they have the ability to open, use or reproduce the documents without experiencing any problem or undue expense. However, some clients or successor counsel do not have that ability and need to receive the file in paper format. When so asked, the lawyer may be obligated to convert the file from one format to another if doing so is in the client's best interest and can be accomplished without too much expense.[27] North Carolina Ethics Opinion 2013-15 provides guidance:

> Records that are stored on paper may be copied and produced to the client in paper format if that is the most convenient or least expensive method for reproducing these

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[24] Colorado Bar Ass'n Formal Op.104 (1999).

[25] North Carolina Ethics Op. 2013-15 (1/24/14).

[26] *Id.* "Electronic records must be organized in a manner that can be searched and compiled as necessary for the representation of the client and for the release of the file to the client upon the termination of representation." When choosing a document management system or configuring their electronic filing systems, lawyers should anticipate clients' requests for their files and consider the ease of access and retrieval.

[27] *Id.*

> records for the client. If converting paper records to an electronic format would be a more convenient or less expensive way to provide the records to the client, this is permissible if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. Similarly, electronic records may be copied and provided to the client in an electronic format (they do not have to be converted to paper) if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense.
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> A lawyer should in most instances bear the reasonable costs of retrieving and producing electronic records for a departing client. However, a lawyer or law firm may charge a client the expense of providing electronic records if the client asks the lawyer or law firm to do any of the following: (1) convert electronic records from a format that is already accessible using widely used or inexpensive business software applications; (2) convert electronic records to a format that is not readily accessible using widely used or inexpensive business software applications; or (3) provide electronic records in a manner that is unduly expensive or burdensome.
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> Nevertheless, if the usefulness of an electronic record in a client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided to the client in an electronic format unless the client requests otherwise. For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel. Similarly, a video recording cannot be reduced to a paper format and therefore must be provided to the client in its original format.

We agree with the guidance provided by North Carolina, and note that other ethics opinions agree that a lawyer may have to convert electronic files to paper format if the client lacks the technological expertise or financial means to access digitized images.[28]

In Wisconsin Formal Ethics Opinion E-00-03, the Professional Ethics Committee noted that former clients increasingly request documents in an electronic format, either in addition to or in lieu of hard copies, for convenience or cost-saving. The Committee concluded that nothing requires the lawyer to provide both a hard copy and an electronic copy of the former client's documents. When a former client requests that documents be provided in an electronic format and the lawyer has maintained those documents electronically, the lawyer should provide those documents in the electronic

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[28] E.g., Arizona Ethics Op. 07-02 (2007)("A lawyer who has chosen to store his or her client files digitally cannot simply hand a disk or other storage medium to a client without confirming that the client is able to read the digitized images. If the client does not have either the technological knowledge or access to a computer on which to display the electronic images, or if the client has hired substitute counsel who is in the same position as the client, the original lawyer may need to provide paper copies of the documents. If the lawyer has opted to store the file solely as digital images for his or her own convenience, the lawyer will need to bear the cost of providing those paper copies, absent other agreed-upon arrangements."); Maine Ethics Op. 183 (2004) ("If an attorney dispenses with the retention of paper files in favor of computerized records, the attorney must be mindful that the obligation to the client may require the attorney to maintain the means to provide copies of those records in a format that will make them accessible to both the attorney and the client in the future."); Missouri Formal Ethics Op. 127 (2009). District of Columbia Ethics Op. 357 (2010) concludes that absent an agreement to the contrary, lawyers must comply with client's reasonable request to convert electronic records to paper form.

format.[29] The lawyer does not, however, have an obligation to convert a paper file to an electronic format simply at the request of a client if the paper format is usable by the client. We reaffirm that position, but we note that the guiding principle should be protection of the client's interests.

To minimize disputes and to facilitate the effective transfer of files, lawyers may wish to discuss with the client at the beginning of representation any specific needs the client may have and the format in which the file will be produced at the termination of the representation. Lawyers may also wish to include in their engagement agreements the format in which the file normally will be produced at the termination of representation and any special needs the client may have.

III. **If a lawyer has provided copies of all materials to the client during representation, is the lawyer required by SCR 20:1.16(d) to provide, at the lawyer's expense, duplicate copies to the client when representation is terminated?**

Yes. The duty to surrender the file arises upon termination of the representation and serves to protect the interests of the client. During the course of the representation, lawyers frequently provide clients with copies of materials as a means of keeping their clients informed of the progress of the representation. The provision of such materials during the course of a representation may be an effective way to communicate with the client, but does not fulfill a lawyer's obligation to surrender the file upon termination of the representation.

Two Wisconsin Formal Ethics Opinions have concluded that a lawyer is not required to provide duplicate copies of file items that have already been provided to the client at the lawyer's expense.[30] We conclude, however, that these two opinions are no longer consistent with the way that SCR 20:1.16(d) is enforced and interpreted in Wisconsin, are inconsistent with opinions from other jurisdictions and, most importantly, are inconsistent with the obligation to protect the interests of the client.

Other jurisdictions have rejected the argument that a lawyer has no duty to provide duplicate copies of file items that have already been provided to the client at the end of the representation when the lawyer has provided copies of the documents during the course of representation. These jurisdictions reason that such an argument fails to acknowledge that the client paid for the documents in the file. These jurisdictions also reason that is not the client's duty to maintain a file on the client's own behalf; rather, it is the affirmative duty of the lawyer to protect the client's interest upon termination of representation.[31] Moreover, in many instances, it may be unlikely that the client will be provided with all of the documents during the course of representation, or will have retained everything previously sent by the lawyer, and provision of the complete file best protects the interests of the client upon termination of the representation.

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[29] While we agree with E-00-03's conclusion that nothing requires the lawyer to provide both a hard copy and an electronic copy of the former client's documents, we disagree with its conclusion that that a lawyer is not required to provide duplicate copies of file items that have already been provided to the client at his or her expense when representation is terminated. Consequently, we are withdrawing Wisconsin Formal Ethics Opinion E-00-03.

[30] See Wisconsin Formal Ethics Opinion E-82-7 and Wisconsin Ethics Opinion E-00-03.

[31] See, e.g., *In re Brussow*, 286 P.3d 1246 (Utah 2012); *Travis v. Supreme Court Comm. on Prof'l Conduct*, 306 S.W.3d 3 (Ark. 2009).

Consequently, we conclude that the "fact that the lawyer may have previously provided copies of documents to the client does not relieve the lawyer of this responsibility,"[32] and we withdraw Wisconsin Formal Ethics Opinion E-00-03, Wisconsin Formal Ethics Opinion E-82-7, and Memorandum Opinion 4/78 B.

IV. May a lawyer retain client papers to secure payment of the lawyer's fee?

No. The duty to surrender the file is not conditional and lawyer may not withhold the file upon termination in order to coerce a former client to pay fees or costs. SCR 20:1.16(d) states that the "lawyer may retain papers relating to the client to the extent permitted by other law." Wisconsin Formal Ethics Opinion E-95-4 concluded that the "so-called 'retaining lien' has not been expressly recognized in Wisconsin and, therefore, any claim by a lawyer that there is, under Wisconsin law, a general right to retain client papers to secure payment of a fee is tenuous, at best." Moreover, a lawyer who asserted a retaining lien against the client's file and a charging lien against the proceeds of the divorce proceeding when he knew these assertions were unwarranted under existing law was found to have violated SCR 20:3.1(a)(1), which prohibits lawyers from knowingly asserting frivolous positions.[33]

Just as lawyers may not condition return of a file upon payment of fees, they may not place other conditions upon return of a file, such as demanding that a former client sign a release of liability.

V. May a lawyer charge the client for copying the file?

No. As discussed above, the client owns the file, and the lawyer fulfills the duty to surrender the file upon termination by providing *the* file. A lawyer may retain a copy of the client file for the lawyer's own records, but that is not required by SCR 20:1.16(d), which simply requires that the lawyer surrender the file upon termination of the representation.[34] Many lawyers will, as prudent risk management, choose to retain a copy of a file provided to a former client, but it is not requirement of the disciplinary rules.[35] Because copying the file is for the lawyer's benefit, a lawyer who chooses to retain copies of documents surrendered to a client may not charge the client for the duplication costs, including the lawyer's or the lawyer's staff's time in copying the materials.[36]

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[32] Colorado Bar Ass'n Formal Op.104.

[33] OLR Public Reprimand 2005-09.

[34] Connecticut Informal Ethics Op. 05-04 (2005) a lawyer may retain a copy of a client's file after termination of representation even though the client has requested return of all copies as well as the originals).

[35] A lawyer's malpractice insurance policy may require a lawyer to retain a copy of a file as well.

[36] *See e.g.,* Alaska Ethics Op. 2011-1 (2011); Connecticut Informal Ethics Op. 00-03 (2000); Michigan Informal Ethics Op.RI-203 (1994). While not directly on point, an attorney was disciplined for charging clients $175 per hour to retrieve their file. See *Disciplinary Proceedings against Kitchen,* 2004 WI 83, 682 N.W.2d 780.

VI. How should a lawyer respond to a request for the file from successor counsel?

It will frequently be the case that the request for a file comes not from the client, but from successor counsel. For example, a criminal defense lawyer who represented a client at trial may receive a request for the file from appellate counsel.

Lawyers owe a duty of confidentiality to their current and former clients (see SCR 20:1.6) and that duty most certainly applies to client files.[37] Consequently, lawyers sometimes demand a written "authorization" from the client before providing the file to successor counsel. There is nothing inherently wrong with such a practice. However, successor counsel is acting as an agent of the former client and a lawyer who receives a request for the file from successor counsel should ordinarily regard that request as the equivalent of a request from the client. There is no requirement in the Rules that lawyers obtain a written authorization from the client before surrendering the file to successor counsel, and to do so could be detrimental to the interests of a client when time is of the essence. All lawyers are prohibited from making false statements of material facts to third parties (see SCR 20:4.1) and a lawyer receiving a request for a file from successor counsel may ordinarily take a statement that the lawyer is making the request on behalf of the client as being truthful.

Of course, there may be unusual circumstances where a client has specifically instructed a lawyer not to surrender a file to successor counsel, and the lawyer must abide by those instructions.

Conclusion

A lawyer should promptly surrender the file to a client or successor counsel upon termination of the representation. A lawyer is not relieved of the duty to provide the client with the file when representation is terminated even though the lawyer may have previously provided copies of documents to the client during representation. A lawyer may not retain papers relating to the client to secure payment of the lawyer's fee. The so-called "retaining lien" has not been recognized in Wisconsin and, therefore, and the assertion of a "lien" for fees on a client file has been found to violate SCR 20:3.1(a)(1). A lawyer who chooses to retain copies of documents surrendered to a client may not charge the client for the duplication costs because copying the file is for the lawyer's benefit.

Wisconsin Formal Ethics Opinions E-00-03, E-84-5, E-82-7 and Memorandum Opinion 4/78 B are withdrawn.

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[37] See *Disciplinary Proceedings against O'Neil*, 2003 WI 48, 661 N.W.2d 813.

EF-17-01
Retention and Destruction of Closed Client Files
February 28, 2017

There is no one answer to the central question of how long a lawyer must keep closed files before they may be destroyed. As a general rule, if the former client has not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer. While six years is a floor, it is not a ceiling. A lawyer should carefully consider whether the file contains items that the lawyer should retain for a longer time or whether special circumstances exist such that the file should be retained for a longer time. Certain practice areas, such as estate planning, normally create those circumstances that require the lawyer to preserve closed files for a longer period of time. Before closed client files are destroyed, a lawyer must ensure that important original client property is returned and that steps are taken to preserve the confidentiality of client information. Lawyers should inform clients both of their right to the file and of the firm's file destruction policy in the engagement agreement and in any letter terminating or completing the relationship or engagement. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.

Wisconsin Ethics Opinions E-84-5 and E-98-1 are withdrawn.

Introduction

How long must a lawyer retain closed client files? This question arises in several contexts: many times, a lawyer has former client files that are twenty or thirty years old, and the lawyer no longer has room to store them; sometimes, a lawyer is closing his or her office or retiring; and sometimes, a lawyer has died. This question is also difficult to answer because it often depends on a host of other questions, such as: whether the client files contain original client documents or records; whether a minor is involved in the representation; and what type of representation was involved.

This opinion addresses the questions of how long closed client files should be kept by the lawyer and what steps the lawyer should take before destroying closed client files. This opinion also addresses the responsibilities of the lawyer or law firm that represented the client in the matter. This opinion does *not* address the responsibilities of a lawyer who is winding up the practice of another lawyer, such as when a lawyer is appointed as a trustee under Supreme Court Rules Chapter 12.

Lawyers may choose to close client files in physical or electronic format, provided that the closed files are secure, accessible by the lawyer, and reproducible in a format that is usable by the client. The guidance provided by this opinion applies equally to physical files and files stored in an electronic format.

How long after the end of the representation must a lawyer keep closed client files?

The Wisconsin Rules of Professional Conduct (the "Rules") do not provide a required retention time for closed files, and thus there is no "magic number" to be found in the Rules. SCR 20:1.16(d) does, however, require lawyers to take steps to the extent reasonably practicable to protect the interests of the client upon termination of the representation. That Rule has consistently been interpreted to require lawyers to preserve closed files for a period of time sufficient to protect the interests of the clients.

In Wisconsin Formal Ethics Opinion E-84-5, the State Bar's Standing Committee on Professional Ethics (the "Committee") considered the question of dealing with closed client files in the lawyer's possession. While the Committee opined that lawyers did not have a duty to preserve all client files on a permanent basis, the opinion concluded, relying on ABA Informal Opinion 1384 (1977), that "former clients reasonably expect that valuable and useful information in their attorney's files, not otherwise readily available to the clients will not be prematurely and carelessly destroyed." The Committee, also relying on ABA Informal Opinion 1384, recognized the reasonable expectations of the former client, cautioned lawyers to maintain files for at least the duration of any applicable statute of limitations that might pertain to a client's claim, and instructed lawyers to return important documents to the client or to maintain them in storage.

In Ethics Opinion E-98-1, the Committee took the position that, if the former client had not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer, and we reaffirm that guidance here. This six year minimum is consistent with SCR 20:1.15(g)(1), which requires lawyers to preserve complete records of trust account funds and other trust account property for at least six years after the date of termination of representation. It is also consistent with the statute of limitations for most malpractice actions,[1] and for most matters, should provide a sufficient period of time to protect the interests of the client.

While six years is a floor, it is not a ceiling. The interests of the client may require that the lawyer retain a closed client file for longer than six years. A lawyer should carefully evaluate whether the file contains items that the lawyer should retain for a longer time or whether circumstances exist such that the file should be retained for a longer time. Some files must usually be retained longer than six years, such as files involving claims of minor children, estate planning, and certain tax matters.[2] In determining how long to retain closed client files, the lawyer must be mindful of relevant statutes of limitations as well as the needs of the client in the particular matter. A lawyer's own interest may also cause a lawyer to retain closed files for more than six years.[3] Many firms have written file retention policies that specify different

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[1] See Wis. Stat. § 893.52. Note, however, that in actions for legal malpractice the date of injury, rather than the date of the negligent act, commences the period of limitation. *Auric v. Continental Casualty Co.*, 111 Wis. 2d 507, 331 N.W.2d 325 (1983). Moreover, the "discovery rule" could extend the period even further.

[2] Similarly, the Tennessee Supreme Court Board of Professional Responsibility in Op. 2015-F-160 concluded that the type of representation is relevant because files should not be destroyed before the expiration of applicable statutes of limitations, which also vary from matter to matter. Accordingly, files "pertaining to minors should be retained until their majority," and certain tax files "should be maintained until the client is no longer exposed to tax liability," the board said. "A lawyer might also wish to consider retaining closed files for six (6) years, the usual statute of limitation period for contract claims in Tennessee, after the conclusion of the representation," it added. The Tennessee board's guidance aligns for the most part with advice in Kan. Bar Ass'n Ethics Advisory Comm., Op. 15-01, 9/28/15. The Kansas committee emphasized that "no hard-and-fast rule can be declared" regarding how long lawyers must retain client files. Like the Tennessee board, it said the "nature and contents of some files may indicate a need for longer retention" because applicable statutes of limitations in client matters will vary.

[3] For example, SCR 21.18 establishes the time limitation for action by the Office of Lawyer Regulation: "(1) Information, an inquiry, or a grievance concerning the conduct of an attorney shall be communicated to the director within 10 years after the person communicating the information, inquiry or grievance knew or reasonably should have known of the conduct, whichever is later, or shall be barred from proceedings under this chapter and SCR chapter 22."

retention periods for different types of files. For example, some firms may have policies mandating longer retention periods for estate planning files than for criminal defense files.[4]

While Wisconsin Ethics Opinion E-98-1 recognized that maintaining former clients' files forever was not practicable and that lawyers should not be burdened by the attendant economic costs, it also recognized that certain safeguards should be followed before a file is destroyed. While we agree with most of the safeguards recognized in E-98-1, we do not agree with all of them. One of the safeguards with which we disagree required that "[a]bsent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files."[5] Although some practitioners may choose to follow this or a similar practice, such a requirement, regardless of the age of the file or the type of the matter, is not required by the Rules of Professional Conduct, nor by any Wisconsin case and can be unduly burdensome.

We, therefore, adopt the following minimum safeguards that should be followed before closed client files may be destroyed. In doing so, we stress, as other ethics opinions have done, that there is "no one safe answer to the central question of how long must [a lawyer's] closed files be kept before they are destroyed."[6]

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[4] In some circumstances, it is possible for a lawyer to obtain the client's express agreement to keep files for a lesser period. The client's agreement must meet the informed consent standard, as set forth in SCR 20:1.0(f), meaning the lawyer must fully describe the material risks of and alternatives to the lesser retention period to the client. The lesser retention period must still be reasonable under the circumstances (e.g. routine traffic cases). In most circumstances, lawyers should observe six year minimum retention period for closed client files.

[5] E-98-1 recognized the following safeguards:

> 1. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15. The lawyer must be satisfied that the files have been adequately reviewed. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed.
> 2. The existence of client property, or information that could not be replicated from other sources if necessary, and the age of the materials in the files are all factors that should be considered in determining the reasonableness of the decision to destroy the file. For example, client property or original documents such as wills or settlement agreements ordinarily should not be destroyed under any circumstances, and the level of effort to locate a missing client should be more diligent where there is actual client property involved than where, for example, the file is a long resolved collection file. *See* S.C. Ethics Op. 95-18, ABA/BNA Man. Prof. Conduct 45:1208.
> 3. At a minimum the files should not be destroyed until six years have passed after the last act that could result in a claim being asserted against the lawyer. *Cf.* Kaap, *The Closed File Retention Dilemma*, 1 Wis. B. Bull. 25 (Jan. 1988).
> 4. In the ideal situation, the lawyer would have discussed the issue of file retention/destruction in either the engagement letter with the client or in the letter terminating or completing the relationship or engagement. Absent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files. *See* Los Angeles County Ethics Op. 475 (1993), ABA/BNA Man. Prof. Conduct 1001:1703.
> 5. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time. *See* ABA Informal Op. 1384.

[6] Tenn. Supreme Court Bd. of Prof'l Responsibility, Op. 2015-F-160 (12/11/15). The Tennessee Supreme Court Board reviewed authorities from other jurisdictions and distilled three "general guidelines" for lawyers to consult when assessing how long they must retain a client's file:

1. The lawyer must preserve the file for a length of time sufficient to protect the client's reasonably foreseeable interests. As discussed above, this should normally be a minimum of six years.

2. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15, and important documents or other materials given to the lawyer by the client should not be destroyed without consent of the client. The lawyer must be satisfied that the files have been adequately reviewed or that the firm's established procedures give reasonable assurance that the file does not contain client property. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed. Client property or original documents such as wills[7] or settlement agreements ordinarily should not be destroyed.

3. Lawyers should review their firm's policies and ensure that the firm's engagement letters and closing letters contain a statement informing the client of the right to the file and the firm's file retention policy. While this is not explicitly required by the Rules, it is an important and relatively easy way to protect the client's interests upon termination of the representation.[8]

4. Likewise, the lawyer must take reasonable measures to ensure that the method by which closed client files are stored, whether the files are in physical or electronic format, protects the confidentiality of those files.

5. Lawyers must take reasonable steps to ensure that closed client files are destroyed in a manner that preserves the confidentiality of the information contained in the files.[9] This applies to files stored both physically and in electronic format. Normally, the retention of a professional shredding service that gives contractual promises of confidentiality will suffice for the destruction of physical files. With respect to electronic files, the lawyer must take steps to ensure that any information protected by SCR 20:1.6 is no longer retrievable from any hardware, software, or device that is no longer in the lawyer's control.

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1. There is no Tennessee Rule of Professional Conduct that requires a retention period of greater than 5 years following the termination of representation; however, the type of representation involved may mandate a longer retention time.
2. Authority to dispose of a file should be obtained from a client whenever possible, so the better practice would be to address file retention initially or contact all clients and determine their wishes.
3. Absent client authority to dispose of files, an attorney should individually review files and be satisfied that no important papers of the clients are contained in the file before destruction.

[7] For example, Wis. Stat. § 856.05(1) states that a person having the custody of any will shall, within 30 days after he or she has knowledge of the death of the testator, file the will in the proper court or deliver it to the person named in the will to act as personal representative. If a lawyer cannot determine whether the testator has died, the lawyer must deposit the original will with the register of the probate court pursuant to Wis. Stat. § 853.09(1).

[8] Such a clause need not be lengthy and should state the firm's policy in plain language, such as:

> [Firm] will retain your client file for ten years from the conclusion of the matter. After ten years, your file will be destroyed, without further notice to you, in a manner which preserves the confidentiality of your information. Should you wish to receive your file, please notify [Firm] before ten years have elapsed and we will promptly provide your file.

[9] See SCR 20:1.6(d).

6. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.[10]

Lawyers are reminded that they must maintain records of trust account funds and property for at least six years after the termination of the representation.[11]

Conclusion

Lawyers have a responsibility to take reasonable steps upon termination of the representation to protect the interests of the client, and preservation of client files for a minimum of six years is an important part of that duty. Lawyers must ensure, both in the storage and eventual destruction of closed files, that client information is protected. Lawyers should also include the firm's file retention policy in engagement agreements and closing letters. Maintaining files in an orderly fashion with clear records of where they are and what is in them will assist lawyers in fulfilling their duty to protect client interests upon termination of the representation.

Wisconsin Formal Ethics Opinions E-84-5 and E-98-1 are withdrawn.

[10] See ABA Informal Op. 1384.

[11] SCR 20:1.15(g)(1).

STATE BAR OF WISCONSIN

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Ethics: "Impliedly Authorized" Disclosure of Client Information

Keeping client information confidential is the cornerstone of the attorney-client relationship; however, there are circumstances in which a lawyer may disclose such information. This article looks at the ability of lawyers to disclose confidential client information when doing so is impliedly authorized to accomplish the objectives of the representation agreed to between the lawyer and the client.

DEAN R. DIETRICH

Question

Judges often ask me questions about my clients, and I am not sure what I should say. What is the rule about disclosing client information?

Answer

The obligation to keep client information confidential is the cornerstone of the attorney-client relationship. There are two ways to look at the disclosure of confidential client information. One focus is on what may be impliedly authorized for disclosure by the attorney as part of the representation. The other relates to disclosures that may be authorized because the client has given informed consent.

Lawyers are allowed to disclose confidential client information if disclosure is "impliedly authorized" to "carry out the representation" under SCR 20:1.6(a). The rule and the accompanying comment offer some guidance to Wisconsin lawyers:

"**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)." (Emphasis added.)

. . .

"**Authorized Disclosure.** [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers."

Lawyers are allowed to make disclosures when doing so is appropriate to accomplish the objectives of the representation agreed to between the lawyer and the client. The lawyer must be sensitive to situations in which disclosure might be adverse to the client's interests but may be authorized under certain circumstances.

The *Annotated Model Rules of Professional Conduct (Sixth Edition)* provides some additional guidance to lawyers:

"Rule 1.6 generally prohibits the disclosure of a client's identity or whereabouts unless the client consents or the disclosure is impliedly authorized to effectuate the representation.

. . .

"In the context of litigation, the general rule is that a client's identity and whereabouts are not protected by the attorney-client privilege unless 'the net effect of the disclosure would be to reveal the nature of a client communication.'"

Disclosures Expressly or Impliedly Authorized

Notwithstanding the duty to be tight-lipped about client matters, lawyers must obviously disclose a great deal of information relating to representation of clients simply to do their jobs. These disclosures are permissible when clients have expressly or impliedly authorized them.

What is "impliedly authorized" will depend on the particular circumstances of the representation. The ethics opinions and court decisions below provide some guidance:

- ABA Formal Ethics Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests);
- ABA Formal Ethics Op. 98-411 (1998) (lawyer impliedly authorized to disclose certain information without client consent);
- ABA Informal Ethics Op. 89-1530 (1989) (using foreseeability analysis to evaluate whether lawyer's disclosure was impliedly authorized);
- ABA Informal Ethics Op. 86-1518 (1986) (interpreting exception for impliedly authorized disclosures as permitting lawyer to disclose to opposing counsel, without client consultation, inadvertent omission of contract provision);
- Ark. Ethics Op. 96-1 (1996) (noting that in real estate transactions, many disclosures, including ones to obtain title insurance, are impliedly authorized; many documents become public records, and other parties to transaction receive information such as purchase price, offer amount, amount accepted, and condition of property);
- Haw. Ethics Op. 38 (1999) (lawyer may disclose information relating to representation of deceased client if doing so would effectuate client's estate plan);
- Kan. Ethics Op. 01-01 (2001) (lawyer whose client inherited property from former client is impliedly authorized to disclose information from deceased client's file to effectuate inheritance);
- *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995) (state attorney general not impliedly authorized to disclose to third party that state agency was changing its position on environmental issue, notwithstanding that lawyer had been directed to file public pleading in future);
- *In re Mandelman*, 182 Wis. 2d 583, 514 N.W.2d 11 (1994) (lawyer violated Rule 1.6 when he asked other lawyers for help on several client matters and transferred client files without seeking clients' consent);
- Mont. Ethics Op. 050621 (2005) (criminal defense lawyer may not, without client's prior consent, tell judge or prosecutor whether client has contacted him, even though client's bond was conditioned on regularly phoning defense lawyer);
- ABA Formal Ethics Op. 93-370 (1993) (unless client consents, lawyer should not reveal to judge – and judge should not require lawyer to disclose – client's instructions on settlement authority limits or lawyer's advice about settlement).

See generally Restatement (Third) of the Law Governing Lawyers § 61 (2000) (permitting disclosure that advances client's interests).

Conclusion

The above examples give some guidance to lawyers. However, each situation will depend on the facts and circumstances involved. Lawyers should try to anticipate, as much as possible, situations that will require the disclosure of confidential information and

Reader Feedback

Using the Terms "Specialist" or "Specializes In." In the June 2010 *Wisconsin Lawyer,* I wrote about social media and problems with statements on a social media page that a lawyer specializes in a particular area of the law. A reader has accurately noted that the Comment to Model Rule 7.4 (and Wisconsin Rule SCR 20:7.4(a)) allows a lawyer to expressly state that the lawyer is a "specialist" or practices a "specialty" or "specializes in a particular field" even though the lawyer is not certified as a specialist by an ABA-approved entity. This Comment would allow a lawyer to use the word "specializes" as long as it is not used in a context that suggests that the lawyer is certified as a specialist by a particular entity.

I am very cautious about the use of "specialist" or "specializes in a particular field of law" because I do not want to use words that could be misunderstood or form the basis for a complaint of being misleading. This may be an overprotective view, but it also eliminates a potential claim that a lawyer owed a client a higher level of a duty of care because the lawyer presented himself or herself as a specialist in a particular field of law.

Producing a Client's File. The September 2010 Ethics column addressed what should be considered the client's file and given to the client at the time of termination of representation or withdrawal from representation. A reader correctly pointed out that this was addressed in Ethics Opinion E-00-03, in which the Ethics Committee wrote "a lawyer is not required to provide, at his or her own expense, a duplicate of those materials in a client file that the lawyer previously sent to the client." This reference is correct, but I caution about applying this language in a situation in which a lawyer is terminating representation or withdrawing from representation.

An argument could be made that certain parts of a file do not have to be given to the client because they were previously sent to the client. gument might not be persuasive if the as charged for the copies and, more nt, if only certain letters were sent to the ut telephone notes, handwritten notes of sations, research documents, or other n the file were not sent to the client. It is better to produce the entire file when ted by the client, at least the first time, to with the requirements of SCR 20:1.16 and mmon concept that the client is the owner client's file.

obtain informed consent from the client to disclose that information. An article on informed consent for disclosure of confidential information will appear in the November *Wisconsin Lawyer*.

Dean R. Dietrich, Marquette 1977, of Ruder Ware, Wausau, is chair of the State Bar Professional Ethics Committee.

Ethics Opinion 324

Disclosure of Deceased Client's Files

When a spouse who is executor of a deceased spouse's estate requests that the deceased spouse's former attorney turn over information obtained in the course of the professional relationship between the deceased spouse and the former attorney, the former attorney may provide such information to the spouse/executor, if (1) the attorney concludes that the information is not a confidence or secret, or, (2) if it is a confidence or secret, the attorney has reasonable grounds for believing that release of the information is impliedly authorized in furthering the interests of the former client in settling her estate. Where these conditions are not met, the deceased spouse's former attorney should seek instructions from a court as to the disposition of materials reflecting confidences or secrets obtained in the course of the professional relationship with the former client. In the absence of such a court order, the attorney should dispose of the materials according to the guidance in Opinion 283.

Applicable Rule

- Rule 1.6 (Confidentiality)

Inquiry

We have received a request for an opinion concerning disposition of documents in the possession of an attorney following a client's death. The inquirers are members of a law firm who represent a husband who is executor and sole heir of his deceased wife's estate. The husband has asked that his wife's former attorney[1] (/bar-resources/legal-ethics/opinions/opinion324.cfm#footnote1) turn over to the estate all documents and files his deceased wife furnished to her attorney, as well as all documents and files the attorney generated or retained in connection with the representation of the wife. These documents and files may be relevant to a legal claim the estate may have against third parties. The inquirers state that the wife's attorney has expressed concerns that releasing the requested documents and files might violate "the attorney-client or attorney work product privileges" and that, "due to the nature of the representation of the deceased spouse," the materials "constitute secrets [sic] and are protected by attorney-client privilege."

The inquirers ask three questions: First, what should become of the documents and files the deceased wife furnished to her attorney? Second, what should become of the documents and files the attorney has generated and retained in connection with her former representation of the deceased wife? Third, may this attorney speak with the former client's husband, who is the executor and sole heir to the estate, without violating "the attorney-client or attorney work product privileges"?

Although the inquirers cast their questions in the framework of privilege law, our answers are confined to their professional responsibilities under the D.C. Rules of Professional Responsibility ("D.C. Rules"), because our charter ordinarily does not extend to questions of substantive law beyond interpretation of the Rules. We thus offer this analysis of the scope of an attorney's continuing duties of confidentiality to a deceased client under D.C. Rule 1.6.

Discussion

D.C. Rule 1.6(a) provides that a lawyer may not reveal "a confidence or secret of the lawyer's client," except under certain specified circumstances. Rule 1.6(b) defines a "confidence" as "information protected by the attorney-client privilege under applicable law," and "secret" as any "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." Thus, unlike ABA Model Rule 1.6 and the rules of many other jurisdictions, D.C. Rule 1.6 does not define as confidential all information relating to legal representation.[2] (/bar-resources/legal-ethics/opinions/opinion324.cfm#footnote2) Material that is not privileged under applicable evidentiary law and does not meet the definition of a "secret" under D.C. Rule 1.6(b) may be disclosed. *See* D.C. Rule 1.6 Comment [6].

The "fundamental principle" underlying D.C. Rule 1.6 is that the lawyer should hold inviolate client "secrets and confidences" so that the client will be "encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." D.C. Rule 1.6 Comment [4]. This duty of confidentiality applies to information in any form,[3] (/bar-resources/legal-ethics/opinions/opinion324.cfm#footnote3) and continues after the termination of the lawyer's employment.

D.C. Rule 1.6(f). The "duty of confidentiality continues as long as the lawyer possesses confidential client information" and extends "beyond the end of the representation and beyond the death of the client." Restatement of the Law Governing Lawyers § 60 comment c (2000).

The attorney-client privilege also usually extends beyond the death of a client. *See, e.g., Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding that attorney-client privilege extends beyond the death of a client and citing numerous cases in agreement from a wide variety of jurisdictions.) As the Court in Swidler discussed, the testamentary exception to the general rule that attorney-client privilege extends beyond a client's death may permit disclosure of privileged information in the context of settling a deceased client's estate, because "the privilege, which normally protects the client's interest, could be impliedly waived in order to fulfill the client's testamentary intent." *Id.* at 405 (citations omitted). A spouse may waive a deceased former client's attorney-client privilege in other circumstances as well, such as where a statute authorizes or requires this step. *See, e.g., State v. Doe*, 101 Ohio St. 3d 170, 803 N.E.2d 777 (2004) (applying 50-year old untested Ohio statute authorizing surviving spouse to waive deceased spouse's attorney-client privilege to require an attorney to testify about what a deceased client told her in a missing-child case).

In short, whether the materials at issue in the inquirers' situation can be revealed to the inquirers' client in his capacity as executor of his wife's estate depends on the nature of the information they contain. Revealing the information would be appropriate if it does not constitute a confidence or secret under the definitions in D.C. Rule 1.6(a). Even if the information is covered by the duty of confidentiality as defined in Rule 1.6, release would be appropriate so long as the attorney has reasonable grounds for concluding that release of the information is impliedly authorized in furthering the former client's interests in settling her estate. The inquirers have told us nothing about the nature of the matter in which the wife sought an attorney's representation, except that it may be relevant to a legal claim the estate may wish to pursue against third parties. With these limited facts we cannot opine on the proper disposition of the documents and files retained by the deceased wife's former attorney, but do offer a more general analysis that we hope will be of help.

In general, the exceptions to D.C. Rule 1.6 permit a lawyer to reveal confidences and secrets when: (i) the "lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a confidence or secret in order to carry out the representation," Rule 1.6(c)(4); (ii) with the client's consent, after full disclosure to the client, Rule 1.6(d)(2); or when permitted by the Rules or (iii) "required by law or court order," Rule 1.6(d)(1). Much information an attorney gains in the course of a representation is routinely disclosed on grounds of implied authorization to carry out the representation, as in drafting a complaint, for example. In the ordinary case, release of information an executor requests would be impliedly authorized under D.C. Rule 1.6(d)(4). In some unusual circumstances, however, an attorney facing the question of disclosure of a deceased client's files or other information to a spouse/executor may confront a more difficult dilemma. An attorney unsure whether a deceased former client wanted information to be disclosed cannot seek the client's instructions as contemplated under D.C. Rule 1.6(d)(1). Instead, the attorney must decide what the client's instructions would have been if the attorney could have consulted her, and this may present a close question.

To take a hypothetical example: Imagine that a wife's will states that she wishes to divide her property equally among her children. The wife later consults another attorney ("second attorney") and confides to this second attorney that, prior to her current marriage, she gave birth to a child about which she has not informed her current husband, and wishes to provide for that child in her will without disclosing the nature of her relationship to this individual. The second attorney begins to prepare a new draft of her will, but the wife unexpectedly dies before it is finalized and signed. After the wife's death, the husband, who is executor of the wife's estate, asks the second attorney for information about the representation. The second attorney must decide whether she has information that is a confidence or a secret. In the example, the fact of the wife's prior child is probably both: the wife told the second attorney this information in the course of seeking legal advice, and stated that she did not want this information disclosed to her husband. But whether the wife would want her wishes to provide for this individual to be known after her death is a more difficult question. The wife expressed to the second attorney her wish that all of her children be provided for, on the one hand, but may wish that her husband not learn of her prior child, on the other.

The decision about what to do in such a situation will require the attorney to exercise her best professional judgment. An attorney who reasonably believes that she knows what her client would have wanted, on the basis of either what the client told her or the best available evidence of what the client's instructions would have been, should carry out her client's wishes. The attorney will usually be best situated to make this determination. In rare situations, however, the attorney may wish to seek an order from the court supervising disposition of the estate and present the materials at issue for the court's in camera consideration.

In reaching these recommendations, we are assisted by a number of opinions from other jurisdictions. The Disciplinary Board of the Hawaii Supreme Court, for example, addressed the question of when an attorney may disclose confidential information concerning a deceased client in Formal Opinion No. 38 (1999). The Board noted that the duty of confidentiality is broader than the attorney-client privilege and that, although a client's heir or personal representative may have authority to waive the attorney-client privilege, the confidentiality protection under the Hawaii Rules of Professional Conduct may still apply. The Board further noted that obtaining client consent to such a disclosure under the Hawaii rules would not be possible once the client was

deceased. The Board concluded, however, that such disclosure might be impliedly authorized in order to carry out the representation, and that in determining the necessity of disclosure of confidential information on this ground the attorney should "consider the intentions of the client." Thus, if an attorney reasonably determines that confidentiality should be waived in order to effectuate the deceased client's estate plan, the attorney would be both "permitted and obligated to make such disclosure." *See also* Restatement of the Law Governing Lawyers § 60 comment I ("the lawyer may reveal confidential client information to contending heirs or other claimants to an interest through a deceased client" if there is "a reasonable prospect that doing so would advance the interest of the client-decedent").[4 (/bar-resources/legal-ethics/opinions/opinion324.cfm#footnote4)]

The Philadelphia Ethics Committee recently considered a situation in which an inquiring attorney represented a client who committed suicide while being treated for mental health problems in a treatment facility. Philadelphia Bar Ass'n Ethics Op. 2003-11 (2003). The former client's father asked the inquirer for information about his son's death, and the inquirer asked whether Pennsylvania Rule of Professional Conduct 1.6 prohibited the inquirer from complying with the father's request. The Committee reasoned that none of the exceptions to Rule 1.6 applied, but that the lawyer could look to the legal representative of the client for decisions on the client's behalf.[5 (/bar-resources/legal-ethics/opinions/opinion324.cfm#footnote5)] The Committee concluded that if the father was appointed executor of his son's estate, he would be authorized to consent to the disclosure of information relating to his son's representation. The Committee cautioned, however, that if the attorney were aware that the former client would not have consented to the revelation of information, the information should not be disclosed.

Finally, in Nassau County (N.Y.) Committee on Professional Ethics Opinion No. 03-4 (2003), the inquirer had represented a woman who sought to file a divorce action against her husband. The client told the inquirer that she did not want to serve papers against her husband or tell him about her plans until she had discussed the matter with her children after they finished their pending college semesters. Ten days later, the client died suddenly. The client's husband discovered that his wife had sought legal representation when he found a check stub showing her payment of the inquirer's retainer fee, and asked the inquirer for itemized billing information. The Nassau County Ethics Committee concluded that, if the information sought revealed the former client's confidences or secrets related to the inquirer's representation of her, the inquirer could not disclose the information requested. The Committee noted that the spouse/executor was the very person whom the inquirer's former client requested not be informed of her plans to seek a divorce until she had "informed her children, a plan upset by her sudden death," and that it was unclear whether the spouse/executor, in requesting the detailed billing records, was "acting to protect the estate and its beneficiaries, or to satisfy his own personal interests." Nassau Op. 03-4 at 2, 5.

The Nassau County Ethics Committee had several helpful suggestions for lawyers facing similar situations. First, the Committee suggested that the inquirer determine whether the spouse/executor would accept the requested itemized billing information in a redacted form that avoided disclosure of his wife's secrets and confidences. This course, the Committee pointed out, could satisfy the spouse/executor's fiduciary duty to determine the proper amount of the partial refund of the retainer fee owed the estate. A similar result might be achieved by offering the written retainer agreement redacted so as to omit the purpose of the legal representation. Op. 03-4 at 6. Finally, the Committee noted that, if the spouse/executor was not satisfied with such offers of redacted documents, the inquirer's refusal to turn over all of the information requested might lead the spouse/executor to seek judicially ordered disclosure in the probate proceeding or related separate action. This development would require the inquirer to present the relevant facts and professional responsibility issues to a court for its determination, including a possible in camera examination of the inquirer's unredacted records. If a court ordered disclosure of the records, the inquirer could either comply with the order, as permitted under the New York provision equivalent to D.C. Rule 1.6(d)(2)(A), or seek appellate review if appropriate.

Our prior opinions have said that an attorney must refuse requests for disclosure of confidential client information until a court has entered a final judicial order requiring such disclosure. *See* D.C. Bar Ethics Op. 214 (1990). We concluded that the attorney need not also pursue appellate review of that order. Id. We further noted that the attorney must give the client notice of the order and a reasonable opportunity to seek review of the order independently. *Id.* These are conditions that cannot be satisfied when the client is deceased. Nonetheless, we think the reasoning of the Nassau Committee is sound on this point, and that, in the general case of a deceased client, an attorney may disclose confidential client information once he or she has been finally ordered to do so by a court, without necessarily seeking appellate review of the court's order. D.C. Rule 1.6(d)(2)(A).

Our prior opinions have also offered guidance to attorneys on handling documents and other materials related to the representation of a former client. In D.C. Bar Ethics Opinion 283 (1998), we advised that lawyers must take care to protect the confidentiality of the contents of clients' closed files. We advised that in a situation in which it was not possible to obtain instructions from the former client or his legal representative as to what to do with such files, a lawyer who concludes that "further retention of a former client's closed files is 'not reasonably practical to protect a client's interests' may destroy the files five years after the termination of the representation." *Id.*

In sum, the proper disposition of the documents the wife's former attorney retains from the prior representation depends on the husband/executor's status in relation to the matter handled in the prior representation. If the matter relates to the husband's

fiduciary duties in handling the disposition of the wife's estate, and if disclosure of the information is impliedly authorized in order to further the deceased client's interests as the former attorney can best ascertain them, then the attorney should furnish the materials to the husband/executor. On the other hand, if these conditions are not met, the wife's former attorney should not turn over the documents. If the attorney reasonably believes that the correct course of conduct is uncertain, she should seek instructions from a court. If no such instructions are forthcoming, the attorney should dispose of the documents according to the guidelines in our Opinion 283. The same analysis applies on the inquirers' question whether the former wife's attorney may speak to the executor/husband. An attorney may disclose a deceased former client's secrets and confidences in any manner, including oral conversation, only if the conditions discussed in this opinion have been met.

May 2004

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1. The term "former attorney" refers to the fact that the client is deceased. We do not intend to imply that the attorney-client relationship terminated for some other reason prior to the client's death.

2. The deliberate decision to incorporate this difference from ABA Model Rule 1.6 is reflected in the legislative history of D.C. Rule 1.6. See Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar (unpublished document dated November 19, 1986), at 41 (deleting ABA Model Rule language covering all "information relating to representation of a client" and inserting D.C. Rule 1.6(b) language defining "confidence" and "secret"); id. at 44 (adding same language to D.C. Rule 1.6 comment [6]); id. at 50 (explaining that D.C. Rule 1.6(a) is substantially identical to ABA Model Code DR 4-101(A), which defines "confidence" and "secret"); id. at 52 (explaining that the Committee and Board preferred the narrower scope of DR 4-101(A) to the ABA's unexplained change in the scope of Model Rule 1.6).

3. See D.C. Rule 1.6 Comment [6] ("This ethical precept, unlike evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge"); Restatement of the Law Governing Lawyers § 59 comment b (definition of confidential information includes documents, files, photographs and other similar materials).

4. Other ethics committee opinions reaching similar conclusions include Kansas Bar Association Professional Ethics Advisory Comm. 01-1 (2001) (a lawyer may use or reveal confidential client information or documents to advance a deceased client's interests in the disposition of property rights by inheritance, but the transfer of information or documents should be limited to that necessary to defend and prove the rights at issue and should not contain information that could be adverse to the deceased client); North Carolina State Bar Ethics Op. 206 (1995) (a lawyer may reveal a client's confidential information to the personal representative of the client's estate, unless the disclosure of confidential information would be clearly contrary to the goals of the original representation or would be contrary to the instructions of the client to the lawyer prior to the client's death).

5. Here the Committee turned to Rule 1.14, which deals with a client under a disability, perhaps because that Rule would have applied to the former client while living.

CLIENT CONSENT – INFORMED CONSENT

SCR 20:1.1 Terminology

(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

CONFLICT WAIVERS
AND THE INFORMED CONSENT STANDARD

By: Timothy J. Pierce

Introduction

Part of practicing law is dealing with conflicts, and dealing with conflicts means dealing with conflict waivers. Lawyers must understand not only how to identify and analyze conflicts, but also how to draft an effective waiver. The lawyer who fails to draft an effective waiver runs the risk of professional discipline, disqualification, loss of fees and malpractice actions. On the other hand, and effective conflict waiver can be a lawyer's most effective tool in defending against any of these actions. The difference, for example, in defeating a malpractice action on summary judgment and proceeding to trial can be a carefully drafted conflict waiver.

Waivers, however, should not be viewed as simply an exercise in self-protection for lawyers for the process of drafting, discussing and obtaining client consent to a waiver provides benefits to both lawyers and clients. Lawyers owe a duty of loyalty to clients and the existence of a conflict means that duty is impaired. The client's decision to waive a conflict is consequently an important decision and taking the time to discuss, review and sign a waiver letter emphasizes the importance of the decision for the client.[1] The process of drafting a waiver letter also forces the lawyer to stop and take a hard look at the conflict and consider whether it is wise to continue. If putting the facts of the conflict and the risks of waiver in writing is uncomfortable, that's a message worth heeding. Waiver letters force both clients and lawyers to think about what they are doing.

In my job as ethics counsel for the State Bar, I discuss conflict questions with lawyers every day, and I'm frequently asked what sort of information should be in a conflict waiver. The purpose of this article is to provide a written reference for Wisconsin lawyers when considering this question. As with most legal topics, it is not possible to provide a comprehensive discussion in the space of a magazine article, but I hope to provide guidance on the types of information that must normally be included in a waiver and a framework for thinking about the issue.

[1] See SCR 20:1.7, Comment, paragraph [20].

I am also often asked if there are any forms to use for conflict waivers. Because of the fact specific nature of conflicts, it is simply not possible to create a "form" conflict waiver. I have, however, appended some simple sample conflict waivers to this article. These samples merely

reflect the author's thoughts as to what might be appropriate language in certain circumstances. They are not "plug and play" waiver forms. Each conflict waiver must be tailored to meet specific circumstances and any lawyer who attempts to rely solely on a form waiver does so at their peril. These samples also ARE NOT "approved" by any court or the Office of Lawyer Regulation.

For considerations of length this article is limited solely to discussion of what sort of information must be in a conflict waiver to meet the informed consent standard, and does not address other topics such as identification of conflicts and analysis of whether a conflict, once identified, is waivable. The information contained herein therefore applies only once a lawyer has identified a conflict and determined that it is waivable.

Background

On July 1, 2007, the Wisconsin Supreme Court adopted revised Rules of Professional Conduct for Attorneys (the "Rules"). As part of those revisions, "informed consent" replaced "consent after consultation," as the standard lawyers must meet when seeking important decisions from clients in certain circumstances, including the decision whether to waive a conflict. Thus, in order to draft a conflict waiver that meets the requirements of the Rules, a lawyer must understand the informed consent standard.[2]

In the 2007 revisions The Wisconsin Supreme Court also retained Wisconsin's requirement that conflict waivers be in writing and signed by each affected client.[3] Therefore, in Wisconsin, an effective conflict waiver requires three things: 1) it must be written 2) it must be signed by the affected, client or former client[4] and 3) must meet the "informed consent" standard. The remainder of this article discusses these three elements.

The requirement that conflict waivers be in writing and signed

These requirements would seem to be self-evident and require no discussion. Both the terms "writing" and "signed" are specifically defined by the Rules, however, and these definitions are worth noting. SCR 20:1.0(q) defines "writing as follows:

[2] "Informed consent" is a term of art used throughout the Rules and its application is not limited to conflict waivers. For example, lawyers are required to obtain the informed consent of clients when seeking to disclose confidential information to third parties (SCR 20:1.6), when entering into business transactions with clients[SCR 20:1.8(a)], when seeking clients' consent to aggregate settlements [SCR 20:1.8(g)] and in various other situations. It does not, however, govern every aspect of a lawyer's communications with a client.

[3] This is a deviation from the ABA Model Rules of Professional Conduct, which require only that conflict waivers be "confirmed in writing."

4 See SCR 20:1.7(b)(4), SCR 20:1.9(a), SCR 20:1.11(a)(2) and SCR 20:1.11(d)(2)(i). The exception to this general rule is SCR 20:1.18, which requires that conflict waivers from prospective clients be confirmed in writing, but does not require such waivers to be signed by the affected clients or prospective clients.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Therefore, in situations requiring a client's informed consent confirmed in a writing signed by the client, such as with conflict waivers, the written confirmation and signature need not be in the form of a letter signed by the client — it can be by e-mail or even voicemail. Some media, however, present problems of preservation and documentation of the lawyer's communication to the client so caution should be observed — it would be at best foolish to rely solely on voicemail as evidence of a written and signed conflict waiver.

The informed consent standard

When seeking a waiver of a conflict from a current or former client, the burden is on the lawyer to communicate sufficient information so that the client's consent meets the informed consent standard. 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.

The Comment, paragraphs [6], to SCR 20:1.0(f) states as follows:

[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.

The Rule and accompanying Comment broadly outline the type of information that is necessary to meet the informed consent standard, but there is no degree of specificity explicitly required. SCR 20:1.0(f) requires "adequate information and explanation" and notes that the amount of information is dependent upon specific circumstances. The Comment also suggests that less sophisticated clients who are not independently represented require more thorough explanations. Thus relatively sophisticated clients might require only a brief description of the circumstances and attendant risks, but inexperienced users of legal services require a more thorough explanation. Lawyers should be cautious, however, of relying on a client's seeming sophistication. Clients' may be very sophisticated about the client's own business, but this does not mean that the client is sophisticated about legal affairs. Sophistication, as that term is used here, means legal sophistication, and it is always better to offer more explanation than might be needed than not enough. Also, because waivers are usually written for non-lawyers, legalese should be avoided — pasting Rules into waivers as an explanation of the conflict will mean little to most clients.

The Comment further suggests that that independently represented clients should be assumed to have had the benefit of advice from that counsel in giving consent and that, in some circumstances, the lawyer should advise a client or former client to seek the advice of such counsel. Thus, while SCR 20:1.0(f) and its Comment do not provide guidance on the precise information that must be provided to the client or former client, but note that the amount of information depends on the particular client. Independently represented clients with a high degree of legal sophistication, such as a corporation with in-house counsel, do not require the same degree of information as an unrepresented individual with no previous experience in the legal system. Good risk management, however, dictates erring on the side of providing more rather than less information to any client. A lawyer doesn't risk discipline or malpractice liability for providing too much information to a sophisticated client.

In looking for further explanation of the standard, little help lies in case law. There is no Wisconsin case discussing SCR 20:1.0(f), which is unsurprising given the recent vintage of the Rule. With respect to the adequacy of conflict waivers in general, Wisconsin courts have addressed the issue in a few cases. The Wisconsin Supreme Court has stated:

Full disclosure contemplated by the conflict of interest provisions of the lawyer ethics code requires far more than merely the client's awareness offacts that may create or suggest a conflict of interest. The disclosure must be sufficient to inform the client of possible adverse effects the conflicting interests of the lawyer or of others might have on the lawyer's representation of the client.

Disciplinary Forester, 189 Wis.2d 563 at 586, 530 N.W.2d 375 at 385 (1995).

The Wisconsin Court of Appeals has held:

An effective waiver of a conflict or potential conflict of interest which is knowing and voluntary requires the lawyer to disclose the following: (1) the existence of all conflicts or potential conflicts in the representation; (2) the nature of the conflicts or potential conflicts, in relationship to the lawyer's representation of the client's interests; and (3) that the exercise of the lawyer's independent professional judgment could be affected by the lawyer's own interests or those of another client. On the part of the client, it also requires: (1) an understanding of the conflicts or potential conflicts and how they could affect the lawyer's representation of the client; (2) an understanding of the risks inherent in the dual representation then under consideration; and (3) the ability to choose other representation. See State v. Cobbs, 221 Wis.2d 101, 105-06, 584 N. W.2d 709, 710 (0.App.1998); Kaye, 106 Wis.2d at 14-16, 315 N. W.2d at 342-43; SCR 20:1.7.

Guardianship of Lillian P., 2000 WI App. 203, ¶ 21, 238 Wis.2d 449, 617 N.W.2d 849 (Ct. App. 2000).

Both of the above referenced cases were decided under the old Rules, which required that clients give "consent after consultation," which was a more lenient standard than informed consent. Even under the old, more lenient standard, however, Wisconsin courts emphasized that client's mere awareness of and consent to a conflict does not suffice — the lawyer must also explain the implications of the conflict, particularly the risks to the client. A waiver that simply states that the lawyer told the client of the existence of a conflict and the client waived it would not be enough even before the informed consent standard was adopted.

Looking beyond case law, the *Restatement (Third) of the Law Governing Lawyers* (the "Restatement")[5] defines informed consent to a waiver of a conflict in § 122 as requiring "that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client." Thus the Restatement, like the Wisconsin Supreme Court in *Forester* and the definition of

[5] The Restatement, while not authority in Wisconsin, is sometimes relied upon by the supreme court professional responsibility cases - see e.g. *Disciplinary Proceedings against Duchemin,* 2003 WI 19, 260 Wis.2d 12, 658 N.W.2d 81 (2003).

informed consent found in SCR 20:1.0(f) emphasizes the necessity of informing the client of the risks attendant in agreeing to waive a conflict.

Based upon the above discussed sources, it can be said that informed consent has three essential elements:

1. **Explanation of facts and circumstances.** In the context of a conflict waiver, this would normally involve an explanation of what the conflict is and why it's a conflict. For example;

- In the case of a concurrent conflict arising from a lawyer's representation of one client against another client that the lawyer represents in an unrelated matter, the lawyer must clearly explain that the lawyer is representing an adverse party against the client in an unrelated matter and this creates a conflict because the lawyer's duty of loyalty to the client would normally preclude taking any positions adverse to the client, even on unrelated matters.

- In the case of a former client conflict, this would normally involve identifying the matter in which the lawyer represented the former client, the fact that the lawyer now represents a different client whose interests are adverse to the former client, in a related matter and that this creates a conflict.

- In the case of a material limitation conflict, such as when joint clients may have claims against each other of small value which the clients have chosen to forego for the benefits of joint representation, that the lawyer is precluded from advising or assisting the client in pursuing a certain course of action (the foregone claims) and that this creates a conflict because the lawyers ability to represent the client is limited by such restrictions.

2. **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 and the most difficult for lawyers. It means that the lawyer must explain in plain language the "downside" to the client of agreeing to the waiver, or, as described by one court, the lawyer must describe the nature of the conflict in such detail so that the affected clients can understand why it may be desirable to withhold that consent.[6] Put another way, the lawyer should point out the risks to the client that the lawyer would point out if the lawyer had been retained specifically for that purpose.' It is understandably uncomfortable for the lawyer seeking the waiver of a conflict to tell the person why it might be a bad idea to give the very consent the lawyer is seeking. Nonetheless, the Rules require it and, as discussed in the introduction to this article, it benefits the lawyer by making her think hard about what is being asked.

6 *Florida Ins. Guaranty Ass'n. v. Carey Canada Inc.* 749 F.Supp. 255 (S.D. Fla. 1990). Lawyers must be careful to avoid stepping over the line and rendering legal advice to unrepresented former clients or prospective clients from whom the lawyer is seeking a conflict waiver. SCR 20:4.3 forbids a lawyer from giving legal advice to an unrepresented

person whose interests are in conflict with the interests of the lawyer's client.

The types of material risks posed to affected clients varies from case to case. For example:

- In seeking a waiver from clients which are affected by a concurrent conflict of interest in connection with unrelated matters, there may be little risk to the clients and a general description of the respective representations and the work involved should suffice. If necessary, however, it should be made plain that the firm may have confidential information that may be relevant to the client's adversary in the unrelated matter and what, if any, steps the firm is taking to protect that information.

- In seeking a waiver for a former client conflict, § 122, comment c(i) of the Restatement provides guidance:

> *When the consent relates to a former-client conflict (see ss' 132), it is necessary that the former client be aware that the consent will allow the former lawyer to proceed adversely to the former client. Beyond that, the former client must have adequate information about the implications (if not readily apparent) of the adverse representation, the fact that the lawyer possesses the former client's confidential information, the measures that the former lawyer might undertake to protect against unwarranted disclosures, and the right of the former client to refuse consent. The former client will often he independently represented by counsel. If so, communication with the former client ordinarily must be through successor counsel (see 99 and following).*

Because the basis of former client conflicts is the fact that the lawyer is irrebuttably presumed to have relevant confidential information about the former client when matters are substantially related,[8] the lawyer should normally explain that the lawyer is now taking a position adverse to the former client in a matter in which information relating to the prior representation may be relevant and useful to the former client's present adversary.[9]

- Multiple representation brings special considerations. § 122, comment c(i) of the Restatement here also provides useful information:

> *In a multiple-client situation, the information normally should address the interests of the lawyer and other client giving rise to the conflict; contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict; the effect of the representation or the process of obtaining other clients' informed consent upon confidential*

[8] See e.g. *Burkes v. Hales* 165 Wis.2d 585, 478 N.W.2d 37 (Ct.App. 1991).
[9] It is important to note that a waiver of a conflict IS NOT a waiver of confidentiality. Thus, a

former client's waiver of a conflict does not give the lawyer permission to reveal information relating to the representation of the former client or use such information adversely to the interests of the former client. See SCR 20:1.9(c).

> *information of the client; any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and the consequences and effects of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients.*

SCR 20:1.7 (Concurrent Conflicts of Interest), Comment paragraphs [30] and [31] provide further guidance:

> *[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.*
>
> *[311 As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.*

Thus, in most multiple representation situations, a conflict waiver should, at a minimum discuss:

1. **The effect of multiple representation on the clients.** This normally would include a discussion of options and alternatives foregone because of the joint representation, such as the fact that the lawyer cannot pursue claims on behalf of one against another. Or, in a transactional matter, the fact that the lawyer cannot take on an advocacy role, such as bargaining for better terms for one client to the disadvantage of another.

2. **The effect on attorney-privilege.** Clients must normally be warned that they will likely not be able to invoke the attorney-client privilege in the event of a future legal dispute between former joint clients.

3. **Confidentiality.** Clients must be informed that the lawyer cannot keep material information secret from any of the joint clients. If one client insists on such secrecy, it will likely create an irreconcilable conflict for the lawyer.

4. **Future withdrawal.** The waiver should also discuss the chance that circumstances may change, for example rendering what was a waivable conflict unwaivable and thus causing each client to bear the expense of retaining new counsel.

5. **Any other reasonable foreseeable risks.**

In considering what other risks might arise, *Arizona Ethics Opinion 07-04 (2007)* provides some guidance.[10] In that opinion, the Ethics Committee of the State Bar of Arizona considered a proposed conflict waiver for a multiple representation and offered the following guidance, which while discussing Arizona law, is still useful in commenting on general principles that are relevant for Wisconsin lawyers:

> *(1)* Conflicting Testimony. *The implications of testimonial conflicts among jointly represented parties is addressed in* Sellers v. Superior Court, *where the defendants had all consented in advance to the joint representation, with knowledge of testimonial conflicts, yet an argument was made in the context of a motion for disqualification that those conflicts presented an "untenable" conflict at the outset on the 'has of that case. Although the inquiring laivyer's consent form appropriately identifies the potential for testimonial and other conflicts, it may be prudent to provide further explanation on how such testimonial conflicts could negatively impact the claims of each individual client, assuming that was not done orally.* Sellers, *154 Ariz. at 287, 742 P.2d at 298 (on remand following disqualification order, trial court should consider whether the ER 1.7 disclosure "encompass fed] the divergence of interest among defendants and the potential significance of their testimonial disparities"). Furthermore, any known testimonial conflicts should be evaluated to determine whether the conflict is "consentable.*
>
> *(2)* Conflicting Settlement Positions. *The consent form appropriately discloses that there may be conflicts among clients with respect to*

settlement, including that "there may be different possibilities of settlements of the claims." h recites the clients' understanding that "a lump sum settlement offer to all plaintiffs" is not permissible," that the law firm may reject such an offer and demand individual settlement offers, and that each plaintiff is free to accept or reject its individual settlement offer. This opinion assumes that the inquiring lawyer, in discussing the topic of settlement, orally discussed the

[9] Arizona follows the ABA in requiring only that conflict waivers be confirmed in writing and does not require the affected clients signature. The quoted excerpts should be read with that caveat in mind.

advantages and disadvantages of the various settlement approaches, including the possible disadvantages of requiring individual offers (as opposed to aggregate offers). Additionally, because individual offers are being required, it should also be made clear to each client that information on the individual settlement offer it receives, and any response thereto, cannot be kept confidential from the other jointly represented plaintiffs. See *ER 1.8, OM 13 (noting that ER 1.8 is a corollary of ER 1.7 and requires that "before any settlement offer... is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement... is accepted");* see also *ABA Formal Op. 06-438 (February 10, 2006) (with respect to aggregate settlement offers under ER 1.8, lawyer must provide each client with detailed information on every other client's participation in the proposed settlement, along with explanation of how costs will be allocated).[5]*

- Advance, or prospective, conflict waivers, like those in multiple representation situations, require special care." Such waivers are not explicitly prohibited by the Rules, but, like all conflict waivers, must meet the informed consent standard. Thus, difficulty arises in both describing an as yet unknown conflict and describing the material risks to the client in sufficient detail. Paragraph [22] of the Comment to SCR 20:1.7 discusses relevant considerations:

[221 Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to

that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is

[11] Advance conflict waivers, as the name suggests, are waivers of conflicts that currently do not exist and are not readily foreseeable. They are common in situations in which, for example, a large firm may undertake representation of a large multi-national corporation and it is likely that, because the or size and scope of the firm's and the client's businesses, the firm will likely be asked to undertake a representation adverse to the corporation in an unrelated matter.

more likely to be effective, particularly if e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

§ 122, comment d., of the Restatement states, in part:

Client consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.

On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Both SCR 20:1.7 and §122 of the Restatement place considerable importance on the relative legal sophistication of the client asked to give advance consent to a conflict and whether the client had access to independent legal counsel in making the decision.[12] An independently represented sophisticated client is much more likely to a have a full appreciation of the risks involved in signing such a waiver.

Courts considering the validity of advance waivers also place considerable weight on these factors, but also tend to uphold waivers that are able to specifically identify potential matters in which conflicts may arise, as opposed to general, open-ended advance waivers.[13] Thus, when considering drafting an advance conflict waiver, the lawyer should strive to be a precise as possible with respect to the anticipated future conflict or conflicts.

3 **An explanation of available options and alternatives.** This final element of obtaining informed consent in the context of a conflict waiver is normally fairly straightforward, and would typically involve simply explaining that the client, or former client, has a right to withhold consent and that decision would preclude the lawyer's involvement in the matter.

[12] See also *ABA Formal Ethics Opinion 05-436 (2005).*

[13] See e.g. *Celgene Corp. v. KV Pharmaceutical Corp* 2008 WL 2937415 (D.N.J.)

Renewed consent

In considering the adequacy of a waiver, the lawyer must bear in mind that, sometimes, material facts may change and render an already executed conflict waiver outdated. In such circumstances, the lawyer must give thought as to whether the change if facts render a once waivable conflict unwaivable. If still waivable, the lawyer must draft a waiver to reflect the changed circumstances and obtain the clients' signatures.

Summary

Thus, when drafting a conflict waiver, lawyer must be mindful of the particular client or former client and focus on conveying adequate information to enable that specific client to understand the three elements discussed above. For a typical case, the lawyer should be sure to describe, in writing, the fact of and nature of the conflict, the risks or downside to the client of agreeing to waive the conflict, and the fact that the client has the option of declining to give the requested consent.

Samples

Disclaimer: The brief samples below are not intended to be used as conflict waivers. All conflict waivers are fact specific, and thus there cannot be adequate form conflict waivers. They are not "approved" by any court or the Office of Lawyer Regulation. They represent solely the opinions of the author and meant to serve only as examples of the type of information lawyers may consider including in conflict waiver letters.

Sample 1 - Unrepresented former client

Dear Mr. X,

This letter confirms our previous conversation about my prior representation of you, my current representation of Mr. Y, and the parcel of farmland you are selling. As you are aware, I represented you in purchasing this farmland from Mr. Z four years ago. Mr. Y has asked me to represent him in the purchase of that very farmland from you. As my former client, you are entitled to expect confidentiality and loyalty from me in connection with those matters in which I represented you. Because Mr. Y has asked me to represent him in the purchase of the same land that I helped you acquire, I am now representing a client whose interests are adverse to yours in a matter that is related to my prior representation of you. This creates a conflict of interest. It is my understanding that you have agreed to waive this conflict of interest.

In making that decision, you should be aware that, by virtue of my prior representation of you in a substantially related matter, I may have confidential information that may be relevant and useful in my representation of Mr. Y. Because of the relatively straightforward nature of this matter and my prior representation of you, I do not believe that any information I may have gained in representing you in the past poses a substantial risk to you now, but you should consider the issue. Your agreement to waive this conflict does not permit me to disclose any information I may have about you to Mr. Y, it simply allows me to represent Mr. Y in this matter, and I will not disclose any such information without your informed consent nor will I use such information in my representation of Mr. Y. You should also understand that my job is to represent Mr. Y's interests in this matter and, because you are not my client, I am very limited in the types of questions 1 can answer for you. I cannot give you legal advice, and I urge you to seek the advice of another lawyer if you have questions about whether or not it is a good idea to sign this conflict waiver.

Although I am asking you to agree to waive this conflict of interest, you are not required to do so. If you change your mind and do not agree to waive this conflict, I will not be able to represent Mr. Y in purchasing the farmland from you. If you do agree to waive this conflict, please sign and return this letter to me.

Sample 2 — current client in connection with former client conflict.

Dear Mr. Y,

This letter confirms our previous conversation about my prior representation of Mr. X and my current representation of you in connection with the parcel of farmland you are

buying from Mr. X. As you are aware, I represented Mr. X in purchasing this farmland four years ago. As my former client, Mr. X is entitled to expect confidentiality and loyalty from me in connection with those matters in which I represented him. Because you have asked me to represent you in the purchase of the same land that I helped Mr. X acquire, I am now representing you in a matter that is adverse to a former client of mine in a matter that is related to my prior representation of that client. This creates a conflict of interest. It is my understanding that you have agreed to waive this conflict of interest. As we discussed, it is also my understanding that Mr. X has agreed to waive the conflict.

In making that decision, you should be aware that, by virtue of my prior representation of Mr. X, the law presumes that I may have confidential information about Mr. X that may be relevant and useful in my representation of you. In representing you, I will not be permitted to disclose or use any information I may have about you to Mr. X, The waiver of the conflict simply allows me to represent you in this matter. I do not believe that may obligations to Mr. X impair my ability to represent you in this matter, however, and I will do so to the best of my ability.

Although I am asking you to agree to waive this conflict of interest, you are not required to do so. If you change your mind and do not agree to waive this conflict, I will not be able to represent you in this matter. I am happy to answer any further questions you might have about this matter. If you would be more comfortable consulting with another lawyer about this conflict waiver, please do so. You are not however, required to speak with another lawyer — it is simply a choice your to make. If you do agree to waive this conflict, please sign and return this letter to me.

Sample 3 - represented former client

Dear Atty. A.,

This letter confirms my understanding your client, Mr. B, has agreed to waive the conflict of interest involved in my proposed representation of Mrs. B in their divorce. As you are aware, the conflict arises because I previously represented both Mr. B. and Mrs. B. in connection with estate planning matters approximately three years ago.

You have informed me that Mr. B has had the benefit of your advice with respect to this matter and after discussing the matter with you has agreed to waive this conflict. If that is not the case, please let me know. If in fact you have had the opportunity to consult with your client about this matter and your client agrees to waive the conflict, please have your client sign this letter and return same to me.

Note: This waiver is brief because it assumes that the former client has the benefit of independent

legal advice. A lawyer in such a situation may nonetheless choose to err upon the side of caution and draft a more detailed letter.

Sample 4 - current business client — screened unrelated matter

Dear Ms. Executive,

As you are aware, our firm currently represents your company, ABC Inc. ("ABC"), in connection with certain tax matters before the IRS. As you also are aware, our firm has been asked to represent XYZ Inc. ("XYZ"), in connection with negotiations with ABC about the terms of a contract to supply ABC with machine parts. Because ABC is a current client of our firm, you are entitled to expect loyalty from this firm in the sense that we cannot represent clients whose interests may be materially adverse to ABC's interests in any matter. XYZ's interests are adverse to the interests of ABC in the contemplated negotiations and this creates a conflict of interest for our firm. It is my understanding that you have agreed to waive this conflict.

In deciding whether to waive this conflict, you should consider our duty of confidentiality to you. We are obliged to keep information relating to out representation of you confidential, and our representation of XYZ in a matter adverse to ABC may cause you to be concerned about the confidentiality of your information. I do not believe that any information relating to our representation of ABC in the tax matters would be relevant to the contemplated negotiations with XYZ, and we will not disclose any information relating to out representation of ABC. Therefore, I do not believe that you confidential information is at risk. Nonetheless, we have put in place screening measures within our firm, so that none of the lawyers who will represent XYZ in the negotiations will have any access to information relating to ABCs tax matters, and vice versa. Those screening measures include memoranda and signed agreements from the lawyers and support staff working on the respective matters, secure separation of the physical files and password protection for information on the firm's computer system.

In addition to issues of confidentiality, you should consider for yourself what effect our representation of XYZ will have on ABC. Clients may rightly be concerned that firms may be less vigorous in pursuing their matters when the firm also represents an opposing party. I do not, however, believe that that there is any risk that our firm's representation of ABC will in any way be impaired by our representation of XYZ because the respective matters are unrelated.

Although I have asked you to waive this conflict on behalf of ABC, you are not required to do so. Should you decline to waive this conflict, our firm would be unable to represent XYZ and other counsel would represent them in connection with the contract negotiations. I urge you to seek the advice of other counsel of your choice if you so wish with respect to this waiver.

If you do agree waive this conflict, please sign and return this form to me.

Sample 5 — multiple representation, civil litigation

Dear Ms. X, Ms. Y and Ms. Z

This letter confirms our prior conversation, wherein I agreed to represent you in connection with your claims against ABC Inc. ("ABC"). In order for me to be able to represent the three of you in this matter, it is necessary that you waive the conflict of interest involved in my representation of all of you in the same matter. The purpose of this letter is to explain the conflict and request your agreement to waive that conflict.

Example 1 Because you all have asked me to represent you jointly in this matter, rather than each of you obtaining your own lawyer, there are certain consequences. Namely, as lawyer for the three you of jointly, there are certain options and alternatives that are precluded. In this matter, there is a possibility that you may have viable cross claims against each other. However, as we discussed, 1 do not believe that any such claim would have significant monetary value, the benefits of presenting a unified front against ABC and the likely savings from using one lawyer outweigh the value of such cross claims. However, by you agreeing to joint representation, you are forgoing pursuing those cross claims because I cannot represent one of you against another. This imposes a material limitation on my representation of the three of you and thus creates a conflict of interest for me as your lawyer. I can represent the three of you jointly only if you agree to waive this conflict.

OR

Example 2 You have asked me to represent you jointly in this matter and I have agreed to do so because you share common goals and interests. I do not believe that, in order to achieve those goals, one of you must take a position that is adverse to the interests of the others. However, with respect to any issue that may arise in this matter about which you disagree, and one of you may wish to pursue a course that benefits one but is detrimental to the interests of the others, I cannot advise or assist any of you in pursuing such a course. That is to say, **I** cannot advocate for your individual interests at the expense of the others. **I** do not believe that this poses a problem because your interests are currently aligned. **I** am confident that my representation of all of you will not be limited in this matter, but you should consider these consequences of joint representation is deciding whether to waive this conflict.

In addition to the material limitation I discussed above, there are other consequences for you in agreeing to joint representation. Because each of you are my clients, as your lawyer I owe equal duties of loyalty and communication to each of you. As such, I must share all relevant information with you and I cannot, at the request of one of you, withhold relevant information from the other clients. That is to say, I cannot keep secrets about this matter among the three of you. Also, lawyers normally cannot be forced to divulge information about communications with their clients because it is protected by the attorney-client privilege. However, because you are joint clients in the same matter, it is likely that in the event of a future legal dispute between you about this matter, the attorney-client privilege

would not apply, and you would each not be able to invoke the privilege against the claims of each other.

Further, while your respective positions are in harmony presently and the conflict discussed above is waivable, facts and circumstances may change. For example, one of you may change your mind and wish to pursue a course that is adverse to the interests of the others and the conflict may become unwaivable, In that case I would likely have to withdraw from representing any of you and you would have to bear the expense, if you choose, of hiring new lawyers who would have to get up to speed on the case.

You are not required to agree to waive this conflict, and you may, after considering the risks involved in joint representation, decline to sign this conflict waiver letter. In that case, I would likely not be able to represent any of you in this matter. In our prior discussion, you each indicated a willingness to waive the conflict, and if that is still the case, please sign and return this letter to me.

Wisconsin Formal Ethics Opinion EF-17-02: Duty of Confidentiality; Identities of Current and Former Clients.

April 4, 2017

Synopsis

The ethical duty of confidentiality protects all information relating to the representation of the client, whatever its source, including the identity of the client. SCR 20:1.6 prohibits the disclosure of a client's identity unless the client gives informed consent to the disclosure, the disclosure is impliedly authorized in order to carry out representation, or the disclosure falls within certain stated exceptions. Whether a client's identity is protected by the lawyer-client privilege under Wis. Stat. § 905.03 is beyond the scope of this opinion.

Ethics Opinion E-93-5 is withdrawn.

Introduction

Lawyers may wish to disclose information about the clients they represent, including the identity of current or former clients, for a variety of reasons not related to the representation of those clients, such as listing representative clients in marketing materials or providing client references to prospective clients. This opinion discusses whether client identity is protected by Supreme Court Rule ("SCR") 20:1.6 and also discusses the scope of information protected by SCR 20:1.6.

Opinion

The lawyer's professional duty to protect the confidentiality of information relating to the representation of clients is governed by SCR 20:1.6. The Rule states, in relevant part:

> 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; or

(6) 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.

The Rule contains a general prohibition on disclosing information relating to the representation of clients, then sets forth one mandatory disclosure provision and several circumstances in which disclosure is permissive. In the course of representing clients, lawyers disclose information in ways that are reasonably necessary to achieve the lawful objectives of the clients, such as negotiating with adversaries, arguing the case in court or representing the client's interests before governmental agencies. Such disclosures are "impliedly authorized" under SCR 20:1.6(a) and do not violate the Rule. The mandatory and permissive disclosure provisions of SCR 20:1.6(b) and (c) also permit disclosure when applicable.

This opinion, however, will focus on whether client identity (and other information relating to the representation of current or former clients) is protected when a lawyer wishes to disclose client identity for the lawyer's own purposes when disclosure is not necessary to further the client's objectives. One example of such a situation is the listing of representative clients in marketing materials.

Information relating to the representation of a client

SCR 20:1.6 is noteworthy in that it does not categorize information as "confidential" and "non-confidential" information – it simply prohibits lawyers from revealing information relating to the representation of a client. It is therefore necessary to determine the scope of "information relating to the representation of a client" and whether client identity falls within this category.

While the Rule itself does not define "information relating to the representation of a client, Comment [3] states, "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Thus, information received from third parties, learned from opposing parties or gathered from other sources is protected provide that the information relates to the representation of the client. This extremely broad definition, coupled with the term "confidential," can lead to confusion as to the scope of the rule. The next sections of the opinion discusses some common questions about the scope of information protected by SCR 20:1.6.

What if the lawyer believes that the identity of a client is not protected by the lawyer-client privilege?

Lawyers sometimes misunderstand the duty to protect information because they confuse the duty of confidentiality with the lawyer-client privilege. It is important to understand the distinction between the evidentiary rule of lawyer-client privilege and the ethical duty of confidentiality

ABA Comment [3] to SCR 20:1.6 notes the differences between these bodies of law:

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The

> confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Being a rule of evidence, not ethics, lawyer-client privilege only applies in proceedings in which the rules of evidence govern and only determines whether certain types of evidence may be admitted or compelled in such proceedings. Lawyer-client privilege does not therefore guide lawyers in determining what information about a client that a lawyer may voluntarily reveal. SCR 20:1.6, which governs a lawyer's duty of confidentiality, applies in all other situations, and governs what information relating to the representation of clients lawyers may voluntarily reveal.

Much information relating to the representation of a client is not covered by the lawyer-client privilege, but nonetheless is protected by SCR 20:1.6. This means that when considering "information related to the representation of a client," the privileged or non-privileged nature of the information is not determinative of whether the information is protected by the duty of confidentiality.

What if the identity of the client has already been disclosed in public?

In Formal Ethics Op. 04-430 (2004), the ABA's ethics committee noted the scope of confidentiality in analyzing a lawyer's duty to a report a lawyer not engaged in the practice of law:

> We also note that Rule 1.6 is not limited to communications protected by the attorney-client privilege or work-product doctrine. Rather, it applies to all information, whatever its source, relating to the representation. Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.
>
> (Footnotes omitted)

ABA Formal Ethics Op. 04-430 makes the point that even information that may be available from public sources remains protected as long as it is information relating to the representation of a client.

Wisconsin case law has also addressed this issue.[1] In one disciplinary case, the Respondent lawyer was charged with violating his duty of confidentiality by revealing information relating to the representation of a former client. The Respondent argued that he was free to reveal that information because it had previously been placed in the public record in a different case. The Wisconsin Supreme Court rejected this argument, holding as follows:

> We agree with Referee Jenkins' interpretation of this rule and her conclusion that the information obtained by Attorney Harman from his client, S.W., even if not protected or deemed confidential because it had previously been filed in the Wood County case, could not be disclosed without S.W.'s permission because that information was obtained as a result of the lawyer-client relationship he had with S.W.

Thus the Wisconsin Supreme Court has recognized that whether information has been previously publicly disclosed does not prevent the information from being protected by the Rule. If the publicly disclosed (or available) information relates to the representation of a client, it is protected by SCR 20:1.6.[2] Similarly,

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[1] *Disciplinary Proceedings against Harman*, 244 Wis.2d 438, 628 N.W.2d 351 (2001)

[2] Other jurisdictions have also recognized that the protections of the confidentiality rule extends to publicly available information. See, e.g., *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995); *Iowa Supreme Court Attorney Disciplinary Bd.*

information remains protected even if known by others or available from other sources. This also illustrates another important distinction between privilege and confidentiality – disclosure does not constitute waiver of confidentiality. Generally when the privilege is waived, it is waived forever and for all purposes, but when information protected by SCR 20:1.6 is disclosed for a permitted purpose, the information does not lose its protected status.[3]

What if the lawyer wishes to disclose the identity of a prospective or former, rather than current, client?

The protections of SCR 20:1.6 may also arise outside the temporal confines of a lawyer-client relationship. SCR 20:1.18 sets forth the duties owed by lawyers to prospective clients. SCR 20:1.18(b) states:

> Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as SCR 20:1.9 would permit with respect to information of a former client.

Thus the Rules specifically apply the same duty of confidentiality owed to former clients to prospective clients even when no lawyer-client relationship ensues. Needless to say, this Rule also protects information learned in discussions with prospective clients when a lawyer-client relationship does ensue. Similarly, a lawyer may learn information from a former client that relates to the representation of that client, such as when a former client calls to ask the lawyer questions about the matter and provides the lawyer with additional information. The determinative factor is whether the information relates to the representation of a client.

The protections of the Rule do not end at the end of the representation of the client.[4] SCR 20:1.9(c)(2) states:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The duty of confidentiality continues beyond the death of the client.[5]

What if the client has not specifically requested that their identity not be disclosed?

The Rule also operates automatically and protects information even if the client has not requested that the information be held in confidence or does not consider it confidential.[6] There is no requirement in the language of either the Rule or Comment of SCR 20:1.6 requiring that the client request information be kept confidential in order to trigger the protections of the Rule. Thus, in order to disclose information relating to the representation of a client, it is the obligation of the lawyer to obtain the client's informed consent or determine that the information falls within one of the stated exceptions.

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v. Marzen, 779 N.W.2d 757 (Iowa 2010); *In re Bryan*, 61 P.3d 641, (Kan. 2003); *Akron Bar Ass'n v. Holder*, 810 N.E.2d 426, (Ohio 2004).

[3] See e.g. *Newman v. Maryland*, 863 A.2d 321 (Md. 2004).

[4] See SCR 20:1.6 Comment [18]. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2)

[5] See Wisconsin Ethics Op. E-89-11.

[6] See Nevada Ethics Op. 41 (2009)

What if the disclosure of the client's identity would be harmless?

Also, whether a lawyer believes that a disclosure would be "harmless" is not relevant to the analysis of whether such a disclosure would be permissible. This is demonstrated by the way the duty under SCR 20:1.6 differs from its predecessor, DR 4-101, which prohibited the lawyer from disclosing "confidential" or "secret" information. Confidential information previously was defined as information protected by the lawyer-client privilege and secrets were defined as information which may be detrimental or embarrassing to the client or which the client has requested be held in confidence. Unlike DR 4-101, SCR 20:1.6 is not limited to information communicated in confidence by the client and does not require the client to indicate what information is protected. Moreover, unlike DR 4-101, SCR 20:1.6 does not permit the lawyer to speculate whether particular information might be embarrassing or prejudicial if disclosed. As long as the information relates to the representation, it is protected by the duty of confidentiality.

Relevant Rules

Of particular relevance to this question is the recently adopted SCR 20:1.6(c)(6), which states:

> (c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (6) 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.

The Wisconsin Committee Comment provides guidance:

> Paragraph (c)(6) differs from its counterpart, Model Rule 1.6(b)(7). Unlike its counterpart, paragraph (c)(6) is not limited to detecting and resolving conflicts arising from the lawyer's change in employment or from changes in the composition or ownership of a firm. Paragraph (c)(6), like its counterpart, recognizes that in certain circumstances, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest. ABA Comment [13] provides examples of those circumstances. Paragraph (c)(6), unlike its counterpart, also recognizes that in certain circumstances, lawyers may need to disclose limited information to clients and former clients to detect and resolve conflict of interests. *Under those circumstances, any such disclosure should ordinarily include no more than the identity of the clients or former clients.* The disclosure of any information, to either lawyers in different firms or to other clients or former clients, is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client. ABA Comment [13] provides examples of when the disclosure of any information would prejudice the client. Lawyers should err on the side of protecting confidentiality.
>
> (Emphasis added)

The fact that a provision allowing permissive disclosure in certain circumstances is necessary to permit lawyers to disclose identities of current or former clients clearly demonstrates that client identities are protected.

Paragraph [2] of the ABA Comment to SCR 20:7.2, the advertising rule, also recognizes that client identity is protected by the duty of confidentiality.

> This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references *and, with their consent,*

names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

(Emphasis added)

The Committee has long recognized this fact, opining in Wisconsin Ethics Opinion E-90-03 that client identity and information concerning fees are protected by SCR 20:1.6(a). This position is also consistent with opinions from other jurisdictions.[7]

Conclusion

The ethical duty of confidentiality under SCR 20:1.6 is thus extremely broad: it protects all information relating to the representation of the client, whatever its source. It protects information irrespective of whether that information is privileged, or if the lawyer believes that disclosure would be "harmless." It protects information that is known to others or may be available from public sources. This duty of confidentiality extends to information relating to the representation of former clients as well by virtue of SCR 20:1.9(c)(2), which prohibits lawyers from revealing information relating to the representation of former clients except as permitted or required by the Rules. Thus, information relating to the representation of former clients is protected to the same extent as that relating to current clients.

It is hard to imagine information more closely relating to the representation of a client than the identity of the client. Therefore, a client's identity, as well as a former client's identity, is information protected by SCR 20:1.6 and the disclosure of a client's identity is prohibited unless the client gives informed consent to the disclosure, the disclosure is impliedly authorized in order to carry out representation, or the disclosure falls within certain stated exceptions. Lawyers must be mindful of the duty of confidentiality owed to current and former clients when considering the use of such information for purposes such as marketing, authoring articles, or presentations.

The State Bar's Standing Committee of Professional Ethics (the "Committee") previously addressed revealing the identity of current and former clients in Wisconsin Ethics Opinion E-93-5. That opinion, which incorrectly states that client identity is not considered to be information relating to the representation of that client, is withdrawn.

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[7] Ellen J. Bennett, Elizabeth J. Cohen, Martin Whittaker, Annotated Model Rules of Professional Conduct 98 (7th ed. ABA Center for Professional Responsibility); Ill. Ethics Op. 12-03 (2012) (client's identity is protected information that may not be disclosed to members of reciprocal referral business networking group without client's informed consent); New York State Ethics Op. 907 (2012) (lawyer may not disclose client's identity when making anonymous charitable donation on client's behalf); Nevada Ethics Op. No. 41 (2009) (lawyer may not reveal information relating to the representation of the client even if the information is generally known and not to the disadvantage of the client); Ill. Ethics Op. 97-1 (1977); Iowa Ethics Op. 97-4 (1977). A former client's identity is also protected under SCR 20:1.6 because SCR 20:1.9(c)(2) prohibits a lawyer from disclosing information except as the rules would permit with respect to a client.

SUCCESSION IN EVENT OF DEATH, DISABILITY, OR HEALTH

SCR 20:1.16 Declining or terminating representation. (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in par. (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

History: Sup. Ct. Order No. 04-07, 2007 WI 4, 293 Wis. 2d xv.

Note: Sup Ct. Order No. 13-10 states that "the Comments to SCRs 11.02, 20:1.1, 20:1.2 (c), 20:1.2 (cm), and 20:1.16 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Wisconsin Committee Comment to Supreme Court Rule 20:1.16, Declining or terminating representation (2014): With respect to subparagraph (c), a lawyer providing limited scope representation in a matter before a court should consult s 802.045, stats., regarding notice and termination requirements.

Case Notes: The formation and termination of an agreement to provide representation is discussed. Gustafson v. Physicians Insurance Co. 223 Wis. 2d 164, 588 N.W.2d 366 (Ct. App. 1998).

Note: The above annotation cites to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04-07.

Wisconsin Committee Comment: With respect to the last sentence of paragraph (d), it should be noted that a state bar ethics opinion suggests that lawyers in Wisconsin do not have a retaining lien with respect to client papers. See State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-95-4 (1995).

ABA Comment: [1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2 (c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal. [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge. [4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal. [7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal. [9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

STATE BAR of WISCONSIN

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SOLUTIONS

So, You Want To... Plan for Succession

Preparing your law practice to carry on in your temporary or permanent absence is vital, although not necessarily the most pleasant task to contemplate. Here's a checklist to get you started.

TYSON H. RHINE

This annual "What's Hot? What's Not?" issue of *Wisconsin Lawyer* is one of my favorites. Not only is it an exceptionally accessible resource for lawyers hoping to stay current with the ever-changing business of practicing law (both nationally and in Wisconsin), its extra helpings of trends and predictions allow us, at least momentarily, to become futurologists – and that just sounds cool.

It got me thinking, though, whether there are any predictions we could make that we know absolutely will come true. It turns out there is – and it is an important one: *Some day, for one reason or another, you will no longer be practicing law.* Perhaps you will have an ideally planned retirement – but perhaps not. No one likes to think about bad things happening to them, especially disability or death, but as lawyers, it is our ethical responsibility to ensure our clients will be taken care of should something happen to us. *See* SCR 20:1.3, ABA Comment [5].

So, whether you have been practicing for one month or 60 years, make sure you have a plan for succession. This is relatively simple if you work in a larger firm and your engagement agreements state that your clients are clients of the firm, but if you are a solo lawyer, or in a practice where individual lawyers tend to operate in separate silos, here are some simple tips to get you started.

Find a Successor

Find a lawyer who you trust, who would be willing to manage your files and handle (or find someone else who can handle) any outstanding matters. You may have done this long ago when you first obtained malpractice insurance, but you should make sure that this person is still your person, and keep that record up to date. If you are having trouble convincing someone to be your successor, try to seal the deal by offering to be his or her backup.

Make Records Accessible

Make sure you have *easy-to-find information* for your successor, including instructions for how to access your files, both paper and electronic (see checklist for more). If, like most people, you find it difficult to keep your list of passwords current, try using a password manager such as LastPass or 1Password.

***Tyson Rhine** is the advisor to the State Bar of Wisconsin Law Office Management Assistance Program (Practice411™). Reach him at (800) 444-9404, ext. 6012, or by email.*

A password manager will keep all your passwords and other vital information in one place, so you just need to worry about remembering (and providing your successor lawyer with) one master password.

Make It Easy for Your Survivors to Get Paid

Prepare a document naming your legal successors in interest (so anyone handling your files knows where to send incoming fees), and make sure your successor lawyer has this information.

Put Your Plans in Writing

Discuss and formalize your arrangement with your successor lawyer, through either a power of attorney or another type of agreement. This will make everything go much smoother, for the courts, your successor lawyer, and you and your family.

Check the Supreme Court Rules

Familiarize yourself with SCR chapter 12, which deals with trustee appointment. This will be particularly helpful if you have been asked to step in for a lawyer who did not have a succession plan. Consider volunteering to be a trustee in your area. Judges will appreciate it, and judicial appreciation is always good.

Conclusion

In general, ask yourself what specific information someone would need if he or she were to step in and attempt to take care of your clients (and your business) on a moment's notice. Succession planning is too important to put off, so if you have any questions, please do not hesitate to contact the State Bar Practice411™ for assistance.

A Checklist for Your Successor

To get you started, here's a short list of the types of information every lawyer should find and make accessible to his or her backup person.

- Names and contact information for staff members
- Locations of financial accounts, account numbers, and passwords for online access
- Insurance carrier(s) information
  - Malpractice
  - Life insurance
  - Disability insurance
- Directions for accessing computer software
- Email login and password
- Server login and password
- Accounting and billing software login and password
- Calendaring software login and password
- Locations and information about offsite storage
- Information about monthly bills (including due dates)
- Rent
- Office equipment under lease
- Internet, phone, and utilities
- Other logins and software
  - Payroll taxes
  - Credit card processing
  - Online document storage and management

Solutions

So, You Want To... Plan for Succession

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ETHICAL REQUIREMENTS OR ADVICE TO ASSURE CONTINUITY OF SERVICE TO CLIENTS – SOLO ATTORNEYS CONTINGENCY PLAN

STATE BAR of WISCONSIN

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WISCONSIN Lawyer

THE OFFICIAL PUBLICATION OF THE STATE BAR OF WISCONSIN

MAY 2016 VOLUME 89 NUMBER 5

MANAGING RISK

Help for Hanging Out Your Own Shingle

If you're thinking about going solo there are many things to consider, from locating an office to developing clients to employing technology to operating your business, and more. Challenging? Yes. Rewarding? Yes. Best of all, you're not really alone.

THOMAS J. WATSON

Lawyers face all kinds of different challenges these days, including how to successfully open and operate law offices. Many lawyers I've run into, whether at local bar association meetings or State Bar events, are currently practicing as a solo or are heading in that direction. It might be you're a new law school grad entering the profession, or you're a lawyer who has been in practice for awhile and, either voluntarily or not, you want to give it a go on your own.

Hanging out your own shingle can have its rewards, no doubt. But it also has risks and challenges. The questions that typically run through the minds of the intrepid lawyer willing to take the plunge include the following:

- Where should I locate?
- Should I lease office space?
- What kind of technology do I need?
- Do I need start-up money?
- What should I do about legal research?
- How do I attract clients?

Of course, there are more, but those are certainly enough to give any lawyer starting a practice enough to think about.

Recently, the State Bar's Solo and Small Firm-General Practice Section put on its eighth annual one-day seminar in Waukesha, titled "Considerations for Starting a Law Practice." The Saturday event filled a room, and many of the attendees were not brand new lawyers, but rather established lawyers looking for ways to make a solo practice work.

New Richmond attorney Terry Dunst, who helps organize the seminar each year, says it started in 2009 when many new law graduates couldn't find law firm jobs. "Our goal is to offer something practical and useful for someone wanting to start a solo practice. Right from the beginning the seminar attracted a wide

range of ages. We had law school students as well as seasoned lawyers who were thinking of leaving firms to go solo."

Dunst says organizers try to present practical information that lawyers can take back to their practices and put to good use. "We try to focus on the business side of running a law practice. What do you really need to start a law office? We cover a wide range of topics from costs to technology to marketing to malpractice insurance."

Getting Your Practice Off the Ground

Some of the more intimidating parts of opening your own law office are often the things you didn't learn about in law school: a business model, a budget, payroll taxes, accounting, and hiring staff (or not). Another challenge is making sure you have enough business and are able to attract new clients to sustain a long-term practice. Brookfield attorney Marty Ditkof, one of the speakers at the seminar, says lawyers, especially ones just getting started in the profession, need to understand that starting a business, and particularly a legal business, is hard work. But he also says that if successful, it is a wonderful way to practice law on your own terms.

Thomas J. Watson, Marquette 2002, is senior vice president and director of communications at Wisconsin Lawyers Mutual Insurance Co., Madison.

"The world is open to solos much more than in the past 30 or so years. Initially, inexpensive technology which allows you to receive, review, and respond almost immediately makes an amazing difference. There's no need for the overhead of a receptionist, office, secretary, or paralegal other than as driven by the type of business you choose."

Madison attorney Zeshan Usman, another seminar speaker, says the advances in technology give solos a fighting chance to compete. "Clients are very cost conscious these days. Sometimes, they think a solo lawyer can provide good legal service for a reasonable price."

Ditkof agrees. "The hourly rates are very important to the smaller clients, which is a solo's main focus. Contracts and employment law are becoming much more complex with higher damages if you do it wrong; as such, smaller clients need services that they previously would have just relied on in-house nonattorneys to sort out. Not so anymore."

Usman says he cautions attorneys when they tell him they're opening a practice. "Many of them jump into partnerships with other lawyers or they agree to office share with others. There's nothing wrong with that, and it often works well. But sometimes lawyers enter into those partnerships without much thought. They believe they have no other option or they're afraid of doing it by themselves.

One lawyer I know got into a partnership with another lawyer before both of them even talked about how they would share the work that comes in. That's a conversation they should have had before they formed the partnership."

Attracting Clients

The seminar also included a segment about attracting clients. Speakers suggested that part of successfully attracting good clients is developing habits that give good clients a reason to keep using your services and recommending you to others. They also warned attendees about client selection.

Sally Anderson, vice president of claims at Wisconsin Lawyers Mutual Insurance Co., and another seminar speaker, says, "Taking every potential client that walks through your door will only lead to frustration, discontent, and possible disciplinary action. And it may also lead to practicing in areas of law in which you may have little or no expertise."

Office Technology

Secure a domain name, develop a website, and at least get the basics. Good software programs for document production, billing, and timekeeping can make your life much easier – and keep you organized. Usman says there are some online tools that lawyers need to get started. These include the following:

- Business name
- Business checking account and IOLTA account
- Malpractice insurance
- Marketing plan
- Domain name linked to a website
- Case management system or software
- Mentors

Ditkof adds, "Develop networks and networking skills with both lawyers and nonlawyers. And then focus on a niche specialty that the clients value and for which you can charge a fair price."

Ditkof has been in solo practice for 15 years. He says it wasn't easy, but he's glad he did it. "Although I have changed my focus and niche three times in the 15 years to totally redefine my business as my clients redefined their legal needs, I wouldn't change this for the world. My success is based on being able to gain the trust of my business clients in a way that allows me to charge mostly on a monthly set-fee basis rather than hourly. Being freed from hourly billing provides a flexibility that really is enabling. Also, my ability to develop business partnerships with other lawyers and nonlawyers has been very helpful."

Dunst works in a multi-lawyer firm. But he says there are two things he would tell a lawyer thinking of starting his or her own practice. "The first is can you do this financially? Can you start a law firm and also put food on the table? Each person's circumstances will be unique as to the money question. Some people may have a working spouse with health insurance, and that will help. The second is 'know thyself.' Do you want to run a small business? Are you willing to lick the stamps and send out the bills? Unless you're independently financially secure, are you ready for some lean times?"

Conclusion

Covering every aspect of opening a law office cannot be done in a short article such as this. An entire edition of *Wisconsin Lawyer* could be devoted to this topic. But, at the very least, when embarking on such an endeavor, consider the following:

- A business plan, with financial goals and objectives
- Technology needs for your office (and out of the office)
- Client selection, fees, and billing procedures
- Attracting clients (marketing your practice and networking)
- Backup plans in the event you are temporarily disabled or cannot work

And don't forget to consider your insurance needs, including malpractice insurance, a business owners policy, and health and life insurance.

You won't learn everything from an article or even a one-day seminar like the one recently held in Waukesha. But considering these issues at the start can be a good foundation that can lead to future success and help avoid sleepless nights.

State Bar Resources for Starting a Solo Practice

If you're thinking about going solo, check out the variety of free or discounted benefits and services the State Bar of Wisconsin provides its members to help set up or maintain a solo – or any – practice. Here's a sample:

- **Practice411™** – From integrating your technology to assisting with trust accounting, and from getting and keeping clients to operations management, Practice411 – the State Bar's Law Office Management Assistance Program – can help improve your office's effectiveness and your quality of life. For links to practice and legal forms, the lending library, online resources, free practice consultations, the Practice411 e-list, and more, visit www.wisbar.org/forMembers/PracticeManagement.
- **Legal Research** – With our legal research tools, the information you need is at your fingertips. State Bar members in good standing have free access to FastCase. From the same search page, you can also search Books Unbound, our website, *Wisconsin Lawyer* magazine, Wisconsin case law, and more. For links to Fastcase, Wisconsin case law search, CaseLaw Express, WICourts.gov Search Resources, circuit court rules, research and reports, and more, visit www.wisbar.org/forMembers/legalresearch.
- **Ethics Guidance** – Practicing law is hard enough. Doing so in compliance with the Wisconsin Rules of Professional Conduct for Attorneys can sometimes be confusing. When you need responsive, practical advice, and detailed guidance in navigating the Rules, contact the ethics hotline. For information about the Ethics Program and links to advice and information, opinions, LLC firm registration, rules, and trust and fiduciary accounts, visit www.wisbar.org/forMembers/ethics.
- **Lawyers Assistance Program** – WisLAP provides confidential, 24/7 assistance to help lawyers, judges, law students, and their families cope with life's problems. You are not alone! For links to information on physical and mental health, addictions, retirement, volunteers, articles, and publications, visit www.wisbar.org/forMembers/wisLAP.

You May Also Be Interested in These *Wisconsin Lawyer* Articles

- "Going It Alone: Overcoming the Fear and Finding Success," by Thomas J. Watson (Managing Risk, June 2015)
- "Going Solo Without Breaking the Bank," by Nerino J. Petro Jr. & Bryan M. Sims (Technology, Nov. 2014)

- "Taking the Bull by the Horns: Going Solo to Find Legal Work?," by Thomas J. Watson (Managing Risk, July 2013)
- "Going Solo: What Are the Risks, Challenges?," by Thomas J. Watson (Managing Risk, July 2010)

Managing Risk

Help for Hanging Out Your Own Shingle

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COGNITIVE IMPAIRMENT – TELLING ABOUT LAWYER WITH MEDICAL CONDITION

WISCONSIN Lawyer

THE OFFICIAL PUBLICATION OF THE STATE BAR OF WISCONSIN

MAY 2014 VOLUME 87 NUMBER 5

ETHICS

Lawyers Must Disclose Health Conditions that Limit Representation

Attorneys have an obligation to reveal to clients medical issues that affect their ability to provide competent representation, and their colleagues must ensure the firm is appropriately serving clients.

DEAN R. DIETRICH

Question

A lawyer in my firm appears to be having trouble concentrating on information given to him by clients or other attorneys. Do I have an ethical duty to report this to our firm's clients?

Answer

First and foremost, a lawyer who is having trouble concentrating on matters has a duty to ensure that he or she is able to provide competent legal representation and, if necessary, must disclose his or her condition to clients. The requirements of SCR 20:1.1 (Competence) and SCR 20:1.4 (Communication with Client) are crucial components of the lawyer-client relationship. A lawyer must provide competent representation to clients at all times, which means he or she must have the requisite legal knowledge, skill, thoroughness, and preparation to effectively represent the client. What may be difficult, of course, is for the lawyer to admit that he or she is struggling with issues that affect his or her ability to represent clients.

There is not a lot of guidance regarding what information must be conveyed to a client if a lawyer has a medical condition that might (or might not) affect his or her ability to represent a client. Some medical conditions are obvious, and it is not necessary to communicate them to the client. Other medical conditions are not obvious, and the lawyer must notify the client if he or she, because of the condition, has a limitation that affects his or her ability to provide competent representation to the client. The lawyer must discuss the nature of the limitation and how it may affect the representation. A decision as to whether the medical condition affects the ability to effectively represent a client will depend on the limitations imposed by the condition and the lawyer's reasonable belief about his or her abilities.

Dean R. Dietrich, Marquette 1977, of Ruder Ware, Wausau, is past chair of the State Bar Professional Ethics Committee.

Other lawyers in the firm may be obligated to interact with the lawyer and verify that the lawyer is able to provide competent representation to the client. Clients generally hire a law firm to provide representation even though they select a particular lawyer in the law firm to be their attorney. Other lawyers in the law firm owe the same fiduciary duties to that client as does the specific lawyer. As a result, other lawyers in the firm might find it necessary to intercede on behalf of a lawyer who has a medical condition that affects his or her ability to provide competent legal services to make sure that the client is properly represented and there is no harm flowing to the client from the limitations being experienced by the particular lawyer.

This too may be a very complex and difficult situation, depending on the nature of the relationships between the lawyer suffering from the medical condition or other type of limiting condition and the firm's other lawyers. There is an obligation, however, for other firm members to address the situation to ensure clients are not suffering harm as a result of the representation by the lawyer with physical or mental limitations.

A recent decision from the Colorado Court of Appeals addressed this situation and held that a law firm did not have a fiduciary duty to disclose information about an attorney in the firm who had a history of disciplinary proceedings, mental illness, alcoholism, and related arrests. The court of appeals concluded that the law firm did not have to disclose this information because the law firm had supervisory measures in place to ensure that the representation provided by the attorney with the prior history was competent and the law firm proved that the representation provided by this attorney did not have an adverse effect on the legal services provided to the client.

The court also held that the client had signed an engagement letter that gave the firm the right to bring in other attorneys to assist the "lead attorney" in the representation of the client and that decision-making was delegated to the "lead attorney" so that decisions regarding the attorneys who would represent the client were effectively delegated to the law firm. This case shows that a law firm that takes appropriate steps to ensure proper representation by an attorney who has a history of impairment might not be subject to a fiduciary duty to disclose information to the client provided the client incurs no harm as a result of the representation provided.

Dealing with the impaired lawyer is a difficult situation that requires the utmost care and caution by other lawyers in the firm. The other lawyers in the firm owe certain duties to clients of the impaired lawyer even though they are not providing direct legal representation. Often, this is a matter of addressing the limitations with the impaired lawyer to ensure that proper legal representation is provided. Lawyers should contact the Wisconsin Lawyers Assistance Program (WisLAP) at the State Bar of Wisconsin (800-543-2625) for help in addressing these situations. WisLAP can advise on best practices for approaching the lawyer and meet with the lawyer to determine appropriate referrals for evaluation and to render ongoing consultation toward resolution of the firm's concerns and the lawyer's potential performance problems, and impairment.

Need Ethics Advice?

As a State Bar member, you have access to informal guidance and help in resolving questions regarding Wisconsin's Rules of Professional Conduct for Attorneys.

Ethics Hotline. To informally discuss an ethics question, contact the State Bar ethics counsel, Timothy Pierce, or assistant ethics counsel Aviva Kaiser. They can be reached at (608) 229-2017 or (800) 254-9154, Monday through Friday, 9 a.m to 4 p.m.

ETHICAL CONCERNS WHEN GIVING "COCKTAIL PARTY" AND INFORMATION ADVICE IN RETIREMENT

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.

WISCONSIN Lawyer

THE OFFICIAL PUBLICATION OF THE STATE BAR OF WISCONSIN

MAY 2013 VOLUME 86 NUMBER 4

Ethics: Electronic Lists: Protect Client Confidentiality When Seeking Advice

Lawyers must take care to not breach client confidences when discussing specific legal matters on electronic lists and in other settings.

DEAN R. DIETRICH

Question

I participate in several electronic lists where we discuss legal questions and sometimes talk about pending cases. Is this acceptable?

Answer

The sharing of general information about legal issues, and even about client matters, is a way for lawyers to gain knowledge and experience in representing clients. There is concern, however, about the practice of discussing specific cases. Even a discussion conducted "off-line" (instead of involving the entire electronic-list group in discussion) can create ethical dilemmas, so lawyers need to be careful about such discussions.

The primary concern in a discussion about a specific client matter on an electronic list is that a lawyer will disclose confidential information about a client. SCR 20:1.6 is the specific rule addressing the confidentiality of client information. This rule applies to all information related to the representation of a client, even if the information is known to the general public. A lawyer may violate the rule's confidentiality requirements if the lawyer discloses information about the representation that is not authorized by the client or that does not fall within one of the narrow exceptions to the rule.

Dean R. Dietrich, Marquette 1977, of Ruder Ware, Wausau, is past chair of the State Bar Professional Ethics Committee.

One of the rule's exceptions (SCR 20:1.6(c)(3)) allows a lawyer to discuss confidential client information if the lawyer is seeking advice about adhering to the Rules of Professional Conduct. This exception allows a lawyer to contact the State Bar Ethics Hotline to ask about compliance with the Rules of Professional Conduct and to be specific about the situation at issue. This exception does not, however, apply when a lawyer is asking for advice or seeking input from other lawyers on an electronic list about legal issues and not ethical questions. Thus, if a lawyer discusses a client's confidential information on an electronic list, the lawyer technically is violating the requirements of client confidentiality in SCR 20:1.6.

Often, a lawyer will pose a question on an electronic list and then ask other list subscribers to communicate off-line, meaning directly with the lawyer posing the question. These types of communications are certainly better, because of the one-on-one nature of the conversation. There are, however, two potential concerns with these more private communications. First, the question of client confidentiality remains; the lawyer may not disclose confidential information about a client representation without permission from the client. A discussion in general terms about a representation, or a hypothetical

discussion about a representation, provides some flexibility for the inquiring lawyer, but care must be taken to ensure that information is not given with such specificity or detail that the client can be readily identified.

The second concern is the possible creation of an attorney-client relationship between the client of the inquiring lawyer and the responding lawyer. Again, this issue should not arise if the information is not specific to a particular client and the client is not identified. If the client is identified or the information is so specific as to permit identification of the client, the responding lawyer may be creating an attorney-client relationship by giving direct advice to the inquiring lawyer about how to handle a particular matter. Some lawyers will provide the advice only after doing a conflicts check to make sure there is no issue in providing the information to the inquiring lawyer. Performing a conflicts check is a very deliberate process, one that both lawyers often will choose not to undertake.

There is a fine line between giving general legal advice or practice tips to another lawyer and giving advice to another lawyer on how to handle a particular representation. Lawyers must be careful to limit their discussions to general information about client representation, and avoid situations in which they identify the client and potentially create a new attorney-client relationship. Nevertheless, it also is important that lawyers participate in these communications, to help other lawyers be successful; doing so is part of being a professional and giving back to the profession.

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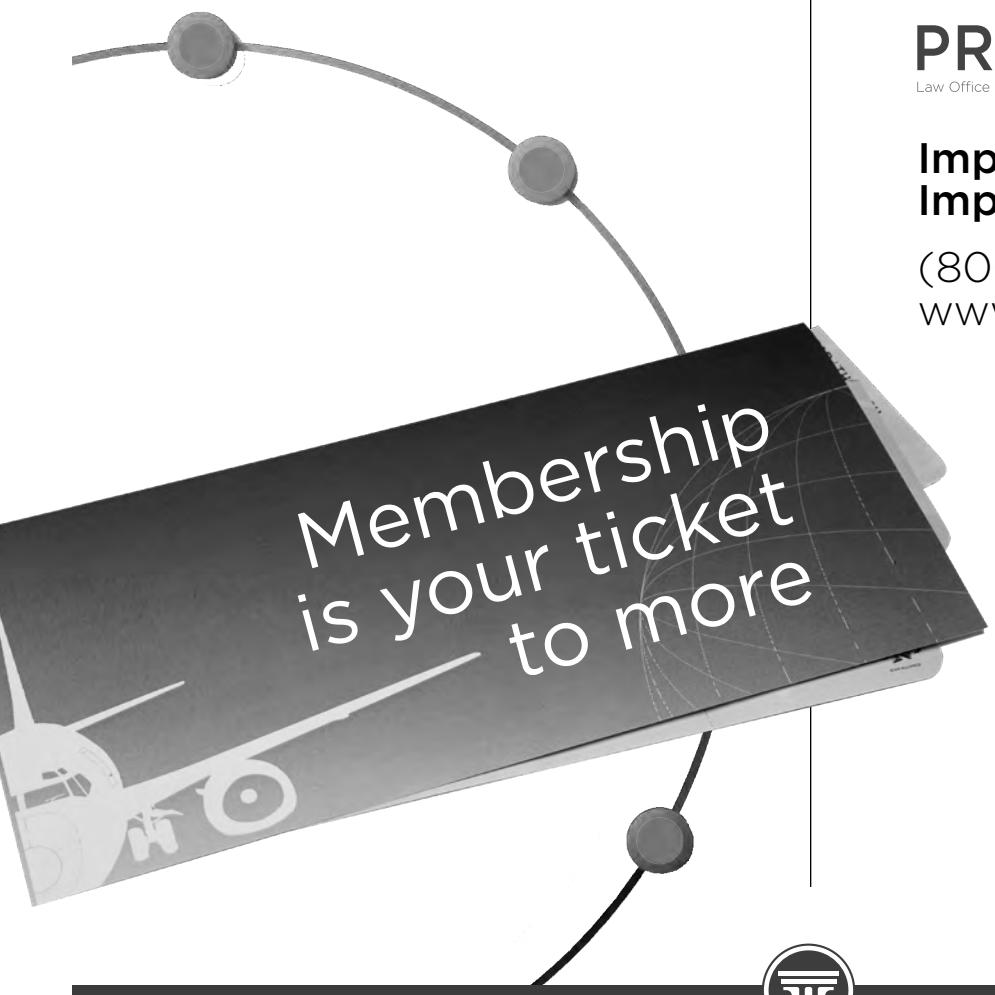

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