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PREAMBLE: A LAWYER’S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a 3rd–party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as 3rd–party neutrals. See, e.g., Rule 1.12 and Rule 2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because
legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate the practice of law in the public interest.

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.

A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

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

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term “should.” Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state’s attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority. Similarly, there are federally recognized Indian tribes with tribal governments in the State of Wisconsin and these tribes have rights of self-government and self-determination. It is not the intent of these rules to abrogate any such authority or tribal governments.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation,
extenuating factors and whether there have been previous violations.

[20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be thwarted when they are invoked as a means of imposing sanctions as procedural weapons. The fact that a rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer’s violation of a rule may be evidence of breach of the applicable standard of conduct.

[21] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each rule is authoritative.

Wisconsin Comment: In addition to the ABA Comments, SCR Chapter 20 includes Wisconsin Committee Comments, which were proposed by the Wisconsin Ethics 2000 Committee, and Wisconsin Comments added by the Wisconsin Supreme Court where the court deemed additional guidance appropriate. These comments are not adopted, but will be published and may be consulted for guidance in interpreting and applying the Rules of Professional Conduct for Attorneys.

While supreme court rules may guide courts in determining required standards of care generally, they may not be employed as an absolute defense in a civil action involving an attorney. Sands v. Menard, 2017 WI 110, 379 Wis. 2d 1, 944 N.W.2d 789, 12–2377.

SCR 20:1.0 Terminology. (ag) “Advanced fee” denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat, or other basis, is an advanced fee regardless of whether that fee is characterized as an “advanced fee,” “minimum fee,” “nonrefundable fee,” or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, including SCR 20:1.5 (f) and (g) and SCR 20:1.5 (h), SCR 20:1.15 (f) (3) b. 4., and SCR 20:1.16 (d).

(ar) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(c) “Confirmed in writing.” When used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See par. (f) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(d) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, or lawyers employed in a legal services organization or the legal department of a corporation or other organization, including a government entity.

(dm) “Flat fee” denotes a fixed amount paid to a lawyer for specific, agreed-upon services, or for a fixed, agreed-upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed-upon stage in the representation. A flat fee, sometimes referred to as “unit billing,” is not an advance against the lawyer’s hourly rate and may not be billed against an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of

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SCR 20:1.5, including SCR 20:1.5 (f) or (g) and SCR 20:1.5 (h), SCR 20:1.15 (f) (3) b. 4., and SCR 20:1.16 (d).

(e) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) “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.

(g) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(h) “Misrepresentation” denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist.

(i) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(j) A “prosecutor” includes a government attorney or special prosecutor (i) in a criminal case, delinquency action, or proceeding that could result in a deprivation of liberty or (ii) acting in connection with the protection of a child or a termination of parental rights proceeding or (iii) acting as a municipal prosecutor.

(k) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(l) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(m) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(mm) “Retainer” denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a “retainer,” “general retainer,” “engagement retainer,” “reservation fee,” “availability fee,” or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16 (d).

(n) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(o) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(p) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(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 electronic communications. 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.

**RULES OF PROFESSIONAL CONDUCT**

**SC 20.1: 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.

**History: Sup. Ct. Order No. C-10-07 states that “the Comments to SCRs 11.02, 20.1, 20.1.5, 20.1.15, and 22.39 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct.”**

**Note:** Sup. Ct. Order No. 14-07 states that “the Comments to SCRs 20.1, 20.1.5, 20.1.15, and 22.39 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct.”

**Wisconsin Comment:** The definition of flat fee specifies that flat fees “become the property of the lawyer upon receipt.” Notwithstanding, the lawyer must either deposit the flat fee in trust until earned, or comply with the alternative in SCR 20.1.5(g). In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject.

**SUBCHAPTER I**

**CLIENT LAWYER RELATIONSHIP**

**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.

**History:** Sup. Ct. Order No. C-10-07, 2007 WI 4, 293 Wis. 2d xx

**Note:** Sup. Ct. Order No. C-13-10 states that “the Comments to SCRs 11.02, 20.1, 20.1.5, 20.1.15 (e), 20.1.15 (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 20.1.1, Competence (2010):** When a lawyer is providing representation to a client, the lawyer, knowledgeable of the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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

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

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

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an indigent person. See SCR 20.15.

**Thoroughness and Preparation.** [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, use of procedures and methods approved for the standards of competent practice. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than routine matters. An essential requisite of competent representation is an agreement between the lawyer and the client regarding the scope of representation. The agreement may provide for limited representation. For example, the lawyer and the client can agree to a contract for legal services. See SCR 20.15(a).

**Retaining or Contracting With Other Lawyers.** [6] Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should obtain the informed written consent of the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. See also SCR 20.15(b).

**Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.**

Updated through March 28, 2020.
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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, a lawyer shall, proceeding that could result in deprivations 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. The client’s informed consent must be in writing except as set forth in sub. (1).

(1) The client’s informed consent need not be given in writing if:

a. the representation of the client consists solely of telephone consultation;

b. the representation is provided by a lawyer employed by or participating in a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court and the lawyer’s representation consists solely of providing information and advice or the preparation of court-approved legal forms;

c. the court appoints the lawyer for a limited purpose that is set forth in the appointment order;

d. the representation is provided by the state public defender pursuant to Ch. 977, stats., including representation provided by a public defender in connection with an appointment by the state public defender;

e. the representation is provided to an existing client pursuant to an existing client-lawyer relationship.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

a. the representation is limited to the lawyer and the services described in the writing, and

b. the lawyer does not represent the client generally or in matters other than those identified in the writing.

Wisconsin Committee Comment to Supreme Court Rule 20:1.2 (c) (2014): With respect to subparagraph (c), a lawyer providing limited scope representation in an action before a court shall consult s. 820.045, stats., regarding notice and withdrawal requirements.

The requirements of subparagraph (c) that require a lawyer’s informed consent, in writing, to the limited scope representation do not supplant or replace the requirements of SCR 20:1.5 (b). Note: Sup Ct. Order No. 13–10 states that “the Comments to SCRs 11.02, 20:1.1, 20:1.2 (c), and 20:1.6 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.”

(cm) A lawyer may prepare pleadings, briefs, and other documents to be filed with the court so long as such filings clearly indicate thereon that “This document was prepared with the assistance of a lawyer.” A lawyer shall advise the client to whom the lawyer provides assistance in preparing pleadings, briefs, or other documents for filing with the court that the pleading, brief, or other document must contain a statement that it was prepared with the assistance of a lawyer.

Wisconsin Committee Comment to Supreme Court Rule 20:1.2 (cm) (2014): A lawyer may prepare pleadings, briefs, and other documents to be filed with the court so long as such filings clearly indicate thereon that said filings are prepared “with the assistance of a lawyer.” Such actions by the lawyer shall not be deemed an appearance by the lawyer in the case.

Note: Sup Ct. Order No. 13–10 states that “the Comments to SCRs 11.02, 20:1.1, 20:1.2 (c), and 20:1.6 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.”

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct in which 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 and defended 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.

History: Sup Ct. Order No. 04–07, 2007 WI 4, 293 Wis. 2d 272, 724 N.W.2d 692, 40–1192.

Case Notes: The formation and termination of an agreement to provide representation is discussed. Gustafson v. Physicians Insurance Co. of Wis., 223 Wis. 2d 164, 585 N.W.2d 866 (Ct. App. 1998).

The attorney-client relationship is one of agent to principal, and as an agent, the attorney must act in conformity with his or her authority and instructions and is entitled to the privilege of a principal if he or she violates this duty. A defendant is not entitled on making a decision that is the defendant’s alone to make in a manner contrary to the advice given by the attorney cannot subsequently complain that the attorney was improperly induced for complying with the ethical obligation to follow the defendant’s unenforceable decision. Van Hout v. Endicott, 2006 WI App 196, 296 Wis. 2d 580, 724 N.W.2d 692, 04–1192.

A defendant who has been informed of his or her options by counsel bears the burden to exercise one of those options and to inform counsel. A defendant cannot remain mute in the face of a request from counsel for direction or when the defendant’s rights to appeal and to counsel are at stake. A defendant must accept responsibility for remaining mute, particularly when that defendant has not exhibited any prior difficulty making his or her views known to counsel and the court. Van Hout v. Endicott, 2006 WI App 196, 296 Wis. 2d 580, 724 N.W.2d 692, 04–1192.

Note: The above annotations cite to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04–07.


Wisconsin Comment: The Model Rule does not include paragraph (e). Paragraph (e) was added to clarify the obligations of counsel for an insurer, in conjunction with the decision to retain Wisconsin’s “insurance defense” exception in SCR 20:1.8 (f). Wisconsin Committee Comment: The Committee has requested that the application of the duties stated to “any proceeding that could result in deprivation of liberty.” The Model Rule does not include this language.

Comment: Allocation of Authority Between Client and Lawyer. [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations. The decisions specified in paragraph (a), as whether to settle a civil matter, must also be made by the client. See Rule 1.4 (a) (1) for the lawyer’s duty to communicate with the client about such decisions. With respect to the means by which the client’s objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4 (a) (2) and may take such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish those objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b) (4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a) (3).

In a case in which the client appears to be suffering diminished capacity, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to Rule 1.14.
Independence from Client’s Views or Activities. [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a person whose appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4 (a) (2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner’s death or incapacity, the lawyer should require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for further assistance. RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 28 (2002) (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan prepared by the lawyer to protect the interests of the clients of a deceased or disabled lawyer).

SCR 20:1.4 Communication. (a) A lawyer shall:

1. Promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in SCR 20:1.0 (f), is required by these rules;

2. reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

3. keep the client reasonably informed about the status of the matter;

4. promptly comply with reasonable requests by the client for information; and

5. consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain to the client the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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


Wisconsin Committee Comment: Paragraph (a) (4) differs from the Model Rule in that the words “by the client” are added for the sake of clarity.

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

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

[3] Paragraph (a) (2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client’s objectives. In some situations, decisions on both the importance of the action and the action itself are the lawyer’s, and the lawyer should include the client in the decision only to the extent reasonably necessary to allow the client to participate in the representation.

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child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

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

SCR 20:1.5 Fees. (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b) (1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney’s fees, will be $1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney’s fees, is more than $1000, the purpose and effect of any retainers or advance fees that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client’s request for information concerning fees and expenses.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

(f) Except as provided in SCR 20:1.5 (g), unearned fees and funds advanced by a client or 3rd party for payment of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to SCR 20:1.5 (h). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

(g) A lawyer who accepts advanced payments of fees may deposit the funds in the lawyer’s business account, provided that review of the lawyer’s fee by a court of competent jurisdiction is available in the proceeding to which the fee relates, or provided that the lawyer complies with each of the following requirements:

(1) Upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client a notice in writing containing all of the following information:

a. The amount of the advanced payment.

b. The basis or rate of the lawyer’s fee.

c. Any expenses for which the client will be responsible.

d. The lawyer’s obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation.

e. The lawyer’s obligation to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of the dispute.

f. The ability of the client to file a claim with the Wisconsin Lawyers’ Fund for Client Protection if the lawyer fails to provide a refund of unearned advanced fees.

(2) Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following:

a. A final accounting, or an accounting from the date of the lawyer’s most recent statement to the end of the representation, regarding the client’s advanced fee payment.

b. A refund of any unearned advanced fees and costs.

c. Notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting.

d. Notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration.

(3) Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer’s receipt of the written notice of dispute from the client.

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(4) Upon receipt of an arbitration award requiring a party to make a payment to the attorney, the lawyer shall pay the arbitration award within 30 days, unless the client fails to agree to be bound by the award of the arbitrator.

(h) (1) At least 5 business days before the date on which a disbursement is made from a trust account for the purpose of paying fees, with the exception of contingent fees or fees paid pursuant to court order, a lawyer shall transmit to the client in writing all of the following:

a. An itemized bill or other accounting showing the services rendered.

b. Notice of the amount owed and the anticipated date of the withdrawal.

c. A statement of the balance of the client’s funds in the lawyer’s trust account after the withdrawal.

(2) The lawyer may draw earned fees on the date that the invoice is transmitted to the client, provided that the lawyer has given prior notice to the client in writing that earned fees will be withdrawn on the date that the invoice is transmitted. The invoice shall include each of the elements required under SCR 20:1.5(h)(1).

(3) If a client makes a particularized and reasonable objection to the disbursement described in SCR 20:1.5(h)(1), the disputed portion shall remain in the trust account until the dispute is resolved. If the client makes a particularized and reasonable objection to a disbursement described in SCR 20:1.5(h)(1) or (2) within 30 days after the funds have been withdrawn, the disputed portion shall be returned to the trust account until the dispute is resolved, unless the lawyer reasonably believes that the client’s objections do not present a basis to hold funds in trust or return funds to the trust account under SCR 20:1.5(h). The lawyer will be presumed to have a reasonable basis for declining to return funds to trust if the disbursement was made with the client’s informed consent, in writing. The lawyer shall promptly advise the client in writing of the lawyer’s position regarding the fee and make reasonable efforts to clarify and address the client’s objection.

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and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in the same firm. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (f) prohibits or regulates the provision of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees. [9] If a procedure has been established for resolution of fee disputes between clients and attorneys, and if the procedure is established by the bar association or another organization, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a particular method for determining a lawyer's fee, for example, in representation of a landlord or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party who bears a financial interest in the outcome of the dispute may appear separately and independently in the prescribed procedure.

Note: Sup. Ct. Order No. 14–047 states that “the Comments to SCRs 20:1.0, 20:1.15, and 22.39 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.”

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SCR 20:1.5(f) Advances for fees and costs. Lawyers are obligated to hold advanced fee payments in trust until earned, or use the alternative protection for advanced fees as set forth in SCR 20:1.5(g). Additional requirements for advanced fees are identified in SCR 20:1.0(ag). Sometimes the lawyer may receive advanced fee payments from 3rd parties. In such cases, the lawyer must follow the requirements of SCR 20:1.8(f). In addition, the lawyer should establish, upon receipt or prior to receipt of the advanced fee payment from a 3rd party, whether any potential refund of unearned fees will be paid to the client or 3rd–party payor. This may be done through agreement with the lawyer or by the lawyer informing the client and the 3rd–party payor of the lawyer’s policy regarding such refunds. Lawyers also receive cash advances from clients or 3rd parties. Since January 1, 1987, the supreme court has recommended that cash be held in trust. Prior to that date, the applicable rule, SCR 20.50(1), specifically excluded such advances from the funds that the supreme court required lawyers to hold in trust accounts. However, by order dated March 11, 2014, the supreme court amended SCR 20.50(1) so that “All advances to clients paid to a lawyer or law firm shall be deposited in one or more identifiable trust accounts as provided in sub. (3) maintained in the state in which the law office is situated in which the funds belonging to the lawyer or law firm may be deposited in real name accounts except as follows . . . .” This requirement is specifically addressed in SCR 20:1.5(f).

SCR 20:1.5(g) Alternative protection for advanced fees. SCR 20:1.5(g) allows lawyers to deposit advanced fees into the lawyer’s business account, as an alternative to SCR 20:1.5(f). The provision regarding court review applies to a lawyer’s fees that are advanced in which the lawyer’s fee is subject to review at the request of the parties or the court, such as bankruptcy, formal probate, and proceedings in which a guardian ad litem’s fee may be subject to judicial review. In any proceeding in which the lawyer’s fees are challenged in a separate action, the lawyer must either deposit advanced fees in trust or use the alternative protections for advanced fees in this subsection. The lawyer’s fee remains subject to the requirement of reasonableness under SCR 20:1.5 (g) as well the requirement that unearned advanced fees be refunded upon termination of the representation under SCR 20:1.16 (d). A lawyer must comply either with SCR 20:1.5(f) or SCR 20:1.5(g), and a lawyer’s failure to do so is professional misconduct and grounds for discipline. The writing required under SCR 20:1.5(g) must contain language informing the client that the lawyer is obligated to refund any unearned advanced fee at the end of the representation, that the lawyer must give the lawyer’s agreement to comply with any dispute regarding a refund to binding arbitration in programs run by the State Bar of Wisconsin and the Milwaukee Bar Association, without the prior written consent of the lawyer for refund, and that the lawyer is obligated to comply with an arbitration award within 30 days of the award. The client is not obligated to arbitrate the fee dispute and may elect another forum in which to resolve the dispute. The lawyer must also inform the client of the opportunity to challenge the event an unearned advanced fee is not refunded, and should provide the address of the Wisconsin Lawyers’ Fund for Client Protection.

If fees are paid by one of the 3rd parties other than the client, then the lawyer’s responsibilities are governed by SCR 20:18.1(b). If there is a dispute as to the ownership of any refund of unearned advanced fees paid by one other than the client, the unearned fees should be treated as trust property pursuant to SCR 20:1.15 (c) (3).

SCR 20:1.5(g) applies only to advanced fees for legal services. Cost advances must be deposited into the lawyer’s trust account. Advanced fees deposited into the lawyer’s business account pursuant to this subsection may be paid by credit card, debit card, prepaid or other types of payment cards, or an electronic transfer of funds. A cost advance cannot be paid by credit card, debit card, prepaid card or other types of payment cards, or an electronic transfer of funds under this section. Cost advances are subject to SCR 20:1.15 (b) (3) or SCR 20:1.5 (f) (3) b.

SCR 20:1.5(h) Withdrawal of non-contingent fees from trust account. SCR 20:1.5(h) prohibits withdrawing non-contingent fees. It does not apply to filing fees, expert witness fees, subpoena fees, and other costs and expenses that a lawyer may incur on behalf of a client in the course of a representation. In addition, this subsection will not apply to filing fees if the terms of the representation agreements require that the fees be deposited in the lawyer’s trust account once returned to the trust account if a client objects to the disbursement of the contingent fee, provided that the contingent fee arrangement is documented by a written fee agreement that allows the client to dispute the reasonableness of a lawyer’s contingent fee, such disputes are subject to SCR 20:1.5(a), (not to this subsection. A client’s objection under SCR 20:1.5(h) must first be made in writing, and if the lawyer does not withdraw the fee, the lawyer’s failure to withdraw the fee must be reported to the appropriate supervisory authority. A lawyer who refuses to withdraw the fee is subject to disciplinary action under SCR 20:3.6(a).

A generalized objection to the overall amount of the fees or the client’s unilateral desire to pay fewer fees will not be considered sufficient to trigger the lawyer’s obligation. A lawyer may resolve a dispute over fees by offering to participate and abide by the decision of a fee arbitration program. In addition, a lawyer’s action for declaratory judgment pursuant to SCR 13.43 (ab) 3 is not the appropriate method to resolve a dispute between a lawyer and a client regarding funds held in trust by the lawyer. The court of appeals suggested employment of that method to resolve a dispute between a client and a 3rd party over funds held in trust by the lawyer. See Riegleman v. Krieg, 2004 WI App 85, 271 Wis. 2d 798, 679 N.W.2d 857.

Additionally, when a lawyer’s fees are subject to final approval by a court, such as a final accounting to a guardian ad litem or lawyer’s fees in formal probate matters, objections to disbursements by clients or 3rd party payors are properly brought before the court having jurisdiction over the matter. A lawyer should hold disputed funds in trust until such time as the appropriate court resolves the dispute.

The language in paragraph (c) was changed from “reasonably certain” to “reasonably likely” to comport with sub. (b). Due to substantive and numbering differences, special care should be taken in consulting the ABA Comment.

Note: The above annotations cite to SCR 20:2 as it existed prior to the adoption of Sup. Ct. Order No. 04–07.

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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, the disclosure should ordinarily include no more information than reasonably necessary to prevent prejudice to the client or to the representation of the client’s interests. Paragraph (c)(7), in turn, provides that if the lawyer reasonably believes the disclosure may not be necessary to accomplish one of the purposes specified in (c)(6), the lawyer may consider such factors as the nature of the lawyer’s relationship with the client and the importance of preserving information concerning the representation to the client or former client. Paragraph (c)(8) requires that the lawyer’s obligations in this regard are subject to the limitation set forth in (c)(7).

RULES OF PROFESSIONAL CONDUCT

Updated through March 28, 2020.

Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.
While courts sometimes can override a defendant’s choice of counsel when deemed necessary, nothing requires them to do so. Requiring a court to disqualify an attorney because of a conflict of interest would infringe upon the defendant’s right to counsel of his choice and could leave the accused with the impression that the legal system had conspired against him or her. State v. Demmerly, 2006 WI App 181, 296 Wis. 2d 153, 724 N.W.2d 692, 05−0181.

Consequently, a defendant who validly raises the right to conflict−free representation also waives the right to claim ineffective assistance of counsel based on the conflict, although there may be instances in which counsel’s performance is deficient and the conflict−free representation would have otherwise benefited the defendant. State v. Demmerly, 2006 WI App 181, 296 Wis. 2d 580, 724 N.W.2d 692, 05−0181.

Note: The above annotations cite to SCR 20 as it existed prior to the adoption of SCR 04−09.


Wisconsin Comment: The Wisconsin Supreme Court Rule differs from the Model Rule in requiring informed consent to be confirmed in a writing “signed by the client.”

ABA Comment: General Principles. [1] Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(a) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken, or whether a conflict of interest exists, that is, whether the representation of one or more clients would be directly adverse to another client or a third person or by a per−sonal interest of the lawyer; and (4) obtain the informed consent of the affected clients.

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 a different client; or
3. The lawyer’s representation of one or more clients would be directly adverse to the interest of any of the clients; or
4. The representation of one client would involve the lawyer in violation of paragraph (b) if confirmed in writing.

(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 against, in connection with a reasonable expectation of recovery from, a former client or a third person or from the lawyer’s own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(a) and (b).

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the client whose representation is terminated. See Rule 1.16. The lawyer may continue to protect the confidentiality of information from the lawyer that is later represented by the lawyer in an unrelated matter.

[6] Loyalty to a current client is not necessarily diminished by obtaining co−counsel for a reasonable fee or providing the client with disclosure regarding the representation of another client. The lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the client whose representation is terminated. See Rule 1.16. The lawyer may continue to protect the confidentiality of information from the lawyer that is later represented by the lawyer in an unrelated matter.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if the lawyer is asked to represent the seller of a business in negotiations with a buyer, the lawyer may have a conflict with a former client who is later represented by the lawyer, not in the same transaction but in another, unrelated matter. The lawyer could not undertake the representation without the informed consent of each of the respective clients.
with the lawyer’s independent professional judgment in considering alternatives or foreseeable courses of action that reasonably should be pursued on behalf of the client.

Lawyer’s Responsibilities to Former Clients and Other Third Persons. [9] In addition to conflicts with other current clients, a lawyer’s duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9(a). When a lawyer is representing multiple clients in the same or substantially related matters, the lawyer may not provide separate representation to each client, to permit the other client to make an informed decision, the lawyer cannot properly be aware of the relevant circumstances and of the material and reasonably foreseeable consequences of his or her representation of the other client.

For example, if the representation of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client a detached advice. Similarly, when a lawyer has a material interest in an transaction of which the lawyer is a party, the lawyer cannot properly represent the other client, or with a law firm representing the opponent, such discussions could materially limit the lawyer’s representation of the client. In addition, a lawyer may not have interests sufficiently protect the rights represented to all clients, or the possibility that separate representation of two or more clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.0 (m)), such representation may be precluded by paragraph (b) (1).

If a lawyer is retained by the parties to represent them in the same or substantially related proceedings, the lawyer may not represent a client in a matter where that lawyer is representing another client directly against the first client, or with a law firm representing the opponent, such discussions could materially limit or impair the lawyer’s representation of the first client. Thus, a lawyer may not have interests sufficiently protected to permit the other client to make an informed decision, the lawyer cannot properly be aware of the relevant circumstances and of the material and reasonably foreseeable consequences of his or her representation of the other client. 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). Paragraph (b) (3) prohibits a lawyer from representing multiple clients in the same litigation, regardless of the clients’ consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a) (2). A conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompleteness in positions in relation to an opposing party or the fact that there are substantially different possibilities of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The conflict between the lawyer’s interest in vigorous development of each client’s position when the clients are generally aligned in interest even though there is some divergence of interests, and the lawyer’s concern for the institutional interest in vigorous development of each client’s position may be materially limited by responsibilities to former clients under Rule 1.9(a) (1), (2) and Rule 1.10 (personal interest conflicts under Rule 1.0 (m)) of the Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed as of March 28, 2020. Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.
lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation. [29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Occasionally, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake a common representation of clients where continuous litigation or negotiation between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients’ interests can be adequately served by common representation is not great.

Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[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.

[31] As to the duty of confidentiality, continued common representation will always be to the detriment of one client if the other 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 about anything of material importance 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 a part of the process of obtaining each client’s informed consent, advise clients in good faith that the information that might 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. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation or to withdraw if the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer’s role is not that of partisanship normally expected in other circumstances and, thus, that the claims may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2 (c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.19 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 16.

Organizational Clients. [34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or individual member of the corporation or organization. See Rule 1.10. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the lawyer should not be considered a client of both the lawyer and the corporation. There is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, or the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict. The effect of the lawyer’s resignation from the board and the possibility of the corporation obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will undermine the lawyer’s independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation’s lawyer when conflicts of interest arise. The lawyer should advise the other members of the board in such circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney−client privilege and that conflict of interest considerations might require the lawyer’s recusal as a director or might require the lawyer and the lawyer’s firm to decline representation of the corporation in a matter.

SCR 20:1.8 Conflict of interest: prohibited transactions. (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(b) a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by the rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, nor prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, except where (1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent or the attorney is appointed at government expense; provided that no further consent or consultation need be given if the client has given consent necessary to the representation or has informed an organization or insurer to retain counsel on the client’s behalf;

(2) there is no interference with the lawyer’s independence of professional judgment or with the client−lawyer relationship; and

(3) information relating to representation of a client is protected as required by SCR 20:1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unauthorized client, former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith; or

(3) make an agreement limiting the client’s right to report the lawyer’s conduct to disciplinary authorities.

Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.
(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1. acquire a lien authorized by law to secure the lawyer’s fee or expenses; and
2. contract with a client for a reasonable contingency fee in a civil case.

(j) A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

In this paragraph, “sexual relations” means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

(k) When the client is an organization, a lawyer for the organization (whether inside counsel or outside counsel) shall not have sexual relations with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization’s legal matters.

(k) While lawyers are associated in a firm, a prohibition in the foregoing pars. (a) through (j) that applies to any one of them shall apply to all of them.

(5) A lawyer shall not acquire a proprietary interest in the cause of action, or subject matter of litigation, the lawyer is conducting for a client, except that the lawyer may:

1. acquire a lien authorized by law to secure the lawyer’s fee or expenses; and
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(k) While lawyers are associated in a firm, a prohibition in the foregoing pars. (a) through (j) that applies to any one of them shall apply to all of them.

History: Sup. Ct. Order No. 04-07, 2007 WI 1, 293 Wis. 2d xv.

Cases: Written client consent to a loan transaction with an attorney as a recipient of a gift shall not be satisfied solely by the client signing the underlying loan documents, which terms are already required to be in writing under sub. (a) 1. The client must give separate consent to the transaction with the lawyer, waiving the conflict of interest, and the client must indicate in writing he or she has been given a reasonable opportunity to consult with independent counsel. OLR v. Trewin, 2004 WI 116, 275 Wis. 2d 116, 684 N.W.2d 121, 02-3314.

Gifts to Lawyers.

[6] A lawyer may accept a gift from a client, if the transaction meets several standards of fairness, such as a simple gift received at a holiday or as a token of appreciation is permitted. If a lawyer offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, but will be published and may be consulted for guidance in interpreting and applying the rules.

[7] This Rule does not prohibit a lawyer from providing legal services to an entity for a nominal fee, even if the entity is interested in a lawyer's continuing representation of a client. Paragraph (i) prohibits disadvantageous use of client information unless the lawyer is permitted or required by these Rules.

[8] Paragraphs (a) (2) (inapplicable to the representation of one client only) may use information to benefit other clients or an organization. Paragraph (i) prohibits disadvantageous use of client information unless the lawyer is permitted or required by these Rules.

[9] Effectuation of a substantial gift requires preparing a legal instrument such as a will conveying the client's gift to the lawyer, or authorizing the lawyer to use the gift. A lawyer's personal use of the gift, such as a lawyer's personal use of the gift, may be permitted under these Rules, provided the sole exception to this Rule is where the client is a relative of the donee.

[10] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer’s interest in obtaining the appointment will materially limit the lawyer’s independence to professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client’s informed consent to the conflict, the lawyer should consider and disclose to the client the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.

Litigation.

[11] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the lawyer and the client and the personal interests of the lawyer. The Rule also applies to client contributions to an organization’s legal matters. Paragraph (i) does not prohibit a lawyer from representing a client in a transaction concerning literary property from agreeing that the lawyer’s fee shall be a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance.

[12] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from reasonable fees and help ensure access to the courts. Similarly, an exception allowing lawyers to operate as indigent defendants and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer’s Services.

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer for either the whole or in part. In such an arrangement, a lawyer may be a relative of the client, a beneficiary of the cause, or a relative of the client, a beneficiary of the cause, or the person who will compensate the lawyer (such as a beneficiary of the cause, a beneficiary of the cause, or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently finance lawsuits on a contingency basis and the fees are generally paid by the losing party, the amount spent on the representation and in learning how the representation is progressing is of great interest to the lawyer. Lawyers are prohibited from accepting compensation for representation of a client except that the lawyer must not accept the representation of a client unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client. See Rule 1.5 (a) (2) and paragraphs (a) and (i).
ments of Rule 1.6 concerning confidentiality. Under Rule 1.7 (a), a conflict of interest exists if there is significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s representation of a third–party payer (for example, when the third–party payer is a co–client). Under Rule 1.7 (b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-


RULINGS OF PROFESSIONAL CONDUCT

SCR 20:1.19 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 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.


Case Notes: Estate planning reasonably contemporaneous with the initiation of divorce proceedings is substantially related to issues which arise in the divorce and may preclude the representation of either spouse in the divorce. In a case of a substantial relationship between two representations, it is presumed that conflicts of interest are disclosed in the initial representation. Mathias v. Mathias, 188 Wis. 2d 280, 525 N.W.2d 81 (Ct. App. 1994).

When a lawyer acquires by contract a security interest in property other than that recovered in a civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter in which that person’s interests are materially adverse to the interests of the former client give informed consent, confirmed in a writing signed by the client.

A lawyer must inform each of them about all the material terms of the settlement, including the fact that the responsible member of the firm will receive or pay if the settlement or plea offer is accepted.

If a defense attorney knowingly fails to disclose to a client or the circuit court his or her former role in prosecuting the client, the attorney is subject to discipline from BAPR. State v. Love, 227 Wis. 2d 60, 594 N.W.2d 806 (1999).

When defense counsel has appeared for and represented the state in the same case in which he or she later represents the defendant, and no objection was made at trial, to prove a violation of the right to effective counsel, the defendant must show that counsel converted a potential conflict of interest into an actual conflict by knowingly failing to disclose the attorney’s former prosecution of the defendant or representing the defendant in a manner that adversely affected the defendant’s interests. State v. Loew, 2008 WI App 281, 615 Wis. 2d 43, 654 N.W.2d 97.

When an attorney represents a party in a matter in which the adverse party is that attorney’s former client, the attorney must not be represented in the same or a substantially related matter by another person in the same or a substantially related matter after a dispute is pending among the clients in that matter, unless all affected clients give informed consent. See SCR 1.6 (b). Under paragraph (a) the firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (g), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Wisconsin Supreme Court Rule differs from the ABA Model Rule in requiring informed consent to be confirmed in a writing "signed by the client.”

ABA Comment: [1] After termination of a client–lawyer relationship, a lawyer has a continuing duty with respect to the confidence and secrets of the former client and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. Nor could a lawyer who has represented multiple clients in a matter in which that person’s interests are materially adverse to the interests of the former client give informed consent, confirmed in a writing signed by the client.

(2) The scope of a “matter” for purposes of this Rule depends on the facts of a particular case or situation. Transaction that is so similar to the earlier transaction that the client identifies it as one and the same. The lawyer’s relationship with the client does not end with conclusion of the representation.


Wisconsin Comment: The Wisconsin Supreme Court Rule differs from the ABA Model Rule in requiring informed consent to be confirmed in a writing “signed by the client.”

When an attorney represents a party in a matter in which the adverse party is that attorney’s former client, the attorney must not be represented in the same or a substantially related matter by another person in the same or a substantially related matter after a dispute is pending among the clients in that matter, unless all affected clients give informed consent. See SCR 1.6 (b). Under paragraph (a) the firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (g), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

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the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.  

[3] Matters are “substantially related” for purposes of this Rule if they involve the same legal dispute or of there otherwise is a substantial risk that the lawyer will be precluded from representing information about that person may then not represent that person’s spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in a matter involving environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded from representing other clients, for example, the developer of another shopping center, if the two clients engaged in unrelated transactions.

(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.

Wisconsin Supreme Court

Wisconsin Committee Comment: Paragraph (a) differs from the Model Rule in not imputing conflicts of interest in limited circumstances where the personally disqualified lawyer is timely screened from the matter.

[5] Rule 1.10 (b) operas to permit a law firm, under certain circumstances, to represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services. Lawyers Moving Between Firms. [4] Where lawyers have been associated in a firm but then end their association, the question of whether a lawyer should under take representation is more complicated. There are several competing considerations. A lawyer who previously represented the former firm must be regarded as one who has been privy to all the knowledge and information that the former firm has.
SCR 20:1.11 Special conflicts of interest for former and current government officers and employees. (a) Except as law may otherwise expressly permit, a lawyer who has formerly
served as a public officer or employee of the government:

(1) is subject to SCR 20:1.9 (c); and

(2) shall not otherwise represent a client in connection with a
matter in which the lawyer participated personally and substan-
tially as a public officer or employee, unless the appropriate gov-
ernment agency gives its informed consent, confirmed in writing,
to the representation.

(b) When a lawyer is disqualified from representation under par.
(a), no lawyer in a firm with which that lawyer is associated
may knowingly undertake or continue representation in such a
matter unless:

(1) the disqualified lawyer is timely screened from any partici-
pation in the matter and is apportioned no part of the fee there-
from; and

(2) written notice is promptly given to the appropriate govern-
ment agency to enable it to ascertain compliance with the provi-
sions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer
having information that the lawyer knows is confidential govern-
ment information about a person acquired when the lawyer was
a public officer or employee, may not represent a private client
whose interests are adverse to that person in a matter in which the
information could be used to the material disadvantage of that per-
son. As used in this rule, the term “confidential government infor-
mation” means information that has been obtained under govern-
mental authority and which, at the time this rule is applied, the
government is prohibited by law from disclosing to the public or
has a legal privilege not to disclose and which is not otherwise
available to the public. A firm with which that lawyer is associ-
ated may undertake or continue representation in the matter only
if the disqualified lawyer is timely screened from any participa-
tion in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer
currently serving as a public officer or employee:

(1) is subject to SCR 20:1.7 and SCR 20:1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated per-
sonally and substantially while in private practice or nongovern-
mental employment, unless the appropriate government agency
gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is
involved as a party or as attorney for a party in a matter in which
the lawyer is participating personally and substantially, except
that a lawyer serving as a law clerk to a judge, other adjudicative
officer or arbitrator may negotiate for private employment as per-
mitted by SCR 20:1.12 (b) and subject to the conditions stated in
SCR 20:1.12 (b).

(e) As used in this rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a
ruling or other determination, contract, claim, controversy, inves-
tigation, charge, accusation, arrest or other particular matter
involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of
the appropriate government agency.

(f) The conflicts of a lawyer currently serving as an officer or
employee of the government are not imputed to the other lawyers
in the agency. However, where such a lawyer has a conflict that
would lead to participation in a matter in a nongovernment setting, the lawyer shall be timely screened from any participation in the matter to
which the conflict applies.

History: Sup. Ct. Order No. 04-07, 2007 WI 14, 293 Wis. 2d xv.
Wisconsin Committee Comment: Paragraph (f) has no counterpart in the Model
Rules, although it is based on statements made in paragraph [2] of the ABA Com-
ment.
(c) If a lawyer is disqualified by par. (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party in the matter, provided that all parties to the proceeding give informed consent, confirmed in writing.

Wisconsin Committee Comment: Paragraph (a) differs from the Model Rule in that the conflict is identified not subject to waiver by consent of the parties involved. As such, paragraph [2] of the ABA Comment should be read with caution. Paragraph (d) differs in that written consent of the parties is required.

ABA Comment: [1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a matter pending in the court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “administrative responsibility” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A (2), B (2), and C, of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing, See Rule 1.0 (c) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third–party neutrals do not have information concerning an organization that is protected under Rule 1.6, they typically owe the organization an obligation of confidentiality under law or codes of ethics governing third–party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0 (k). Paragraph (c) (1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Although a lawyer is a constituent of the organization, the lawyer’s prior representation of the organization does not bar the lawyer from representing a constituent of the organization. Paragraph (c) provides that the conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

SCR 20:1.13 Organization as client. (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

(c) Except as provided in par. (d), if

(1) despite the lawyer’s efforts in accordance with par. (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not SCR 20:1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been disqualified because of the lawyer’s actions taken pursuant to par. (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

(f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituencies, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of SCR 20:1.7. If the organization’s consent to the dual representation is required by SCR 20:1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented by the lawyer.

(h) Notwithstanding other provisions of this rule, a lawyer shall comply with the disclosure requirements of SCR 20:1.6 (b).

SCR 20:1.62 Other organizations. (a) Except as prohibited by par. (b), a lawyer employed or retained by an organization may not represent the organization as a client or otherwise represent constituents or constituents’ interests or employees of the organization.

(b) Paragraph (h) differs from the Model Rule and calls attention to the mandatory disclosure provisions contained in Wisconsin Supreme Court Rule 20:1.6 (b).

Wisconsin Committee Comment: Paragraph (h) differs from the Model Rule and calls attention to the mandatory disclosure provisions contained in Wisconsin Supreme Court Rule 20:1.6 (b).

ABA Comment: [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other corporate representatives, officers, employees, shareholders, representatives and other persons associated with the organization. The clients defined in this Comment are the positions equivalent to officers, directors, and other representatives held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents the information relating to the representation except for disclosures clearly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province, but are by definition decisions of the people engaged in the operation of the client organization. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization on the part of an organization’s lawyer, the lawyer should not be required or prevented from acting to the extent that is reasonably necessary in the best interest of the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibilities of the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to a higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not com-
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SCR 20.14 Client with diminished capacity. (a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act on the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.
impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the permission of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client’s interests before discussing matters related to the client. The lawyer’s position in such cases is an unavoidably difficult one.

Emergency Legal Assistance.[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client–lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person’s behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of the lawyer’s relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

SCR 20:1.15 Safekeeping property; trust accounts and fiduciary accounts. (a) Definitions. In this section:

(1) “Draft account” means an account from which funds are withdrawn through a properly payable instrument or an electronic transaction.

(2) “Electronic transaction” means a paperless transfer of funds to or from a trust or fiduciary account. Electronic transactions do not include transfers initiated by voice or automated teller or cash dispensing machines.

(3) “Fiduciary” means an agent, attorney–in–fact, conservator, guardian, personal representative, special administrator, trustee, or other position requiring the lawyer to safeguard the property of a client or 3rd party.

(4) “Fiduciary account” means an account in which a lawyer deposits fiduciary property.

(5) “Fiduciary property” means funds or property of a client or 3rd party that is in a lawyer’s possession in a fiduciary capacity. Fiduciary property includes, but is not limited to, property held as agent, attorney–in–fact, conservator, guardian, personal representative, special administrator, or trustee, subject to the exceptions identified in sub. (m).

(6) “Financial institution” means a bank, savings bank, trust company, credit union, savings and loan association, or investment institution, including a brokerage house.

(7) “Immediate family member” means a lawyer’s spouse, registered domestic partner, child, stepchild, grandchild, sibling, parent, stepparent, grandparent, aunt, uncle, niece, or nephew.

(8) “Interest on Lawyer Trust Account or ‘IOLTA account’” means a pooled interest–bearing or dividend–paying draft trust account, separate from a lawyer’s business and personal accounts, which is maintained at an IOLTA participating institution. Typical funds that would be placed in an IOLTA account include earnest money, loan proceeds, settlement proceeds, collection proceeds, cost advances, and advanced payments of fees that have not yet been earned. An IOLTA account is subject to the provisions of SCR Chapter 13 and the trust account provisions of subs. (a) to (i), including the IOLTA account provisions of subs. (c) and (d).

(9) “IOLTA participating institution” means a financial institution that voluntarily offers IOLTA accounts and certifies to WisTAF annually that it meets the IOLTA account requirements of sub. (d).

(10) “Property payable instrument” means an instrument that, if presented in the normal course of business, is in a form requiring payment pursuant to the laws of this state.

(11) “Trust account” means an account in which a lawyer deposits trust property.

(12) “Trust property” means funds or property of clients or 3rd parties, which is not fiduciary property, that is in a lawyer’s possession in connection with a representation.

(13) “WisTAF” means the Wisconsin Trust Account Foundation, Inc.

(b) Segregation and safekeeping of trust property. (1) Separate account. A lawyer shall hold in trust, separate from the lawyer’s own property, that property of clients and 3rd parties that is in the lawyer’s possession in connection with a representation. All funds of clients and 3rd parties paid to a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable trust accounts.

(2) Identification and location of account. Each trust account shall be clearly designated as a “Client Account,” “Trust Account,” or words of similar import. The account shall be identified as such on all account records, including signature cards, monthly statements, checks, and deposit slips. An acronym, such as “IOLTA,” “IOTA,” or “LTAB,” without further elaboration, does not clearly designate the account as a client account or trust account. Each trust account shall be maintained in a financial institution that is authorized by federal or state law to do business in Wisconsin and that is located in Wisconsin or has a branch office located in Wisconsin and which agrees to comply with the overdraft notice requirements of sub. (h). A trust account may be maintained at a financial institution located in the jurisdiction where the lawyer principally practices law if that jurisdiction has an overdraft notification requirement.

(3) Lawyer funds. No funds belonging to a lawyer or law firm, except funds reasonably sufficient to pay monthly account service charges, may be deposited or retained in a trust account. Each lawyer or law firm that receives trust funds shall maintain at least one draft account, other than the trust account, for funds received and disbursed other than in a trust capacity, which shall be entitled “Business Account,” “Office Account,” “Operating Account,” or words of similar import.

(4) Trust property other than funds. Unless a client otherwise directs in writing, a lawyer shall keep securities in bearer form in a safe deposit box at a financial institution authorized to do business in Wisconsin. The safe deposit box shall be clearly designated as a “Client Account” or “Trust Account.” The lawyer shall clearly identify and appropriately safeguard other property of a client or 3rd party.

(5) Insurance and safekeeping requirements. Each trust account shall be maintained at a financial institution that is insured by the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Share Insurance Fund (NCUSIF), the Securities Investor Protection Corporation (SIPC), or any other investment institution financial guaranty insurance. IOLTA accounts shall also comply with the requirements of sub. (d) (3). Lawyers using the alternative to the E–Banking Trust Account shall comply with the requirements of sub. (f) (3) c. Except as provided in subs. (b) (4) and (d) (3) b. and c., trust property shall be held in an account in which each individual owner’s funds are eligible for insurance.

(c) Types of trust accounts. (1) IOLTA accounts. A lawyer or law firm who receives client or 3rd–party funds that the lawyer or law firm determines to be nominal in amount or that are expected to be held for a short period of time such that the funds cannot earn income for the benefit of the client or 3rd party in excess of the costs to secure that income, shall maintain a pooled interest–bearing or dividend–paying draft trust account in an IOLTA participating institution.

(2) Non–IOLTA accounts. A lawyer or law firm who receives client or 3rd–party funds that the lawyer or law firm determines to be capable of earning income for the benefit of the client or 3rd party shall maintain an interest–bearing or dividend–paying non–IOLTA trust account. A non–IOLTA trust account shall be established as any of the following:

Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.
a. A separate interest-bearing or dividend-paying trust account maintained for the particular client or 3rd party, the interest or dividends on which shall be paid to the client or 3rd party, less any transaction costs.

b. A pooled interest-bearing or dividend-paying trust account with sub-accounting by the financial institution, the lawyer, or the law firm that will provide for computation of interest or dividends earned by each client’s or 3rd party’s funds and the payment of the interest or dividends to the client or 3rd party, less any transaction costs.

c. An income-generating investment vehicle selected by the client and designated in specific written instructions from the client or authorized by a court or other tribunal, on which income shall be paid to the client or 3rd party or as directed by the court or other tribunal, less any transaction costs.

d. An income-generating investment vehicle selected by the lawyer to protect and maximize the return on funds in a bankruptcy estate, which investment vehicle is approved by the bankruptcy trustee or by a bankruptcy court order, or otherwise consistent with 11 U.S.C. § 345.

e. A draft account or other account that does not bear interest or pay dividends because it holds funds the lawyer has determined are not eligible for deposit in an IOLTA account because they are neither nominal in amount nor expected to be held for a short term such that the funds cannot earn income for the client or 3rd party in excess of the costs to secure the income, provided that the account has been designated in specific written instructions from the client or 3rd party.

(3) Selection of account. In deciding whether to use the account specified in par. (1) or an account or investment vehicle specified in par. (2), a lawyer shall determine, at the time of the deposit, whether the client or 3rd-party funds could be utilized to provide a positive net return to the client or 3rd party by taking into consideration all of the following:

a. The amount of interest, dividends, or other income that the funds would earn or pay during the period the funds are expected to be on deposit.

b. The cost of establishing and administering a non-IOLTA trust account, including the cost of the lawyer’s services and the cost of preparing any tax reports required for income accruing to a client’s or 3rd party’s benefit.

c. The capability of the financial institution, lawyer, or law firm to calculate and pay interest, dividends, or other income to individual clients or 3rd parties.

d. Any other circumstance that affects the ability of the client’s or 3rd party’s funds to earn income in excess of the costs to secure that income for the client or 3rd party.

(4) Professional judgment. The determination whether funds to be invested could be utilized to provide a positive net return to the client or 3rd party rests in the sound judgment of the lawyer or law firm. If a lawyer acts in good faith in making this determination, the lawyer is not subject to any charge of ethical impropriety or other breach of the Rules of Professional Conduct.

(d) INTEREST ON LAWYER TRUST ACCOUNT (IOLTA) REQUIREMENTS.

(1) Location. An IOLTA account shall be maintained only at an IOLTA participating institution.

(2) Certification by IOLTA participating institutions. a. Each IOLTA participating institution shall certify to WisTAF annually that the financial institution meets the requirements of sub. (d) (3) to (6) for IOLTA accounts and that it reports overdrafts on draft trust accounts and draft fiduciary accounts of lawyers and law firms to the office of lawyer regulation, pursuant to the institution’s agreements with those lawyers and law firms. WisTAF shall review overdrafts or transactional activity on draft accounts to verify compliance.

b. WisTAF shall confirm annually, by a date established by WisTAF by rule adopted under SCR 13.03 (1), the accuracy of a financial institution’s certification under sub. (d) (2) a. by reviewing one or more of the following:

1. The IOLTA comparability rate information form submitted by the financial institution to WisTAF.

2. Rate and product information published by the financial institution.

3. Other publicly or commercially available information regarding products and interest rates available at the financial institution.

c. WisTAF shall publish annually, no later than the date on which the state bar mails annual dues statements to members of the bar, a list of all financial institutions that have certified, and have been confirmed by WisTAF as IOLTA participating institutions. WisTAF shall update the published list located on its website, which investment vehicle is approved by the bankruptcy trustee or by a bankruptcy court order, or otherwise consistent with 11 U.S.C. § 345.

e. A pooled interest-bearing or dividend-paying trust account with sub-accounting by the financial institution, the lawyer, or other tribunal, less any transaction costs.

e. A draft account or other account that does not bear interest or pay dividends because it holds funds the lawyer has determined are not eligible for deposit in an IOLTA account because they are neither nominal in amount nor expected to be held for a short term such that the funds cannot earn income for the client or 3rd party in excess of the costs to secure the income, provided that the account has been designated in specific written instructions from the client or 3rd party.

(3) Selection of account. In deciding whether to use the account specified in par. (1) or an account or investment vehicle specified in par. (2), a lawyer shall determine, at the time of the deposit, whether the client or 3rd-party funds could be utilized to provide a positive net return to the client or 3rd party by taking into consideration all of the following:

a. The amount of interest, dividends, or other income that the funds would earn or pay during the period the funds are expected to be on deposit.

b. The cost of establishing and administering a non-IOLTA trust account, including the cost of the lawyer’s services and the cost of preparing any tax reports required for income accruing to a client’s or 3rd party’s benefit.

c. The capability of the financial institution, lawyer, or law firm to calculate and pay interest, dividends, or other income to individual clients or 3rd parties.

d. Any other circumstance that affects the ability of the client’s or 3rd party’s funds to earn income in excess of the costs to secure that income for the client or 3rd party.

(4) Professional judgment. The determination whether funds to be invested could be utilized to provide a positive net return to the client or 3rd party rests in the sound judgment of the lawyer or law firm. If a lawyer acts in good faith in making this determination, the lawyer is not subject to any charge of ethical impropriety or other breach of the Rules of Professional Conduct.

(d) INTEREST ON LAWYER TRUST ACCOUNT (IOLTA) REQUIREMENTS.

(1) Location. An IOLTA account shall be maintained only at an IOLTA participating institution.

(2) Certification by IOLTA participating institutions. a. Each IOLTA participating institution shall certify to WisTAF annually that the financial institution meets the requirements of sub. (d) (3) to (6) for IOLTA accounts and that it reports overdrafts on draft trust accounts and draft fiduciary accounts of lawyers and law firms to the office of lawyer regulation, pursuant to the institution’s agreements with those lawyers and law firms. WisTAF shall review overdrafts or transactional activity on draft accounts to verify compliance.

b. WisTAF shall confirm annually, by a date established by WisTAF by rule adopted under SCR 13.03 (1), the accuracy of a financial institution’s certification under sub. (d) (2) a. by reviewing one or more of the following:

1. The IOLTA comparability rate information form submitted by the financial institution to WisTAF.

2. Rate and product information published by the financial institution.

3. Other publicly or commercially available information regarding products and interest rates available at the financial institution.

c. WisTAF shall publish annually, no later than the date on which the state bar mails annual dues statements to members of the bar, a list of all financial institutions that have certified, and have been confirmed by WisTAF as IOLTA participating institutions. WisTAF shall update the published list located on its website, which investment vehicle is approved by the bankruptcy trustee or by a bankruptcy court order, or otherwise consistent with 11 U.S.C. § 345.

e. A pooled interest-bearing or dividend-paying trust account with sub-accounting by the financial institution, the lawyer, or other tribunal, less any transaction costs.

e. A draft account or other account that does not bear interest or pay dividends because it holds funds the lawyer has determined are not eligible for deposit in an IOLTA account because they are neither nominal in amount nor expected to be held for a short term such that the funds cannot earn income for the client or 3rd party in excess of the costs to secure the income, provided that the account has been designated in specific written instructions from the client or 3rd party.

(3) Selection of account. In deciding whether to use the account specified in par. (1) or an account or investment vehicle specified in par. (2), a lawyer shall determine, at the time of the deposit, whether the client or 3rd-party funds could be utilized to provide a positive net return to the client or 3rd party by taking into consideration all of the following:

a. The amount of interest, dividends, or other income that the funds would earn or pay during the period the funds are expected to be on deposit.

b. The cost of establishing and administering a non-IOLTA trust account, including the cost of the lawyer’s services and the cost of preparing any tax reports required for income accruing to a client’s or 3rd party’s benefit.

c. The capability of the financial institution, lawyer, or law firm to calculate and pay interest, dividends, or other income to individual clients or 3rd parties.

d. Any other circumstance that affects the ability of the client’s or 3rd party’s funds to earn income in excess of the costs to secure that income for the client or 3rd party.

(4) Professional judgment. The determination whether funds to be invested could be utilized to provide a positive net return to the client or 3rd party rests in the sound judgment of the lawyer or law firm. If a lawyer acts in good faith in making this determination, the lawyer is not subject to any charge of ethical impropriety or other breach of the Rules of Professional Conduct.

(d) INTEREST ON LAWYER TRUST ACCOUNT (IOLTA) REQUIREMENTS.

(1) Location. An IOLTA account shall be maintained only at an IOLTA participating institution.

(2) Certification by IOLTA participating institutions. a. Each IOLTA participating institution shall certify to WisTAF annually that the financial institution meets the requirements of sub. (d) (3) to (6) for IOLTA accounts and that it reports overdrafts on draft trust accounts and draft fiduciary accounts of lawyers and law firms to the office of lawyer regulation, pursuant to the institution’s agreements with those lawyers and law firms. WisTAF shall review overdrafts or transactional activity on draft accounts to verify compliance.

b. WisTAF shall confirm annually, by a date established by WisTAF by rule adopted under SCR 13.03 (1), the accuracy of a
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1. A business checking account with an automated or other automatic investment sweep feature into a daily financial institution repurchase agreement or open−end money market fund. A daily financial institution repurchase agreement must be invested in United States government securities. An open−end money market fund must consist solely of United States government securities or repurchase agreements fully collateralized by United States government securities, or both. In this par. c.1., “United States government securities” include securities of government−sponsored entities, such as, but not limited to, securities of, or backed by, the Federal National Mortgage Association, the Government National Mortgage Association, and the Federal Home Loan Mortgage Corporation;

2. A checking account paying preferred interest rates, such as money market or indexed rates;

3. An interest−bearing checking account such as a negotiable order of withdrawal (NOW) account or business checking account with interest; and

4. Any other suitable interest−bearing or dividend−paying account offered by the institution to its non−IOLTA customers.

d. ‘Options for compliance.’ An IOLTA participating institution may:

1. Establish the comparable product for qualifying IOLTA accounts, subject to the direction of the lawyer or law firm; or,

2. Pay the highest non−promotional interest rate or dividend, as defined in sub. (d) (4) b., less any allowable reasonable fees charged in connection with the comparable highest interest rate or dividend product, on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product.

c. ‘Paying rates above comparable rates.’ An IOLTA participating institution may pay a set rate above its comparable rates on the IOLTA checking account negotiated with WisTAF that is fixed over a period of time set by WisTAF, such as 12 months.

(5) Allowable reasonable fees on IOLTA accounts. a. Allowable reasonable fees on an IOLTA account are as follows:

1. Per check charges.
2. Per deposit charges.
3. Fees in lieu of minimum balance.
4. Sweep fees.
5. An IOLTA administrative fee approved by WisTAF.
6. Federal deposit insurance fees.

b. Allowable reasonable fees may be deducted from interest earned or dividends paid on an IOLTA account, provided that the fees are calculated in accordance with an IOLTA participating institution’s standard practice for non−IOLTA customers. Fees in excess of the interest earned or dividends paid on the IOLTA account for any month or quarter shall not be taken from interest or dividends of any other IOLTA accounts. No fees that are authorized under SCR 20:1.15 (d) (5) shall be assessed against or deducted from the principal of any IOLTA account. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. IOLTA participating institutions may elect to waive any or all fees on IOLTA accounts.

(6) Remittance and reporting requirements. A lawyer or law firm shall direct the IOLTA participating institution at which the lawyer or law firm’s IOLTA account is located to do all of the following, on at least a quarterly basis.

a. Remit to WisTAF the interest or dividends, less allowable reasonable fees as allowed under par. (5), if any, on the average monthly balance in the account or as otherwise computed in accordance with the IOLTA participating institution’s standard accounting practice.

b. Provide to WisTAF a remittance report showing for each IOLTA account the name of the lawyer or law firm for whose IOLTA account the remittance is sent, the rate and type of interest or dividend applied, the amount of allowable reasonable fees deducted, if any, the average account balance for the period for which the report is made, and the amount of remittance attributable to each IOLTA account.

c. Provide to the depositing lawyer or law firm a remittance report in accordance with the participating institution’s normal procedures for reporting account activity to depositors.

d. Respond to reasonable requests from WisTAF for information needed for purposes of confirming the accuracy of an IOLTA participating institution’s certification.

(e) PROMPT NOTICE AND DELIVERY OF PROPERTY. (1) Notice and delivery. Upon receiving funds or other property in which a client has an interest, or in which a lawyer has received notice that a 3rd party has an interest identified by a lien, court order, judgment, or contract, the lawyer shall promptly notify the client or 3rd party in writing. Except as stated in this rule or otherwise permitted by law or by agreement with the client, the lawyer shall promptly deliver to the client or 3rd party any funds or other property that the client or 3rd party is entitled to receive.

(2) Accounting. Upon final distribution of any trust property or upon request by the client or a 3rd party having an ownership interest in the property, a lawyer shall promptly render a full written accounting regarding the property.

(3) Disputes regarding trust property. When a lawyer and another person or a client and another person claim an ownership interest in trust property identified by a lien, court order, judgment, or contract, the lawyer shall hold that property in trust until there is an accounting and severance of the interests. If a dispute arises regarding the division of the property, the lawyer shall hold the disputed portion in trust until the dispute is resolved. Disputes between the lawyer and a client are subject to the provisions of SCR 20:1.5 (h).

(4) Burden of proof. A lawyer’s failure to promptly deliver trust property to a client or 3rd party entitled to the trust property, promptly submit trust account records to the office of lawyer regulation or promptly provide an accounting of trust property to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold trust property in trust, contrary to SCR 20:1.15 (b) (1). This presumption may be rebutted by the lawyer’s production of records or an accounting that overcomes this presumption by clear, satisfactory, and convincing evidence.

(f) SECURITY REQUIREMENTS AND RESTRICTED TRANSACTIONS. (1) Security of transactions. A lawyer is responsible for the security of each transaction in the lawyer’s trust account and shall not conduct or authorize transactions for which the lawyer does not have commercially reasonable security measures in place. A lawyer shall establish and maintain safeguards to assure that each disbursement from a trust account has been authorized by the lawyer and that each disbursement is made to the appropriate payee. Only a lawyer admitted to practice law in this jurisdiction or a person under the supervision of a lawyer having responsibility under SCR 20:5.3 shall have signatory and transfer authority for a trust account.

(2) Prohibited transactions. a. ‘Cash.’ No withdrawal of cash shall be made from a trust account or from a deposit to a trust account. No check shall be made payable to “Cash.” No withdrawal shall be made from a trust account by automated teller or cash dispensing machine.
b. ‘Telephone transfers.’ 1. Except as provided in SCR 20:1.15 (f) (2) b. 2., no deposits or disbursements shall be made to or from a pooled trust account by a telephone transfer of funds.
   2. Wire transfers may be initiated by telephone, and telephone transfers may be made between non-pooled trust accounts that a lawyer maintains for a particular client.
   c. ‘Electronic transfers by 3rd parties.’  A lawyer shall not authorize a 3rd party to electronically withdraw funds from a trust account. A lawyer shall not authorize a 3rd party to deposit funds into the lawyer’s trust account through a form of electronic deposit that allows the 3rd party making the deposit to withdraw the funds without the permission of the lawyer.

(3) Electronic transactions. A lawyer shall not make deposits to or disbursements from a trust account by way of an electronic transaction, except as provided in SCR 20:1.15 (f) (3) a. through c.
   a. ‘Remote deposit.’ A lawyer may make remote deposits to a trust account, provided that the lawyer keeps a record of the client or matter to which each remote deposit relates, and that the lawyer’s financial institution maintains an image of the front and reverse of each remote deposit for a period of at least six years.
   b. ‘E−banking trust account.’ A lawyer may accept funds paid by credit card, debit card, prepaid or other types of payment cards, and other electronic deposits, and may disburse funds by electronic transactions that are not prohibited by sub. (f) (2) c., provided that the lawyer does all of the following:
      1. Maintains an IOLTA account, which shall be the primary IOLTA account, in which no electronic transactions shall be conducted other than those transferring funds from the primary IOLTA to the E−Banking Trust Account for purposes of making an electronic disbursement, or those transactions authorized by SCR 20:1.15 (f) (3) a., (3) b. 4. a., and (3) b. 4. d.
      2. Maintains a separate IOLTA account with commercially reasonable account security for electronic transactions, which shall be entitled: “E−Banking Trust Account.”
      3. Holds lawyer or law firm funds in the E−Banking Trust Account reasonably sufficient to cover monthly account fees and fees deducted from deposits and maintains a ledger for those account fees.
      4. Transfers the gross amount of each deposit within 3 business days after the deposit is available for disbursement, and if necessary, adds funds belonging to the lawyer or law firm to cover any deduction of fees and surcharges relating to the deposit, in accordance with all of the following:
         a. All advanced costs and advanced fees held in trust under SCR 20:1.5 (f) shall be transferred to the primary IOLTA account by check or electronic transaction.
         b. Earned fees, cost reimbursements, and advanced fees that are subject to the requirements of SCR 20:1.5 (g) shall be transferred to the business account by check or by electronic transaction.
         c. Any funds that the client has directed be disbursed by electronic transfer shall be promptly disbursed from the E−Banking Trust Account by electronic transaction.
         d. All funds received in trust other than funds identified in SCR 20:1.15 (f) (3) a., b., and c. shall be transferred to the primary IOLTA account by check or by electronic transaction.
         e. Except for funds identified in SCR 20:1.15 (f) (3) a. and b., a lawyer or law firm shall not be prohibited from deducting electronic transfer fees or surcharges from the client’s funds, provided the client has agreed in writing to accept the electronic payment after being advised of the anticipated fees and surcharges.
      5. Identifies the client matter and the reason for disbursement on the memo line of each check used to disburse funds; records in the financial institution’s electronic payment system the date, amount, payee, client matter, and reason for the disbursement for each electronic transaction; and makes no disbursements by credit card, debit card, prepaid or other types of payment cards, or any other electronic payment system that does not generate a record of the date, amount, payee, client matter, and reason for the disbursement in the financial institution’s electronic payment system.
   c. ‘Alternative to E−Banking Trust Account.’ A lawyer may deposit funds paid by credit card, debit card, prepaid or other types of payment cards, and other electronic deposits into a trust account, and may disburse funds from that trust account by electronic transactions that are not prohibited by sub. (f) (2) c., without establishing a separate E−Banking Trust Account, provided that all of the following conditions are met:
      1. The lawyer or law firm maintains commercially reasonable account security for electronic transactions.
      2. The lawyer or law firm maintains a bond or crime insurance policy in an amount sufficient to cover the maximum daily account balance during the prior calendar year.
      3. The lawyer or law firm arranges for all chargebacks, ACH reversals, monthly account fees, and fees deducted from deposits to be deducted from the lawyer’s or law firm’s business account; or the lawyer or law firm replaces any and all funds that have been withdrawn from the trust account by the financial institution or card issuer within 3 business days of receiving actual notice that a chargeback, surcharge, or ACH reversal has been made against the trust account; and the lawyer or law firm reimburses the account for any shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal. The lawyer shall reimburse the trust account for any chargeback, surcharge, or ACH reversal prior to disbursing funds from the trust account.
      4. The lawyer or law firm identifies the client matter and the reason for disbursement on the memo line of each check used to disburse funds; records in the financial institution’s electronic payment system the date, amount, payee, client matter, and reason for the disbursement for each electronic transaction; and makes no disbursements by credit card, debit card, prepaid or other types of payment cards, or any other electronic payment system that does not generate a record of the date, amount, payee, client matter, and reason for the disbursement in the financial institution’s electronic payment system.

(4) Availability of funds for disbursement. a. ‘Standard for trust account transactions.’ A lawyer shall not disburse funds from any trust account unless the deposit from which those funds will be disbursed has cleared, and the funds are available for disbursement.
   b. ‘Exception: Real estate transactions.’ In closing a real estate transaction, a lawyer’s disbursement of closing proceeds from funds that are received on the date of the closing, but that have not yet cleared, shall not violate sub. (f) (4) a., provided that the lawyer complies with sub. (f) (4) c., and that the closing proceeds are deposited no later than the first business day following the closing and are comprised of any of the following types of funds:
      1. A cashier’s check, teller’s check, money order, official check or electronic transfer of funds, issued or transferred by a financial institution insured by the FDIC or a comparable agency of the federal or state government.
      2. A check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state.
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3. A check issued by the state of Wisconsin, the United States, or a political subdivision of the state of Wisconsin or the United States.

4. A check drawn on the account of or issued by a lender approved by the Federal Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2.

5. A check from a title insurance company licensed in Wisconsin, or from a title insurance agent of the title insurance company, if the title insurance company has guaranteed the funds of that title insurance agent.

6. A non-profit organization check in an amount not exceeding $5000 per closing if the lawyer has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the trust account.

7. A personal check or checks in an aggregate amount not exceeding $5000 per closing if the lawyer has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the trust account.

c. ‘Uncollected funds.’ Without limiting the rights of the lawyer against any person, it is the responsibility of the disbursing lawyer to reimburse the trust account for any funds described in sub. (f) (4) b. that are not collected and for any fees, charges, and interest assessed by the financial institution on account of the funds being disbursed before the related deposit has cleared and the funds are available for disbursement. The lawyer shall maintain a subsidiary ledger for funds of the lawyer that are deposited in the trust account to reimburse the account for uncollected funds and to accommodate any fees, charges, and interest.

d. ‘Exception: Collection trust accounts.’ When handling collection work for a client and maintaining a separate trust account to hold funds collected on behalf of that client, a lawyer’s disbursement to the client of collection proceeds that have not yet cleared does not violate sub. (f) (4) a. so long as those collection proceeds have been deposited prior to the disbursement.

(g) RECORD−KEEPING REQUIREMENTS FOR ALL TRUST ACCOUNTS. (1) Record retention. A lawyer shall maintain and preserve complete records of trust account funds, all deposits and disbursements, and other trust property and shall preserve those records for at least 6 years after the date of termination of the representation. Electronic records shall be backed up by an appropriate storage device. The office of lawyer regulation shall publish guidelines for trust account record−keeping.

(2) Record production. All trust account records have public aspects related to a lawyer’s fitness to practice. Upon request of the office of lawyer regulation or upon direction of the supreme court, the records shall be submitted to the office of lawyer regulation for its inspection, audit, use, and evidence under any conditions to protect the privilege of clients that the court may provide. The records, or an audit of the records, shall be produced at any disciplinary proceeding involving the lawyer, whenever material.

(3) Burden of proof. A lawyer’s failure to promptly deliver trust property to a client or 3rd party entitled to that trust property, promptly submit trust account records to the office of lawyer regulation, or promptly provide an accounting of trust property to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold trust property in trust, contrary to SCR 20.1.15 (b) (1). This presumption may be rebutted by the lawyer’s production of records or an accounting that overcomes this presumption by clear, satisfactory, and convincing evidence.

(h) DISHONORED PAYMENT NOTIFICATION (OVERDRAFT NOTICES). All draft trust accounts, and any draft fiduciary account that is not subject to an alternative protection under sub. (k) (10), are subject to the following provisions on dishonored payment notification:

(1) Overdraft reporting agreement. A lawyer shall maintain draft trust and fiduciary accounts only in a financial institution that has agreed to provide an overdraft report to the office of lawyer regulation under par. (2). A lawyer or law firm shall notify the financial institution at the time a trust account or fiduciary account is established that the account is subject to this subsection.

(2) Overdraft report. In the event any properly payable instrument or electronic transaction is presented against or made from a lawyer trust or fiduciary account containing insufficient funds, whether or not the instrument or electronic transaction is honored, the financial institution shall report the overdraft to the office of lawyer regulation.

(3) Content of report. All reports made by a financial institution under this subsection shall be substantially in the following form:

a. In the case of a dishonored instrument or electronic transaction, the report shall be identical to an overdraft notice customarily furnished to the depositor or investor, accompanied by the dishonored instrument or electronic transaction, if a copy is normally provided to the depositor or investor.

b. In the case of instruments or electronic transactions that are presented against insufficient funds and are honored, the report shall identify the financial institution involved, the lawyer or law firm, the account, the date on which the instrument or electronic transaction is paid, and the amount of overdraft created by the payment.

(4) Timing of report. A report made under this subsection shall be made simultaneously with the overdraft notice given to the depositor or investor.

(5) Confidentiality of report. A report made by a financial institution under this subsection shall be subject to SCR 22.40, Confidentiality.

(6) Withdrawal of report by financial institution. The office of lawyer regulation shall hold each overdraft report for 10 business days to enable the financial institution to withdraw a report provided by inadvertence or mistake. The deposit of additional funds by the lawyer or law firm shall not constitute reason for withdrawing an overdraft report.

(7) Lawyer compliance. Every lawyer shall comply with the reporting and production requirements of this subsection, including filing of an overdraft notification agreement for each IOLTA account, each draft-type trust account and each draft-type fiduciary account that is not subject to an alternative protection under sub. (k) (10).

(8) Service charges. A financial institution may charge a lawyer or law firm for the reasonable costs of producing the reports and records required by this rule.

(9) Immunity of financial institution. This subsection does not create a claim against a financial institution or its officers, directors, employees, or agents for failure to provide a trust account overdraft report or for compliance with this subsection.

(i) TRUST ACCOUNT CERTIFICATE AND ACKNOWLEDGEMENTS. (1) Annual requirement. A member of the state bar of Wisconsin shall file with the state bar of Wisconsin annually, with payment of the member’s state bar dues or upon any other date approved by the supreme court, a certificate as to whether the member is engaged in the practice of law in Wisconsin. If the member is practicing law, the member shall certify the name, address, and telephone number of each financial institution in which the member maintains a trust account, a fiduciary account, or a safe deposit box. The state bar shall supply to each member, with the annual dues statement, or at any other time directed by the supreme court, a form on which this certification shall be made.

(2) Certification by law firm. A law firm shall file one certificate of accounts on behalf of the lawyers in the firm who are required to file a certificate under par. (1).

(3) Compliance with SCR 20.1.15. Each state bar member shall acknowledge on the annual dues statement, or another form approved by the supreme court, that the member is aware of all of the following requirements of this rule:

a. That SCR 20.1.15 establishes fiduciary obligations for trust and fiduciary property that comes into the member’s possession, including the duty to hold that property in trust separate
from the member’s own property, to safeguard that property, to maintain complete records of that property, to account fully for that property, and to promptly deliver that property to the owner.

b. That SCR 20:1.15 requires a member to maintain each IOLTA account in an IOLTA participating institution, to file an overdraft agreement with the office of lawyer regulation for each account that is subject to SCR 20:1.15 (h) and (k), and to annually report all trust and fiduciary accounts to the state bar of Wisconsin that are not subject to an exception under SCR 20:1.15 (m).

4. Suspension for non-compliance. A state bar member who fails to file the acknowledgements required by sub. (1) (3) or a trust account certificate, unless a certificate of accounts is filed by the law firm, is subject to the automatic suspension of the member’s membership in the state bar in the same manner provided in SCR 10.03 (6) for nonpayment of dues.

(f) Multi-Jurisdictional Practice. If a lawyer also licensed in another state is entrusted with funds or property in connection with a representation in the other state, the provisions of this rule shall not supersede the applicable rules of the other state.

(k) Fiduciary Property. (1) Segregation of Fiduciary Property. A lawyer shall hold in trust, separate from the lawyer’s own funds or property, those funds or that property of clients or 3rd parties that are in the lawyer’s possession when acting in a fiduciary capacity.

(2) Accounting. Upon final distribution of any fiduciary property or upon request by a client or a 3rd party having an ownership interest in the property, a lawyer shall promptly render a full written accounting regarding the property.

(3) Fiduciary Accounts. A lawyer shall deposit all fiduciary funds specified in par. (1) in any of the following:

a. A separate interest-bearing or dividend-bearing fiduciary account on which interest or dividends shall be paid to the fiduciary entity or its beneficiary or beneficiaries, less any taxes and expenses of the fiduciary entity.

b. A pooled interest-bearing or dividend-bearing fiduciary account with sub-accounting by the financial institution, the lawyer, or the law firm that will provide for computation of interest or dividends earned by each fiduciary entity’s funds and the proportionate allocation of the interest or dividends to each of the fiduciary entities, less any taxes and expenses of the fiduciary entity.

c. An income-generating investment vehicle, on which income shall be paid to the fiduciary entity or its beneficiary or beneficiaries, less any taxes and expenses of the fiduciary entity.

d. An income-generating investment vehicle selected by the lawyer and approved by a court for guardianship funds if the lawyer serves as guardian for a ward under Ch. 54 and subject to Ch. 881, Wis. Stats.

e. An income-generating investment vehicle selected by the lawyer to protect and maximize the return on funds in a bankruptcy estate, which investment vehicle is approved by the bankruptcy trustee, by a bankruptcy court order, or otherwise consistent with 11 U.S.C. § 345.

f. A draft account or other account that does not bear interest or pay dividends when, in the lawyer’s professional judgment, placement in the account is consistent with the needs and purposes of the fiduciary entity or its beneficiary or beneficiaries.

(4) Location. Each fiduciary account shall be maintained in a financial institution as provided by the written authorization of the client, the governing trust instrument, organizational by-laws, an order of a court, or, absent such direction, in a financial institution that, in the lawyer’s professional judgment, will best serve the needs and purposes of the client or 3rd party for whom the lawyer serves as fiduciary. If a lawyer acts in good faith in making this determination, the lawyer is not subject to any charge of ethical impropriety or other breach of the Rules of Professional Conduct. When the fiduciary property is held in a draft account and the account is at a financial institution that is not located in Wisconsin or authorized by state or federal law to do business in Wisconsin, the lawyer shall comply with the requirements of sub. (k) (10) b., c., d., e., or f.

5. Prohibited transactions. a. ‘Cash.’ No withdrawal of cash shall be made from a fiduciary account or from a deposit to a fiduciary account. No check shall be made payable to “Cash.” No withdrawal shall be made from a fiduciary account by automated teller or cash dispensing machine.

b. ‘Card transactions.’ A lawyer shall not authorize transactions by way of credit, debit, prepaid or other types of payment cards to or from a fiduciary account.

6. Availability of funds for disbursement. A lawyer shall not disburse funds from a fiduciary account unless the deposit from which those funds will be disbursed has cleared and the funds are available for disbursement. The exception for real estate transactions in sub. (f) (4) b. shall apply to fiduciary accounts.

7. Record retention. A lawyer shall maintain and preserve complete records of fiduciary account funds, all deposits and disbursements, and other fiduciary property and shall preserve those records for the 6 most recent years during which the lawyer served as a fiduciary and shall preserve at a minimum, a summary accounting of all fiduciary funds and property for prior years during which the lawyer served as a fiduciary. After the termination of the fiduciary relationship, the lawyer shall preserve the records required by this paragraph for at least 6 years. Electronic records shall be backed up by an appropriate storage device. The office of lawyer regulation shall publish guidelines for fiduciary account record-keeping.

8. Record production. All fiduciary account records have public aspects related to a lawyer’s fitness to practice. Upon request of the office of lawyer regulation, or upon direction of the supreme court, the records shall be submitted to the office of lawyer regulation for its inspection, audit, use, and evidence under any conditions to protect the privilege of clients that the court may provide. The records, or an audit of the records, shall be produced at any disciplinary proceeding involving the lawyer, whenever material.

9. Burden of proof. A lawyer’s failure to promptly submit fiduciary account records to the office of lawyer regulation or promptly provide an accounting of fiduciary property to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold fiduciary property in trust, contrary to SCR 20:1.15 (k) (1). This presumption may be rebutted by the lawyer’s production of records or an accounting that overcomes this presumption by clear, satisfactory, and convincing evidence.

10. Dishonored payment notification or alternative protection. A lawyer who holds fiduciary property in a draft account from which funds are disbursed through a properly payable instrument or electronic transaction shall take any of the following actions:

a. Comply with the requirements of sub. (h) relating to dishonored payment notification (overdraft notices).

b. Have the account independently audited by a certified public accountant on at least an annual basis.

c. Hold the funds in a draft account, which requires the approval of a co-trustee, co-guardian, co-conservator, or co-personal representative before funds may be disbursed from the account.

d. Require and document the approval of two people from a group consisting of a lawyer or a member or employee of the lawyer’s law firm before funds may be disbursed from the account.

e. In the case of an estate or trust, provide an accounting of the administration at least annually to all beneficiaries currently eligible to receive income distributions.

f. In the case of a guardianship proceeding in which annual financial accountings must be reviewed by a court, timely file those annual financial accountings with the court.

11. Fiduciary account certificate and acknowledgements. Funds held by a lawyer in a fiduciary account are subject to the requirements of sub. (i).
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**(m) EXCEPTIONS TO THIS SECTION.** This rule does not apply in any of the following instances in which a lawyer is acting in a fiduciary capacity:

1. The lawyer is serving as a bankruptcy trustee, subject to the oversight and accounting requirements of the bankruptcy court or the office of U.S. Trustee.

2. The lawyer is serving as an assignee or receiver under the provisions of Ch. 128, Wis. Stats.

3. The property held by the lawyer when acting in a fiduciary capacity is property held for the benefit of an immediate family member of the lawyer.

4. The lawyer is serving in a fiduciary capacity for a civic, fraternal, or non-profit organization that is not a client and has other officers or directors participating in the governance of the organization.

5. The lawyer is acting in the course of the lawyer’s employment by an employer not itself engaged in the practice of law, provided that E-lawyer’s employment is not ancillary to the lawyer’s practice of law.

**History:** Sup. Ct. Order No. 02−06, 2004 Wis. 49, 269 Wis. 2d xiii; Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 06−04, 2007 WI 4, 297 Wis. 2d xiv; Sup. Ct. Order No. 08−03, 2009 WI 62, filed and eff. 7−19−09, eff. 1−1−10; Sup. Ct. Order No. 10−04, 2010 WI 43, 323 Wis. 2d 99, filed and eff. 5−10−10; Sup. Ct. Order No. 12−05, 2010 WI 127, 329 Wis. 2d xxi; Sup. Ct. Order No. 14−07, 2016 WI 21, filed 4−16−16, eff. 7−1−16; Sup. Ct. Order No. 14−07A, 2016 WI 97, filed and eff. 12−7−16.


**Note:** Sup. Ct. Order No. 14−07 states that “the Comments to SCRs 20.10, 20.15, 20.16, and 22.39 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.” Wisconsin, 2016.

A lawyer must hold the property of others with the care required of a professional fiduciary. All property that is the property of clients or 3rd parties may be kept separate from the lawyer’s business and personal funds, and, if monies, in one or more trust or fiduciary accounts. Lawyers have duties to keep clear, distinct, and accurate records of all trust transactions, and to be able always to account for trust monies. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

**SCR 20.115 (a) (2) Electronic transaction.** The types of electronic transactions are as follows: (1) SCRs 20:1.15 (e) and (f) electronic transfers by 3rd parties, see the record−keeping guidelines published by the office of lawyer regulation.

**SCR 20.115 (b) (1) Separate accounts.** With respect to probate matters, a lawyer may be serve in a fiduciary capacity as the personal representative, to represent an estate’s personal representative, or to act as both personal representative and attorney for an estate. SCR 20.115 (k) applies to funds and property which a lawyer holds for a client or a person on whose behalf the lawyer is acting as a fiduciary, except that a lawyer need not keep a separate account with respect to funds and property if the lawyer is acting as a fiduciary in a fiduciary capacity on behalf of the lawyer, unless the lawyer has a contractual or similar claim against that person but does not claim to own the property, or has a security interest in it, the lawyer is free to deliver the property to the person to whom it belongs.

**SCRs 20.115 (e) Prompt notice and delivery of property.** Third parties, such as a client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law, including SCR 20.115 (e), to protect such 3rd−party claims against wrongful interference by the client, and accordingly, may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume that the client has a claim to the property before the lawyer is notified of a claim by the creditor. If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or has a security interest in it, the lawyer is free to deliver the property to the person to whom it belongs.

**SCRs 20.115 (e) Burden of proof.** A lawyer’s failure to comply with the debtors requirements of SCR 20.115 (e) will result in a presumption that the lawyer has failed to hold property in trust, contrary to SCR 20.115 (b) (1). This presumption can be rebutted by the lawyer, who must present evidence of records or accounting that overcome the presumption of clear, satisfactory, and convincing evidence. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

**SCRs 20.115 (d) (2) c. Electronic transfers by 3rd parties.** Many forms of electronic deposit allow the transferor to remove the funds without the consent of the account holder. A lawyer must not only be aware of the financial institution’s policy and the federal regulations pertaining to the specific form of electronic deposit, but must ensure that the transferor is prohibited from withdrawing deposited funds without the lawyer’s consent.

**SCR 20.115 (d) (3) a. Remote deposit.** A remote deposit is an electronic deposit of a paper check to a lawyer’s trust account. Subject to a lawyer’s compliance with the requirements of this subsection, such transactions are permitted in an IOLTA account to violate this type of requirement may constitute conduct involving dishonesty, fraud, deceit, oppression, or gross negligence, in violation of SCR 20.8 (c).

**3. By requiring clients to pay the credit card charges, is the lawyer required to pay the credit card charges before a credit card payment for legal fees is accepted?** If a lawyer intends to accept credit card fees as payment for legal services, the lawyer needs to assure that the lawyer complies with all state and federal laws relating to such transactions, including, but not limited to, Regulation Z of the Truth in Lending Act, 12 CFR § 206.

**SCR 20.115 (c) (3) c. Alternative E−Banking Trust Account.** As an alternative to using an E−Banking trust account for the purposes of electronic deposits and disbursements, a lawyer may make electronic deposits and disbursements from an IOLTA account when additional protections are in place. This alternative would reduce the expense of maintaining two accounts, but it also requires that the lawyer prevent the electronic withdrawal of funds from the IOLTA account that could occur through chargebacks or reversals against a credit card, bank card, or other electronic withdrawals. Specifically, the lawyer must either establish agreements with the lawyer’s financial institution and with payment providers to deduct fees, surcharges, and chargebacks from the lawyer’s bank account or reimburse the account for such deductions with funds belonging to the lawyer or lawyer firm within 3 business days after receiving notice of the deductions. In addition, the lawyer must establish an agreement with the financial institution to block deposits from the IOLTA account.

**SCR 20.115 (f) (4) b.** Establishes an exception to the requirement that a lawyer only disburse funds that have been credited to the IOLTA account. This exception was created in recognition of the fact that real estate transactions in Wisconsin require a simultaneous exchange of funds. However, even under this exception, the funds from which a lawyer disburses the proceeds of the real estate transaction, i.e., the lender’s check, draft, wire transfer, etc., must be deposited no later than the first business day following the date of the closing. In refinancing transactions, the lender’s funds must be deposited as soon as possible, but not later than the first business day after the loan proceeds are distributed. Proceeds are generally distributed within 3 days after the closing date.

**SCR 20.115 (g) (2) Record production.** The duty of the lawyer to produce client trust account records for inspection under SCR 20.115 (g) (2) is a specific exception to the lawyer’s responsibility to maintain the confidentiality of the client’s information, as required by SCR 20.1.

**SCR 20.115 (g) (3) Burden of proof.** A lawyer’s failure to comply with the record production requirements of SCR 20.115 (g) (2) or to provide an accounting that the lawyer reasonably believes the property will result in a presumption that the lawyer is not acting in good faith or in the best interest of the client, contrary to SCR 20.115 (b) (1). This presumption can be rebutted by the lawyer’s production of records or an accounting that overcomes this presumption by...
clear, satisfactory, and convincing evidence. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

SCR 20:1.15 (k) 1 Segregation of fiduciary property. See comment to SCR 20:1.15 (h).

SCR 20:1.15 (k) 2 Burden of proof. A lawyer’s failure to comply with the record production requirements of SCR 20:1.15 (k) 8 or to provide an accounting for fiduciary property will result in an automatic presumption that the lawyer has failed to hold fiduciary property in trust, contrary to SCR 20:1.15 (k) (1). This presumption can be rebutted by the lawyer’s production of records or an accounting that overcomes such presumption by clear, satisfactory, and convincing evidence. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

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 is limited, 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 in the lawyer’s files and to the extent practicable, to permit the client to acquire the lawyer’s files without unreasonable delay and at a reasonable cost. A lawyer may not withhold files or information from a client unless:

1. The proposed sale;
2. The client’s right to retain other counsel or to take possession of the file; and
3. 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.

History: Sup Ct. Order No. 88−05, 1989 Wis. 2d 525.

Note: The above annotation cites to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 88−05.

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. Ethics, Formal Op. 1998−11, re请注意 SCR 20:1.16 as it existed prior to the adoption of SCR 20:1.16.

SCR 20:1.17 Sale of law practice.

(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.

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

ABA Comment: [1] 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, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms.

Termination of Practice by the Seller: [2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith markets the entire practice, or the area of practice, for sale to the purchaser. The fact that a number of the seller’s clients decide not to be represented by the purchasers or take matters elsewhere, therefore, does not result in a violation. When an unexpected change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to an appointment to judicial office does not violate the requirement that the
sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, are applicable if, for example, a lawyer or law firm that has been practicing law in the same community for many years decides to move to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To allow the lawyer to benefit from sales of his or her practice is unfair to those clients whose matters were handled by the lawyer in that state and who had moved with the lawyer to another state.

[5] Where the information indicates that a conflict of interest or other reason for disqualification exists, disqualification should be shown by filing a motion to disqualify in the court that has or acquires jurisdiction. Subject to Rule 2.12, if no actual client−lawyer relationship exists, disqualification may be shown by filing a motion to disqualify in the court that may acquire jurisdiction.

[6] The Rule requires that the seller, the prospective client; and the client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the representation in response. See also Comment [4]. In contrast, a consultation does not occur if the lawyer obtains the informed consent, confirmed in writing, of both the prospective client and the lawyer. Hence, prospective clients should receive written notice of the contemplated sale, not required. See Rule 1.6(b)(7). Providing the purchaser access to information relating to the representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 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.

[10] The sale may not be financed in fees charged the client of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller’s obligation to exercise due diligence in identifying a purchaser qualified to assume the practice and the purchaser’s obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client’s informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.6(c) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.10). Arrangements by which the selling lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to require the informed consent of all affected clients.

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-attorney representative not subject to the Rules. Since, however, the client may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to require the informed consent of all affected clients.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice to a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

SCR 20:1.18 Duties to prospective client. (a) A person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that 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 from the prospective client that could be significantly harmful to that person in the matter, except as provided in par. (d).

(d) If a lawyer is disqualified from representation under this paragraph, the lawyer may not in a firm with which that lawyer is associated may unknowingly undertake or continue representation in such a matter, except as provided in par. (d).

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

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

(ii) 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.

[1] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-attorney representative not subject to the Rules. Since, however, the client may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to require the informed consent of all affected clients.

[2] A lawyer considering whether or not to undertake a new matter should limit the initial consultation to matters that do not present a conflict of interest.

[3] It is often necessary for a prospective client to reveal information to the lawyer during the initial consultation prior to the decision about formation of a client−lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should initially consult with the client as to the nature of the representation to be provided for the present purpose. Where the information indicates that a conflict of interest or other reason for disqualification exists, the lawyer should inform the prospective client and decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before any other determinations can be made.

[5] A lawyer may condition a consultation with a prospective client on the client’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. Paragraph (b) permits the lawyer to condition the consultation on the definition of informed consent. If the lawyer agrees to provide the consultation, the lawyer may not use or disclose the information without the client’s informed consent.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the representation in response. See also Comment [4]. In contrast, a consultation does not occur if the lawyer obtains the informed consent, confirmed in writing, of both the prospective client and the lawyer. Hence, prospective clients should receive written notice of the contemplated sale, not required. See Rule 1.6(b)(7). Providing the purchaser access to information relating to the representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 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.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, if the lawyer is disqualified from representation under this paragraph, the lawyer may not in a firm with which that lawyer is associated may unknowingly undertake or continue representation in such a matter, except as provided in par. (d).

29 Updated 17–18 Wis. Stats.

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SCR 20:2.1 Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

History: Sup. Ct. Order No. 04–07, 2007 WI 1, 293 Wis. 2d. 2d sy.

ABA Comment: Scope of Advice. [1] A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves implications of alternatives that a client may not be free to consider. When giving candid advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially with respect to moral considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or implicitly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, the lawyer’s responsibility as an advisor may indicate that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. When consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.

At the same time, a lawyer’s advice at its best often consists of recommending a course of action that is the face of conflicting recommendations of experts.

Offering Advice. [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that may result in substantial adverse legal consequences to the client, the lawyer may have a duty to make reasonable effort to inform the client of the adverse consequences. The lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation. Similarly, when a matter is in litigation, it may be necessary for the lawyer to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigations of a client’s affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.

SCR 20:2.2 Omitted.

SCR 20:2.3 Evaluation for use by 3rd persons. (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is obliged by SCR 20:1.6.

History: Sup. Ct. Order No. 04–07, 2007 WI 1, 293 Wis. 2d sy.

ABA Comment: Definition. [1] An evaluation may be performed at the client’s direction or when implicitly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser. The lawyer is also authorized for the investigation of a prospective lender.

In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A lawyer evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor’s title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person’s affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the true person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client. [3] When the evaluation is intended for use to information or use of a third person, a legal duty to the third person arises. This duty arises primarily in a lawyer’s role as one who represents a client.

[4] A lawyer’s role as a 3rd−party neutral shall inform unrep-
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b. That the lawyer does not represent either party to the mediation.

c. That the lawyer cannot give legal advice or advocate on behalf of either party to the mediation.

d. The desirability of seeking independent legal advice before executing any documents prepared by the lawyer–mediator.

(2) The drafting, selection, completion, modification, and filing of documents pursuant to par. (1) does not create a client–lawyer relationship between the lawyer and a party.

(3) Notwithstanding par. (2), in drafting, selecting, completing or modifying the documents referred to in par. (1), a lawyer serving as mediator shall exercise the same degree of competence and shall act with the same degree of diligence as SCR 20:1.1 and 20:1.3 would require if the lawyer were representing the parties to the mediation.

(4) A lawyer serving as mediator who has prepared documents pursuant to par. (1) may, with the informed consent of all parties to the mediation, file such documents with the court. However, a lawyer who has served as a mediator may not appear in court on behalf of either or both of the parties in mediation.

(5) Any document prepared pursuant to this subsection that is filed with the court shall clearly indicate on the document that it was "prepared with the assistance of a lawyer acting as mediator."

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 04−07, eff. 2−21−17, eff. 7−1−18.

ABA Comment: [1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute−resolution processes, lawyers often serve as third−party neutrals. A third−party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third−party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third−party neutral is not unique to lawyers. Although, in some court−connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or ethical considerations that apply to either third−party neutrals generally or to lawyers serving as third−party neutrals. Lawyer−neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by the American Bar Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third−party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third−party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer−neutral to inform unrepresented parties that the lawyer−neutral does not have a client−lawyer relationship with either party to the mediation. For some parties, particularly parties who are represented by counsel, use of dispute−resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. For purposes of this rule, "unrepresented parties" are parties who have not retained a lawyer to represent them.

(4) A lawyer serving as a third−party neutral subsequently may be retained by the parties to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in SCR 20:1.3, which provides that a lawyer who has served as a mediator may not appear in court on behalf of either party to the mediation. SCR 20:1.3 also applies where a lawyer who has served as mediator does not act as a legal advisor to either party to the mediation, but rather acts as a fact finder or expert witness involved in the matter.

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 16−04 states that the Comment to SCR 20:2.4 (c) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

ABA Comment: [1] The filing of an action or defense or similar action taken for a client is not frivolous; or

[2] The filing of an action or defense or similar action taken for a client is not frivolous; or

[4] That a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in SCR 20:1.3, which provides that a lawyer who has served as a mediator may not appear in court on behalf of either party to the mediation. SCR 20:1.3 also applies where a lawyer who has served as mediator does not act as a legal advisor to either party to the mediation, but rather acts as a fact finder or expert witness involved in the matter.

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 16−04 states that the Comment to SCR 20:2.4 (c) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.
and the applicable law and determine that they can make good faith arguments in support of their clients’ positions. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if it is undertaken either to make a good faith argument or to urge the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

3) The duties stated in paragraphs (a) and (b) are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

SCR 20:3:2 Expediting litigation. A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

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

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

SCR 20:3:3 Candor toward the tribunal. (a) A lawyer shall not knowingly:

1. make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
2. fail to disclose to the tribunal legal authority that the tribunal has a right to consider in determining the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law;
3. offer evidence that the lawyer knows to be false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1:6.

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

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

Case Notes: An attorney may not substitute narrative question for the traditional question and answer format unless counsel knows that the client intends to testify falsely. Absent the most extraordinary circumstances, such knowledge must be based on the client’s expressed admission of intent to testify untruthfully. While the defendant’s admission need not be phrased in magic words, it must be unambiguous and directly made to the attorney. State v. McDowell, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500, 04−07.

When a defendant informs counsel of the intention to testify falsely, the attorney’s first duty shall be to attempt to dissuade the client from the unlawful course of conduct. The attorney should then consider moving to withdraw from the case. If the motion to withdraw is denied and the defendant persists in committing perjury, counsel should proceed with the narrative form of questioning, advising the defendant beforehand about risks and informing opposing counsel and the circuit court of the change of questioning style prior to use of the narrative. State v. McDowell, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500, 02−1203.

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Comment: [1] This Rule governs the conduct of a client who is representing himself or herself at issue. SCR 20:1:7 (m) (2) (b) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition.

3) The duties stated in paragraphs (a) and (b) are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

2) This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with vigor and persuasiveness. Of course, the lawyer’s role in an adversary proceeding is to make an effective advocate for his or her client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present only that evidence which supports the client’s case, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

2) This Rule applies by its terms to a lawyer representing a client in an in-court adversary proceeding. However, the duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1:6.

2) The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness to or to give a narrative statement of facts known to the lawyer, including, but not limited to, the facts that the testimony will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment 9.

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

2) Although paragraph (a) (3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer’s ability to discriminate in the quality of evidence. A lawyer who reasons that the ends of justice require that the opposite party be permitted or will not undergo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information which is privileged as provided in SCR 19:5. It is for the tribunal then to determine what should be done — making a statement about the matter to the trial of fact, ordering a mistrial or perhaps nothing.

2) The disclosure of a client’s fraud can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in assisting the client’s fraud on the court and the client keep silent. Thus the client could in effect coerce the lawyer into violating the lawyer’s duty of candor to the tribunal.

2) Moreover, the lawyer will have failed to perform the lawyer’s duty of loyalty to the tribunal to make an informed decision, whether or not the facts are adverse. This Rule, therefore, assures a fair hearing, which is the purpose of our adversary system of justice.

2) This Rule is designed to implement SCR 20. (2) (d). Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 808.504.5801 or lrb.legal@legis.wisconsin.gov.
SCR 20:3.4 Fairness to opposing party and counsel. A lawyer shall not:
(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b) falsely evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
1) the person is a relative or an employee or other agent of a client; and
2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

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

Case Note: A lawyer in a civil case may ask witnesses about the identity of other witnesses. Wis. Stat. § 806.09(3)(a). It is not improper to ask a witness to identify the lawyer's client as the source of the communication. Wis. Stat. § 806.09(3)(a)1. A lawyer may ask whether a witness knows any other witness present at the scene of the crime. Wis. Stat. § 806.09(3)(a)2.

ABA Comment: [1] The practice of law requires that a lawyer’s actions not be inconsistent with the lawyer’s duties to the tribunal. For, as a corollary of the advocate’s right to speak on behalf of the client, the lawyer’s duty is to aid in the just recognition and enforcement of rights under existing law. ABA Model Rule 1.2, Comment 3. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. ABA Model Rule 1.2, Comment 4. A lawyer is not required to withdraw from an adversarial proceeding merely because the lawyer was involved in the misconduct.

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

[3] At the request of a government entity, the ABA Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 1003, which provides guidance to lawyers concerning the proper conduct of a lawyer in internal investigations.

[4] The ABA Model Rules also provide for a lawyer to engage in ex parte communications to the court in appropriate circumstances. ABA Model Rules 3.4 and 3.5. ABA Model Rule 4.2 permits a lawyer to advise employees of a client to refrain from giving information to another party. A lawyer may identify their interests with the employees. ABA Model Rule 6.2. Wisconsin Committee Comment: Paragraph (b) permits a lawyer to request that a person refrain from giving information to another party.

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

SCR 20:3.6 Trial publicity. (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement referred to in par. (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in deprivation of liberty, and the statement relates to:
1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
2) in a criminal case or proceeding that could result in deprivation of liberty, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or state-
ment given by a defendant or suspect or that person’s refusal or failure to make a statement;
(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in deprivation of liberty;
(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
(e) Notwithstanding pars. (a) and (b) (1) through (5), a lawyer may state:
(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that an investigation of a matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to sub. (1) through (6):
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
(d) Notwithstanding par. (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial likelihood of undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
(e) No lawyer associated in a firm or government agency with a lawyer subject to par. (a) shall make a statement prohibited by par. (a).
History: Sup. Ct. Order No. 04−07, 293 Wis. 2d xv.

Wisconsin Committee Comment: Paragraph (b) contains provisions found in ABA Comment [5] but not contained in the Model Rule. Because of the addition of paragraph (b), this rule and the Model Rule have differing numbering, so that care should be used in consulting the ABA Comment.

ABA Comment: [1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4 (c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer’s making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the statements of a lawyer who is not involved in the examination is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer’s statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is intended to be an exhaustion of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or content of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;
(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials will be less sensitive. Non−jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party’s lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer’s client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resultant adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8 (f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

SCR 20:3.7 Lawyer as witness. (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless prohibited from doing so by SCR 20:1.7 or 1.9.

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

Case Note: When a prosecutor elicits testimony that can only be contradicted by defense counsel or the defendant, if defense counsel could not reasonably foresee the direction and the defendant has not been called to testify, defense counsel must be permitted to testify. State v. Vory, 206 Wis. 2d 629, 557 N.W.2d 494 (Ct. App. 1996).

The party seeking disqualification based on SCR 20:3.7 has the burden of proving the necessity for disqualification. Whether disqualification of an attorney is required in a particular case involves an exercise of the circuit court’s discretion. State v. Gonzalez−Villarreal, 2012 WI App 110, 2012 WI App 110, 11−1295.

Note: The above annotation cites to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04−07.

ABA Comment: [1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate−Witness Rule. [2] The tribunal has proper objection when the trier of fact will be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate−witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a) (1) through (a) (5). Paragraph (a) (1) recognizes that if the testimony was uncontested, the ambiguity would be patent. Paragraph (a) (2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony of the proceeding is subjected.

[4] Apart from these two exceptions, paragraph (a) (3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the oppos-
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ing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer’s testimony, and the probability that the lawyer’s testimony will conflict with the lawyer’s interest. Even if there is risk of such prejudice in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer’s client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9, and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer’s firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest. [6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer’s disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a) (3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client’s informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client’s consent. See Rule 1.7. See Rule 1.0 (b) for the definition of “informed consent.”

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from serving as an advocate by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

SCR 20:3.8 Special responsibilities of a prosecutor. (a) A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute a charge that the prosecutor knows is not supported by probable cause.

(b) When communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor’s role and interest in the matter.

(e) When communicating with an unrepresented person who has committed a municipal or other statutory offense, the prosecutor shall inform the person of the right to counsel and the procedures to obtain counsel and shall give that person a reasonable opportunity to obtain counsel.

(d) When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor, other than a municipal prosecutor, shall not:

(1) otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights or how the tribunal is likely to rule in the case, or

(2) assist the tribe in the completion of (i) guilty plea forms (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial.

(e) A prosecutor shall not subpoena a lawyer in a grand jury or other proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(f) A prosecutor, other than a municipal prosecutor, in a criminal case or a proceeding that could result in deprivation of liberty shall:

(1) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(2) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under SCR 20:3.6.

(g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall do all of the following:

(1) promptly disclose that evidence to an appropriate court or authority;

(2) if the conviction was obtained in the prosecutor’s jurisdiction,

(i) promptly make reasonable efforts to disclose that evidence to the defendant unless a court authorizes delay; and

(ii) make reasonable efforts to undertake an investigation or cause an investigation to be undertaken, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

History: Sup. Ct. Order No. 04−07, 2007 Wis. 4, 293 Wis. 2d xv; Sup. Ct. Order No. 08−24, 2009 Wl 55, filed and eff. 6−17−09.


Note: The above annotation cites to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04−07.

Wisconsin Comment: The Wisconsin Supreme Court Rule differs from the Model Rule in several respects: (1) paragraphs (b) adds the reference to “the context of an investigation or proceeding’’; (2) paragraphs (c) and (d) expand the rule by deleting a reference to communications occurring only “after the commencement of litigation’’; (4) paragraphs (d) and (f) exempt municipal prosecutors from certain requirements of the rule. Care should be used in consulting the ABA Comment.

ABA Comment: [1] A prosecutor has the responsibility of a minister of justice and not that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systemic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors could not seek to obtain a waiver of preliminary hearing in a case where disclosable prejudicial information is known and could result in substantial harm to an individual or to the public interest.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client−lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that could have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the commencement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6 (b) or 3.6 (c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law−enforcement personnel and other relevant persons.
A lawyer representing a client before a legislative body of admin-
istrative agencies has a right to expect lawyers to deal with them as they
would with courts. However, legislatures and administrative agencies have a right to expect lawyers to deal with others on a client's behalf, but generally has no affirmative duty to
inform an opposing party of relevant facts. A misrepresentation can occur if the law-
gen is not made to the other party or if the other party is not made aware that the
information that was the equivalent of an affirmative false statement. For dishonest
conduct is lawful. See SCR 20:1.2 (d). This is allowed even in circumstances in
which the lawyer personally participates in the deception, or if, after commencing communication, the lawyer learns that the person is one with
whom communication is not permitted by this Rule.

ABA Comment: [1] This Rule applies to communications with any person who is
represented by counsel concerning the matter to which the communication relates.
[2] This Rule applies even though the represented person initiates or consents to the
communication. A lawyer must immediately terminate communication with a person if,
after commencing communication, the lawyer learns that the person is one with whom
communication is not permitted by this Rule.

Note: The above annotations cite to SCR 20 as it existed prior to the adoption of
Sup. Ct. Order No. 04-07.

ABA Comment: [1] This Rule contributes to the proper functioning of the legal system
by protecting a person who has been chosen to represent a lawyer in a matter that might possibly be handled by some other lawyer participating in the matter, interference by those lawyers with the client–lawyer relationship and the unen-
counseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by
counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the
communication. A lawyer must immediately terminate communication with a person if,
after commencing communication, the lawyer learns that the person is one with whom
communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an
employee or agent of such a person, concerning matters outside the representation.
For example, the existence of a controversy between a government agency and a
private party, or between two organizations, does not prohibit a lawyer from com-
municating with nonlawyer representatives of the other regarding a separate mat-
Jer.
cated with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is protected by court order. A lawyer may also seek a court order to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to oblige the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Communication with a represented organization’s lawyer is not required for communications with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient. See SCR 20:4.3(f).

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of representation but actual knowledge may be inferred from the circumstances. See Rule 1.0(f).

[9] The lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

SCR 20:4.3 Dealing with unrepresented person. (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer’s role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1:2 (c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing party otherwise.

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 13−10, 2016 WI 76, filed 7−21−16, eff. 1−1−17.


Note: The above annotations cite to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04−07.

Wisconsin Comment: A municipal prosecutor’s obligations under this rule should be read in conjunction with SCR 20:3.8 (d) and (f).

Wisconsin Committee Comment: This Wisconsin Supreme Court Rule differs from the Model Rule in requiring lawyers to inform unrepresented persons of the lawyer’s role in the matter, whereas the Model Rule requires only that the lawyer not state or imply that the lawyer is disinterested. A similar obligation to clarify the nature of the role is expressed in SCR 20:1.13 (f), SCR 20:2.4, SCR 20:3.8 (b), and SCR 20:4.1.

ABA Comment: [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid misunderstanding, a lawyer will typically need to identify the lawyer’s client and, when necessary, explain that the lawyer has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13 (f).

[2] This Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer’s client and those in which the lawyer’s interests are not in conflict with the client’s. In the former situation, the possibility that the lawyer will compromise the unrepresented person’s interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving improper advice may depend on the experience and sophistication of the unrepresented person. The advice to secure counsel is necessary when the lawyer represents a client, as well as the session in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.

[3] It was also confirmed that the lawyer represents the adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter, prepare documents that the lawyer’s client will sign, and explain the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations.

SCR 20:4.4 Respect for rights of 3rd persons. (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

(c) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information contains information protected by the lawyer-client privilege or the work product rule and has been directed to the lawyer inadvertently shall:

(1) immediately terminate review or use of the document or electronically stored information;

(2) promptly notify the person or the person’s lawyer if communication with the person is prohibited by SCR 20:4.2 of the inadvertent disclosure; and

(3) abide by that person’s or lawyer’s instructions with respect to disposition of the document or electronically stored information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 15−03, 2016 WI 76, filed 7−21−16, eff. 1−1−17.

Wisconsin Committee Comment, 2016

Note: Sup. Ct. Order No. 15−03 states that the Comments “are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rules.”

This Rule, unlike its Model Rule counterpart, contains paragraph (c), which specifically applies to information protected by the lawyer-client privilege and the work product rule. If a lawyer knows that the document or electronically stored information contains information protected by the lawyer-client privilege or the work product rule has been disclosed to the lawyer inadvertently, then this Rule requires the lawyer to immediately terminate review or use of the document or electronically stored information, promptly notify the person or the person’s lawyer if communication with the person is prohibited by SCR 20:4.2 of the inadvertent disclosure, and abide by that person’s or lawyer’s instructions with respect to disposition of the document or electronically stored information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

Due to substantive and numbering differences, special care should be taken in consulting the ABA Comment.

ABA Comment: [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was inadvertently sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes paper documents, emails or other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.


SCR 20:4.5 Guardians ad litem. A lawyer appointed to act as a guardian ad litem or as an attorney for the best interests of an individual represents, and shall act in, the individual’s best interests, even if doing so is contrary to the individual’s wishes. A lawyer so appointed shall comply with the Rules of Professional Conduct.
duties that are consistent with the lawyer’s role in representing the best interests of the individual rather than the individual personally.

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

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.

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

ABA Comment: [1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document’s frivolity.

[2] When lawyers in a supervisor–subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a contrary conclusion as a matter of fact or law may not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor’s reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

SCR 20:5.2 Responsibilities of a subordinate lawyer. (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

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

ABA Comment: [1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document’s frivolity.

[2] When lawyers in a supervisor–subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a contrary conclusion as a matter of fact or law may not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor’s reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

SCR 20:5.3 Responsibilities regarding nonlawyer assistance. 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.

History: Sup. Ct. Order No. 04-07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order 15-02, 2016 WI 76, filed 7-21-16, eff. 1-17.

ABA Comment: [1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the Rules of Professional Conduct with the professional obligations of the lawyer. See Comment 6 to Rule 1.1 (retaining lawyers outside the firm) and Comment 1 to Rule 5.1 (responsible supervisory authority). Paragraph (b) requires that a lawyer have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers inside or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2] Lawyers generally employ assistants in their practice, including secretaries, law student interns, paralegals, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical obligations and duties of such assistants, including, in particular, preventing the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in super-
vising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or para-professional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or a Computer or Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the ethical and legal environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (Unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer. [Created by Sup. Ct. Order No. 15−2016 WI 76, effective 1−1−17.]

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. [Created by Sup. Ct. Order No. 15−03, 2016 WI 76, effective 1−1−17.]

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 representatives of that lawyer the agreed upon purchase price; and (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 non−profit 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.


Note: The above annotations cite to SCR 20 as it existed prior to the adoption of SCR 20:1.17, 2004 WI 4−07.

ABA Comment: [1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer’s professional independence of judgment. Where someone other than the client pays the lawyer’s fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer’s obligation to the client. As stated in paragraph (c), such arrangements should not in any way affect the lawyer’s professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another. See also Rule 1.8 (f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer’s independent professional judgment and the client gives informed consent).

SCR 20:5.5 Unauthorized practice of law; multijurisdictional practice of law. (a) A lawyer shall not: (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction except that a lawyer admitted to practice in Wisconsin does not violate this rule by conduct in another jurisdiction that is permitted in Wisconsin under SCR 20:5.5 (c) and (d) for lawyers not admitted in Wisconsin; or (2) assist another in practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by this rule or other law, establish an office or maintain a systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to the practice of law in this jurisdiction.

(c) Except as authorized by this rule, a lawyer who is not admitted to practice in this jurisdiction but who is admitted to practice in another jurisdiction of the United States and not barred or suspended from practice in any jurisdiction for disciplinary reasons or for medical incapacity, may not provide legal services in this jurisdiction except when providing services on an occasional basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; or (2) are in, or reasonably related to, a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or (3) are in, or reasonably related to, a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of, or are reasonably related to, the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within subsections (c) (2) or (c) (3) and arise out of, or are reasonably related to, the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, who is not barred or suspended from practice in any jurisdiction for disciplinary reasons or medical incapacity, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: (1) are provided to the lawyer’s employer or its organizational affiliates after compliance with SCR 10.03(4)(f), and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law or other rule of this jurisdiction.

(e) A lawyer admitted to practice in another jurisdiction of the United States or a foreign jurisdiction who provides legal services in this jurisdiction pursuant to sub. (c) and (d) above shall consent to the appointment of the Clerk of the Wisconsin Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer’s firm that may arise out of the lawyer’s participation in legal matters in this jurisdiction.

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 06−06, 2008 WI 109, filed 7−30−08, eff. 1−1−09; Sup. Ct. Order No. 15−03, 2016 WI 76, filed 7−21−16, eff. 1−1−17.

[12] Paragraph (c) (3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction by or on behalf of any person who are associated with the lawyer in the practice of law in the other jurisdiction, and require the lawyer to provide legal services in or reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c) (2) or (c) (5). These services include both the practice of law when performed by lawyers.

[13] Paragraph (c) (4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if those services are in or reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c) (2) or (c) (5). These services include both the practice of law when performed by lawyers.

[14] Paragraphs (c) (3) and (c) (4) require that the services arise out of or be reasonably related to the lawyer’s practice in another jurisdiction and require the lawyer to provide legal services in or reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c) (2) or (c) (5). These services include both the practice of law when performed by lawyers.

[15] Paragraph (d) identifies two circumstances in which a lawyer admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction in which the lawyer is admitted. Paragraphs (d) (1) and (d) (2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d) (1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer’s officers or employees. The paragraph applies to in−house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer’s ability to represent the employer outside the jurisdiction in which the lawyer is admitted is limited by the presence in or continuous presence in that jurisdiction of the lawyer’s organization or corporation. Paragraph (d) (2) allows a lawyer admitted to practice in another jurisdiction to provide legal services to the employer’s officers or employees. Paragraph (d) (2) requires the lawyer to represent the employer in a jurisdiction in which the lawyer is admitted and requires the lawyer to establish a continuing presence in that jurisdiction. Paragraph (d) (2) also requires the lawyer to represent the employer in the jurisdiction in which the lawyer is admitted and requires the lawyer to establish a continuing presence in that jurisdiction. Paragraph (d) (2) also requires the lawyer to represent the employer in a jurisdiction in which the lawyer is admitted and requires the lawyer to establish a continuing presence in that jurisdiction.

[17] If an employed lawyer establishes and solicits other clients in assessing this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d) (2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or state law, which includes statutes, rules and other forms of legal regulation. Paragraph (d) (2) also recognizes that a lawyer admitted to practice law in this jurisdiction may provide legal services to the employer outside the jurisdiction in which the lawyer is admitted and requires the lawyer to represent the employer in a jurisdiction in which the lawyer is admitted and requires the lawyer to establish a continuing presence in that jurisdiction. Paragraph (d) (2) also recognizes that a lawyer admitted to practice law in this jurisdiction may provide legal services to the employer outside the jurisdiction in which the lawyer is admitted and requires the lawyer to represent the employer in a jurisdiction in which the lawyer is admitted and requires the lawyer to establish a continuing presence in that jurisdiction.

[19] A lawyer practices law in this jurisdiction pursuant to paragraphs (c) (2) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.2. Paragraph (c) (2) does not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice law in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

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.

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


Note: The above annotations cite to SCR 20 as it existed prior to the adoption of SCR 20:5.6.

A. [16] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for...
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restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

SCR 20:5.7 Limited liability legal practice. (a) (1) A lawyer may be a member of a law firm that is organized as a limited liability organization solely to render professional legal services under the laws of this state, including chs. 178 and 183 and subch. XIX of ch. 180. The lawyer may practice in or as a limited liability organization if the lawyer is otherwise authorized to practice law in this state and the organization is registered under sub. (b).

(2) Nothing in this rule or the laws under which the lawyer or law firm is organized shall relieve a lawyer from personal liability for any acts, errors or omissions of the lawyer arising out of the performance of professional services.

(b) A lawyer or law firm that is organized as a limited liability organization shall file an annual registration with the state bar of Wisconsin in a form and with a filing fee that shall be determined by the state bar. The annual registration shall be signed by a lawyer who is licensed to practice law in this state and who holds an ownership interest in the organization seeking to register under this rule. The annual registration shall include all of the following:

(1) The name and address of the organization.

(2) The names, residence addresses, states or jurisdictions where licensed to practice law, and attorney registration numbers of the lawyers in the organization and their ownership interest in the organization.

(3) A representation that at the time of the filing each lawyer in the organization is in good standing in this state or, if licensed to practice law elsewhere, in the states or jurisdictions in which he or she is licensed.

(4) A certificate of insurance issued by an insurance carrier certifying that it has issued to the organization a professional liability policy to the organization as provided in sub. (bm).

(5) Such other information as may be required from time to time by the state bar of Wisconsin.

(bm) The professional liability policy under sub. (b) (4) shall identify the name of the professional liability carrier, the policy number, the expiration date and the limits and deductibles. Such professional liability insurance shall provide not less than the following limits of liability:

(1) For a firm composed of 1 to 3 lawyers, $100,000 of combined indemnity and defense cost coverage per claim, with a $300,000 aggregate combined indemnity and defense cost coverage amount per policy period.

(2) For a firm composed of 4 to 6 lawyers, $250,000 of combined indemnity and defense cost coverage per claim, with $750,000 aggregate combined indemnity and defense cost coverage amount per policy period.

(3) For a firm composed of 7 to 14 lawyers, $500,000 of combined indemnity and defense cost coverage per claim, with $1,000,000 aggregate combined indemnity and defense cost coverage amount per policy period.

(4) For a firm composed of 15 to 30 lawyers, $1,000,000 of combined indemnity and defense cost coverage per claim, with $2,000,000 aggregate combined indemnity and defense cost coverage amount per policy period.

(5) For a firm composed of 31 to 50 lawyers, $4,000,000 of combined indemnity and defense cost coverage per claim, with $4,000,000 aggregate combined indemnity and defense cost coverage amount per policy period.

(6) For a firm composed of 51 or more lawyers, $10,000,000 of combined indemnity and defense cost coverage per claim, with $10,000,000 aggregate combined indemnity and defense cost coverage amount per policy period.

(c) Nothing in this rule or the laws under which a lawyer or law firm is organized shall diminish a lawyer’s or law firm’s obligations or responsibilities under any provisions of this chapter.

(d) A law firm that is organized as a limited liability organization under the laws of any other state or jurisdiction or of the United States solely for the purpose of rendering professional legal services that is authorized to do business in Wisconsin and who also has an ownership interest in the firm may register under this rule by complying with the provisions of sub. (b).

(e) A lawyer or law firm that is organized as a limited liability organization shall do all of the following:

(1) Include a written designation of the limited liability structure as part of its name.

(2) Provide to clients and potential clients in writing a plain−English summary of the features of the limited liability law under which it is organized and the applicable provisions of this chapter.

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 15−03, 2016 WI 76, filed 7−21−16, eff. 1−1−17.


Note: The above annotations cite to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04−07.

Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.
41  Updated 17–18 Wis. Stats.

RULES OF PROFESSIONAL CONDUCT

SCR 20:6.1 Voluntary pro bono publico service. Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate; and

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(c) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

History: Sup. Ct. Order No. 04–07, 2007 WI 1, 293 Wis. 2d xx.

ABA Comment: [1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay. The problems of the disinherited can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. A lawyer, however, may decide to contribute a higher or lower number of hours of service (which may be expressed as a percentage of a lawyer’s professional time) depending upon local needs and local conditions. It is recognized that in some years it may render greater or for smaller numbers of hours of service. During the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a) (1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even where restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a) (1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines set forth in such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women’s centers and food pantries. The term “organizations of the legal profession” includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of this Rule is that a lawyer render fee legal services is essential for the work performed to fall within the meaning of paragraphs (a) (1) and (2). Accordingly, services rendered can be considered pro bono if an anticipated fee is collected to compensate the lawyer’s time or if an anticipated fee is collected to compensate the lawyer’s time or if an attorney-client relationship exists with a legal entity described in paragraph (a) (1) or (2).

Subsection (b)

SCR 20:6.2 Accepting appointments. A lawyer shall not be prohibited from accepting an appointment to serve as an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the legal profession are a few examples of the many activities that fall within this paragraph.

[5] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono service. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably calculated to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as a firm’s aggregate pro bono activities.

[6] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[7] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[8] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

SCR 20:6.3 Income sharing and reduced fee arrangements. A lawyer shall not:

(a) enter into an arrangement whereby a lawyer provides legal services to a person other than the client for a fee that is contingent on the outcome or settlement of the matter; 

(b) enter into an arrangement where a lawyer or a law firm shall share legal fees with persons not in the law firm.

History: Sup. Ct. Order No. 04–07, 2007 WI 1, 293 Wis. 2d xx.

ABA Comment: [9] A broad range of economic and other interests of clients may be served by lawyers engaging in the delivery of law-related services. Examples of law-related services include, but are not limited to, title insurance, financial planning, accounting, trust and estate planning, estate administration, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a) (1) and (2), to the extent that any hours of service remained unfulfilled, the commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a) (1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] SCR 20:6.4 Proper use of data and information. A lawyer shall properly use data and information, including electronic data and information, obtained in connection with the representation of a client.

[13] SCR 20:6.5 Attorney-client privilege. A lawyer shall maintain the confidentiality of information relating to the representation of a client, except as authorized or required by law or as otherwise provided in this Rule.

Updated through March 28, 2020.

Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 608.504.5801 or lrb.legal@legis.wisconsin.gov.
(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; or
(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client–lawyer relationship or the lawyer’s ability to represent the client.

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

ABA Comment: [1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer’s freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel. [2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain a counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client–lawyer relationship or the lawyer’s ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonable burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client–lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

SCR 20:6.3 Membership in legal services organization. A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would be incompatible with the lawyer’s obligations to a client under SCR 20:1.7; or
(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

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

ABA Comment: [1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client–lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer’s clients. If the possibility of such conflict disqualified the lawyer in a legal services organization, the profession’s involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

SCR 20:6.4 Law reform activities affecting client interests. A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

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

ABA Comment: [1] Lawyers involved in organizations seeking law reform generally do not have a client–lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might affect a client. See also Rule 1.2 (a). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

SCR 20:6.5 Nonprofit and court–annexed limited legal services programs. (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

1. is subject to SCR 20:1.7 and SCR 20:1.9 (a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
2. is subject to SCR 20:1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by SCR 20:1.7 or SCR 20:1.9 (a) with respect to the matter.

(b) Except as provided in par. (a) (2), SCR 20:1.10 is inapplicable to a representation governed by this rule.

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

Wisconsin Committee Comment: Unlike the Model Rule, paragraph (a) expressly provides coverage for programs sponsored by bar associations and accredited law schools.

ABA Comment: [1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms — that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-aid hotlines, advice–only clinics or pro se counseling programs, a client–lawyer relationship is established, but there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short–term limited legal services pursuant to this Rule must secure the client’s informed consent to the limited scope of the representation. See Rule 1.2 (c). If a short–term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9 (c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 and 1.9 (a) (only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer’s firm is disqualified by Rules 1.7 or 1.9 (a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest, the lawyer’s obligations under SCR 20:1.7 and SCR 20:1.9 (a) are not triggered by compliance with Rule 7.10. Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a) (2). Paragraph (a) (2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer’s firm is disqualified by Rules 1.7 or 1.9 (a). By virtue of paragraph (b), however, a lawyer’s participation in a short–term limited legal services program will not preclude the lawyer’s firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program’s auspices. Nor will the personal disqualification of a participating lawyer be imputed to other lawyers participating in the program.

[5] If, after commencing a short–term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9 (a) and 1.10 become applicable.

SUBCHAPTER VII

INFORMATION ABOUT LEGAL SERVICES

SCR 20:7.1 Communications concerning a lawyer’s services. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

c) compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated; or

d) contains any paid testimonial about, or paid endorsement of, the lawyer without identifying the fact that payment has been made or, if the testimonial or endorsement is not made by an actual client, without identifying that fact.

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


ABA Committee Comment: Paragraphs (b) through (d) of the Wisconsin Supreme Court Rule are not contained in the Model Rule.
SCR 20:7.2 Advertising. (a) Subject to the requirements of SCR 20:7.1 and SCR 20:7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may:

1. pay the reasonable cost of advertisements or communications permitted by this rule;
2. pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
3. pay for a law practice in accordance with SCR 20:1.17; and
4. refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if
   i. the reciprocal referral arrangement is not exclusive;
   ii. the client gives informed consent;
   iii. there is no interference with the lawyer’s independence of professional judgment or with the client—lawyer relationship; and
   iv. information relating to representation of a client is protected as required by SCR 20:1.6.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Abortion Comment: [1] This Rule governs all communications about a lawyer’s services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.

[2] Communications that are misleading or otherwise prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to form a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar situations. The specificity as to the fact or factual context and circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the fees of or other lawyers may be misleading if presented without reference to the specific facts or fact situations of each case. To the extent the comparison can be substantiated, the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] See also Rule 8.4 (e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

SCR 20:7.3 Solicitation of clients. (a) A lawyer shall not by in-person or live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted:

1. is a lawyer; or
2. has a family, close personal or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by par. (a), if:

1. the communications consider as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to think that it was a lawyer referral service sponsored by a state agency or bar association or that it was a lawyer referral service held itself out to the public as being a lawyer referral service. Such referral services are not regulated or supervised by the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal service plan would mislead the public to think that it was a lawyer referral service.

2. A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal service plan would mislead the public to think that it was a lawyer referral service. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

3. A lawyer who agrees to accept referrals from another lawyer or a nonlawyer professional in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4 (c), as such as interpreted in Rule 1.5(e), a lawyer who the lawyer receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the lawyer or nonlawyer professional, so long as the reciprocal referral arrangement is not exclusive and the client is informed of the referral arrangement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Wisconsin Supreme Court Rules updated by the Legislative Reference Bureau. Current through all Supreme Court Orders filed prior to March 28, 2020. Report errors at 808.504.5801 or lrb.legal@legis.wisconsin.gov.
(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer; or

(b) the target of solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(c) the solicitation involves coercion, duress or harassment.

Every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any printed, recorded, or electronic communication, unless the recipient of the communication is a person specified in paras. (a) (1) or (a) (2), and a copy of it shall be filed with the office of lawyer regulation within five days of its dissemination.

(d) Notwithstanding the provisions in par. (a), a lawyer may participate with a pre paied or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Except as permitted under SCR 11.06, a lawyer, at his or her own discretion, shall not draft legal documents, such as wills, trust instruments or contracts, which require or imply that the lawyer’s services be used in relation to that document.

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 15−03, 2016 WI 76, filed 7−21−16, eff. 1−1−17.

Wisconsin Committee Comment: The Wisconsin Supreme Court Rule differs from the Model Rule in that paragraph (b) (1) has been added, as have the last clause of paragraph (c) and all of paragraph (e). These provisions are carried forward from the prior Wisconsin Supreme Court Rule.

When a lawyer uses standard form solicitations that are mailed to many prospective clients, the lawyers satisfies the filing obligation in subparagraph (c) by filing one copy of each version of the solicitation form with the office of lawyer regulation, and by maintaining in the lawyer’s files the names and addresses to which the solicitation was mailed.

Because of differences in content and numbers between the Wisconsin Supreme Court Rule and the Model Rule, care should be used in considering the ABA Comment.

ABA Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and to offer, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches. [Created by Sup. Ct. Order No. 15−03, 2016 WI 76, filed 7−21−16, eff. 1−1−17.]

[2] There is a potential for abuse when a solicitation involves direct in−person, live telephone or real−time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel vulnerable and anxious, may be given rise to the need for legal services, may find it difficult to evaluate all available alternatives with reasoned judgment and to make an appropriate self−interest in the face of the lawyer’s presence and insistence upon business. The situation is fraught with the possibility of undue influence, intimidation, and over−reach.

[3] This potential for abuse inherent in direct in−person, live telephone or real−time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real−time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in−person, telephone or real−time electronic persuasion that may overwhelm a person’s judgment.

[4] Paragraph (a) recognizes both general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in−person, live telephone or real−time electronic contact, will help to assure that the information flows more freely. The contents of these solicitations and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review will help guard against statements and claims that may be false and misleading communications, in violation of Rule 7.1. The contents of direct in−person, live telephone or real−time electronic contact can be disputed and may not be subject to such scrutiny. Consequently, much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] It is also possible that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Nor is there any serious potential for abuse when a lawyer contacts a person with whom the lawyer has made known to the lawyer a desire not to be solicited by the lawyer.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule is not intended to prohibit a lawyer from communicating with representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of any particular lawyer’s or law firm’s services to be provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in−person or telephone solicitation of legal employment of the lawyer through membership in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of the means of affordable legal services available. A lawyer’s participation in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (b). See Rule 8.4 (a).

SCR 20.7 Communication of fields of practice. (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “patent attorney” or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation “admiralty,” “proctor in admiralty” or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association, and

(2) the name of the certifying organization is clearly identified in the communication.

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

Case Note: An attorney whose practice is concentrated in one particular area and who represents himself as a specialist should be held to a higher standard of care than a generalist. The enforceability of this section insofar as it prohibits statements that are truthful and not misleading is questionable. Duffey Law Office v. Tank Transport, 194 Wis. 2d 675, 535 N.W.2d 91 (Ct. App. 1995).


Notes: The above annotations cite to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04−07.

ABA Comment: (1) Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in a few fields, or will not accept clients in a specified field or fields, the lawyer is permitted to so indicate. A lawyer generally is permitted to state that the lawyer is a “specialist,” practices a “specialty,” or “specializes in” particular fields, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

(2) Paragraph (b) recognizes the long−established policy of the Patent and Trademark Office of permitting lawyers practicing only in a specific field of law, or having particular expertise in patent practice, to use the designations “patent attorney” or another substantially similar term.

(3) Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

(4) Paragraph (d) permits a lawyer to state that he or she is a “specialist” in a particular field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another appropriate association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge...
and expertise in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer’s recognition as a specialist is reasonable.

In order to insure that consumers can obtain accurate information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

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 service 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 jurisdiction in which 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.

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

ABA Comment: [1] A firm may be designated by the names of all or some of its members, or by any other distinctive name or name of deceased members where there has been a continuous succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or cost-able professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denote themselves as, for example, “Smith and Jones,” for that title suggests that they are practicing law together in a firm.

SCR 20:7.6 Political contributions to obtain government legal engagements or appointments by judges. A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

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

ABA Comment: [1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term “political contribution” denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initative and referendum elections are not included. For purposes of this Rule, the term “political contribution” does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term “government legal engagement” describes any arrangement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term “appointment by a judge” denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis compiled without regard to political contributions.

[4] The term “lawyer or law firm” includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the designation, would not be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer’s firm would support an inference that the purpose of the contributions was to obtain the engagement absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4 (b) is implicated.

SUBCHAPTER VIII
MAINTAINING THE INTEGRITY OF THE PROFESSION

SCR 20:8.1 Bar admission and disciplinary matters. An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by SCR 20:1.6.

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

ABA Comment: [1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer’s own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer’s own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any mis-understanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client−lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

SCR 20:8.2 Judicial and legal officials. (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

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

ABA Comment: [1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal office, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

SCR 20:8.3 Reporting professional misconduct. (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.
If the information revealing misconduct under sub.s. (a) or (b) is confidential under SCR 20:1.6, the lawyer shall consult with the client about the matter and abide by the client’s wishes to the extent required by SCR 20:1.6.

This rule does not require disclosure of any of the following:

1. Information gained by a lawyer while participating in a confidential lawyers’ assistance program.
2. Information acquired by any person selected to mediate or arbitrate disputes between lawyers arising out of a professional or economic dispute involving law firm dissolutions, terminations or departures of one or more lawyers from a law firm where such information is acquired in the course of mediating or arbitrating the dispute between lawyers.


 Wisconsin Comment: The change from “having knowledge” to “who knows” in SCR 20:8.3 (a) and (b) was drafted to remove any implication that SCR 20:1.6. See also SCR 20:1.0 (g) defining “knows.” The requirement under paragraph (c) that the lawyer consult with the client is not expressly included in the Model Rule. Paragraph (d) differs slightly from the Model Rule. It deletes reference to confidential assistance programs such as the state bar sponsored Wisconsin Lawyers’ Assistance Program (WLAP), the Law Office Management Assistance Program (LOMAP), or the Ethics Hotline.

ABA Comment: [1] Self-regulation of the legal profession requires that members of the profession institute disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client’s interests.

[3] If a lawyer were to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with this Rule. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client–lawyer relationship.

[5] Information about a lawyer’s or judge’s misconduct or fitness may be received by a lawyer (1) directly from the client or former client or (2) from a lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) of this rule. The actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not authorize a violation of this rule.

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2 (d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulations of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

SCR 20:8.4 Misconduct. It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers;

(g) violate the attorney’s oath;

(h) fail to cooperate in the investigation of a grievance filed with the office of lawyer regulation as required by SCR 21.15 (4), SCR 22.001 (9) (b), SCR 22.03 (2), SCR 22.03 (6), or SCR 22.04 (1); or

(i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer’s professional activities. Legitimize advocacy respecting the foregoing factors does not violate par. (i).


Note: The undisputed fact of conversion of a client’s money demonstrates as a matter of law the element of dishonesty, in violation of sub. (c). Office of Lawyer Regulation v. Scanlan, 2006 WI 38, 290 Wis. 2d 30, 712 N.W.2d 877, 04–1930.

The above annotations cite to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04–07.

 Wisconsin Comment: Intentional violation of tax laws, including failure to file tax returns or failure to pay taxes may violate SCR 20:8.4 (4), absent a showing of innocence or misconception.

 Wisconsin Committee Comment: Failure to cooperate, paragraph (b), was previously enforced as a violation of the investigation provision set forth in SCR 22.15 (5) and SCR 22.22 (1). [Sup. Ct. Order No. 10–09] Note: Sup. Ct. Order No. 10–09 states that “the comment to SCR 20:8.4(b) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.”

 ABA Comment: [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take. Paragraph (b) is based on the premise that certain acts of the lawyer, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, this exception was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. Paragraph (c) explains that the actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not authorize a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2 (d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

SCR 20:8.5 Disciplinary authority; choice of law. (a) Disciplinary Authority. A lawyer admitted to the bar of this state is subject to the disciplinary authority of this state regardless of where the lawyer’s conduct occurs. A lawyer not admitted to the bar of this state is also subject to the disciplinary authority of this state if the lawyer provides or offers to provide any legal services in this state. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction for the same conduct.

(b) Choice of Law. In the exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:

1. (for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

2. for any other conduct,
(i) if the lawyer is admitted to the bar of only this state, the rules to be applied shall be the rules of this state.

(ii) if the lawyer is admitted to the bars of this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices, except that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is admitted to the bar, the rules of that jurisdiction shall be applied to that conduct.

(iii) if the lawyer is admitted to the bar in another jurisdiction and is providing legal services in this state as allowed under these rules, the rules to be applied shall be the rules of this state.

(c) A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

History: Sup. Ct. Order No. 04–07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 06–06, 2008 WI 109, filed 7–30–08, eff. 1–1–09.

Case Note: SCR 20:8.5 authorizes the OLR to proceed with a complaint alleging violations of another state’s rules of professional conduct for alleged misconduct that occurred in a proceeding before a court in the other state. OLR v. Marks, 2003 WI 114, 265 Wis. 2d 1, 665 N.W.2d 836, 01–2284.

Note: The above annotations cite to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04–07.

Wisconsin Comment: SCR 20:8.5 differs from the ABA Model Rule 8.5. Due to substantive and numbering differences, special care should be taken in consulting the ABA Comment. [Re Order No. 06–06, effective January 1, 2009]

ABA Comment: Disciplinary Authority. [1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction’s disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22. ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5 (a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law. [2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer’s conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b) (1) provides that as to a lawyer’s conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b) (2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. [Re Order No. 06–06, effective January 1, 2009]

An attorney licensed outside of Wisconsin acting as in–house counsel in this state is not practicing law for the purposes of bar admission under Mostkoff v. Board of Bar Examiners, 2005 WI 33. Sands v. Menard, 2017 WI 110, 379 Wis. 2d 1, 904 N.W.2d 789, 12–2377.