

In the Matter of
the Petition for Amendment
of Various Rules in Chapter SCR 20

PETITION

TO: Chief Justice Shirley S. Abrahamson
Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice David T. Prosser, Jr.
Justice Patience D. Roggensack
Justice Annette Kingsland Ziegler
Justice Michael J. Gableman

Filed with the Clerk of the Supreme Court
110 E. Main Street, Suite 215
Madison, WI 53701-1688

The Petitioner, John Nicholas Schweitzer, attorney, hereby petitions the Supreme Court of Wisconsin for an order that amends as described below the following Rules in Chapter SCR 20: the Preamble, SCR 20:1.1, SCR 20:1.2, SCR 20:1.3, SCR 20:1.4, SCR 20:1.5, SCR 20:1.6, SCR 20:1.7, SCR 20:1.8, SCR 20:1.9, SCR 20:1.11, SCR 20:1.18, SCR 20:3.4, SCR 20:3.8, SCR 20:4.1, SCR 20:7.3, and SCR 20:8.4.

PROPOSED AMENDMENT

Preamble: A Lawyer's Responsibilities

[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~~ vigorously 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.

[8] 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~~ vigorous 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.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and

moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation ~~zealously~~ vigorously 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.

JUSTIFICATION

All attorneys are aware of the deleterious effect on litigation that was unintentionally created when the word "zealous" was incorporated into the predecessor of today's rules. It encourages a win-at-all-costs approach. Since then, the word has been largely excised and replaced, but it still exists in the preamble and in a comment to SCR 20:3.1 (see below). The concept of dedicated advocacy and commitment to one's client should remain, but the rules should more effectively avoid enshrining blind zeal and, symbolically, the word should be exiled from the rules. In this proposed change, the word "vigorous" is substituted for "zealous", though another word or phrase, or no modifier at all, could serve the same purpose. If the court wishes to further strengthen the message that the rules are intended to convey, it could consider a Wisconsin Comment with language such as, "The advocate should represent his/her client vigorously, but the attorney's obligation to the client must never be allowed to outweigh the attorney's obligation to the courts, to justice, and to society as embodied in these rules." or, "Attorneys are admitted to the

practice of law to promote the interests of their clients within a system that reveres the law and seeks the truth."

PROPOSED AMENDMENT

SCR 20:1.1 Competence

ABA Comment [2] says

"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 that necessarily transcends any particular specialized knowledge. A lawyer can 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 field in question."

The Supreme Court should consider adding a Wisconsin Comment that says: If an attorney decides to provide representation in an unfamiliar field of law, s/he must inform the client of that fact, obtain the client's agreement, and inform the client whether time spent studying the law in general will be billed to the client.

JUSTIFICATION

Practicing in an unfamiliar area of specialized knowledge is a privilege not granted to most other licensed professions, but SCR 20:1.1 grants an attorney the right to decide when s/he is competent to practice in a new area. A more far-reaching and effective response to this occupational anomaly would be to require certification of attorneys in specialty areas; such an amendment is not proposed in this petition, but by mentioning it I wish to indicate that I think the Supreme Court should reconsider the issue. The amendment proposed here merely imposes a duty on the attorney to disclose that s/he does not have experience in the area, as well as to reach an explicit billing agreement with the client about any time spent "getting up to speed".

PROPOSED AMENDMENT

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

ABA Comment [1] says

"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), such 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."

The Supreme Court should consider adding a Wisconsin Comment that says: Lawyers would be well advised to discuss the distinction between objectives and means with clients and to incorporate the objectives of representation into a written agreement.

JUSTIFICATION

Different expectations over which decisions belong to the client and which to the attorney have been at the heart of some suits for ineffective assistance of counsel. Without attempting to catalog and categorize the myriad decisions involved in representation, the proposed amendment would be a reminder to attorneys to consider such issues and to discuss them with the client.

PROPOSED AMENDMENT

SCR 20:1.3 Diligence

ABA Comment [1] says

"A lawyer should pursue a matter on behalf of a client despite

opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."

and ABA comment [3] says

"Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a

reasonable request for a postponement that will not prejudice the lawyer's client."

Since the actual text of the ABA Comments can't be modified directly, the Supreme Court should consider adding two Wisconsin Comments:

[1] The word "zeal" in ABA Comment [1] is replaced by the word "vigor", and

[2] Since representations differ, no explicit time requirements for the attorney's actions can be specified but, since an attorney's opinion of what is reasonable may differ from the client's, the attorney would be well advised to discuss the client's expectations and to incorporate any likely sources of disagreement into a written agreement.

JUSTIFICATION

A lack of diligence is one of the main sources of complaints against lawyers. Without attempting to prescribe what diligent representation would be in a particular case, the proposed amendment would be a reminder to attorneys to anticipate and head off problems by discussing their expectations with the client.

PROPOSED AMENDMENT

SCR 20:1.4 Communication

(c) An attorney shall not lie to a client or fail to correct a client's misunderstanding if the attorney knows or should know of the misunderstanding.

Add a Wisconsin Comment:

Since representations differ, no explicit requirements for the timing or form of communications can be specified but, since an attorney's opinion of what is reasonable may differ from the client's, the attorney would be well advised to discuss the client's expectations and to incorporate any likely sources of disagreement into a written agreement.

JUSTIFICATION

No rule explicitly prohibits lying to a client. Such language would be appropriate here.

A failure to communicate is another major source of complaints against attorneys. Without attempting to prescribe what communications must take place in a particular case, the proposed amendment would be a reminder to attorneys to anticipate and head off problems by discussing their expectations with the client.

PROPOSED AMENDMENT

SCR 20:1.5 Fees

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, , except before or within a reasonable time after commencing the representation 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~~ be negotiated with the client.

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.

(f) If an attorney uses rounding in billing, s/he will follow the normal rules for rounding and round down if the number of minutes is less than half of the billing interval, and up if the number of minutes is half or more of the billing interval.

Add a Wisconsin Comment:

Prior to representation, an attorney would be well advised to discuss details of his/her fee in order to give the client a better idea of what the requested service will cost, in order to avoid possible fee disputes. In a hourly fee agreement or an advanced fee agreement as defined in SCR 20:1.0, the lawyer should provide an estimate of the number of hours that will be required and the total fee, including an explanation of any different billing rates for overhead, administrative expenses, other expenses, paralegal time, etc. The agreement should include a provision for consultation and renegotiation if the attorney anticipates that services will exceed the agreed-upon number. A fee agreement may be written in such a way as to include costs based on various contingencies.

In a flat fee agreement as defined in SCR 20.1.0, the contract must explain to the client that if the attorney does not perform a certain agreed-upon service, a portion of the fee will be returned, and that

unused portion. If the attorney anticipates any time spent "getting up to speed" in an area of law, the fee agreement should state whether the client is responsible for paying for the attorney's time for that purpose.

JUSTIFICATION

Billing disagreements are common, and the proposed amendments suggest many ways that attorneys could avoid disputes by being more fair and more forthcoming about their fees. At this stage, most of the proposals are made simply as recommendations in a comment, though some of them should eventually become part of the rules.

The first proposed change would take away the right for attorneys to change their fees unilaterally and inform the client afterward.

The second proposed change would remove the prohibition on charging a contingent fee in divorces and other domestic relations cases, since the origin of the restriction seems to have been society's interest in preserving the sanctity of marriage, a position that is no longer compelling.

The third proposed change would prevent attorneys from always rounding up a fraction of a billing interval, which is a matter of basic fairness and honesty.

PROPOSED AMENDMENT

SCR 20:1.6 Confidentiality

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

(6) to prevent the unlawful imprisonment or execution of a person the attorney knows to be innocent.

JUSTIFICATION

This proposed change addresses the situation in which an attorney's obligations force him/her to be party to a manifest miscarriage of justice. Although such a change would effect a major alteration in the sanctity of the attorney-client relationship, and I have little expectation that it would be adopted, I propose it in the interest of justice.

PROPOSED AMENDMENT

SCR 20:1.7 Conflicts of interest current clients

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

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

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

Add a Wisconsin Comment:

Since representations differ, when a conflict is identified, no rule can tell an attorney which of two clients, or both, must be terminated, but the decision should not be based on which client will pay more; instead, the decision should be based on the nature of the relationship the attorney has established with each client and the nature and extent of any information related to the representation that the lawyer has received.

JUSTIFICATION

Since conflicts between current clients and former clients are dealt with in SCR 20:1.9, the inclusion of "a former client" in this rule is merely confusing. For the purposes of this rule, a former client can be included in the phrase "a third person".

The proposed comment provides some guidance on how an attorney should choose which client must be terminated in a conflict situation.

PROPOSED AMENDMENT

SCR 20:1.8 Conflict of interest: prohibited transactions

(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; and

(3) a lawyer may provide an indigent client with financial assistance for living and communication expenses if necessary to continue the representation.

Add a Wisconsin Comment: An attorney may provide financial assistance to an indigent client under par. (e)(3) only if it will not affect the lawyer's professional judgment. The attorney must keep a record of any financial assistance provided to a client.

JUSTIFICATION

The prohibition in the current rule against providing any financial assistance to a client is designed to avoid the attorney obtaining too great an interest in the outcome of the litigation. The comment addresses the concern, and the rule change would permit an attorney to assist and maintain contact with a client who might otherwise be

unable to maintain a meritorious cause of action.

PROPOSED AMENDMENT

SCR 20:1.9 Conflict of interest: prohibited transactions

ABA Comment [3] says "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing 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, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are

substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services."

Since the text of the ABA Comment can't be modified directly, the Supreme Court should consider adding a Wisconsin Comment:

The word 'factual' in the first sentence of ABA Comment [3] is removed.

JUSTIFICATION

The word "factual" is meaningless and unnecessarily confusing.

PROPOSED AMENDMENT

SCR 20:1.11 Special conflicts of interest for former and current government officers and employees

(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 personally and substantially while in private practice or nongovernmental employment, unless the ~~appropriate government agency~~ former client or employer 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 permitted by SCR 20:1.12(b) and subject to the conditions stated in SCR 20:1.12(b).

JUSTIFICATION

The language and logic of paragraph (d)(2)(i) is simply wrong and needs to be corrected. To continue representing a current client (the governmental office) in a conflict situation with a former client (a

client while in private practice or nongovernmental employment), the informed consent must be obtained from the former client, not the current client.

PROPOSED AMENDMENT

SCR 20:1.18 Duties to prospective client

Add a Wisconsin Comment:

Since courts have found an attorney-client relationship to have been formed in ambiguous situations, the attorney would be well advised to memorialize the discussion with the prospective client and the failure to form an attorney-client relationship in unambiguous terms, and to convey it to the prospective client.

JUSTIFICATION

The rule does not define the commencement of an attorney-client relationship and, rather than attempt to do so, a comment is proposed to suggest a best practice to attorneys to avoid the inadvertent creation of one.

PROPOSED AMENDMENT

SCR 20:3.4 Fairness to opposing party and counsel

A lawyer shall not:

~~(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.~~

An attorney may ask a person not to give information to another party only if

(a) the person is a relative or an employee or another agent of the client, and

(b) the attorney reasonably believes that the person's interests will not be adversely affected by the withholding of the information.

JUSTIFICATION

The section in the current rule is unnecessarily complex and confusing. Rewriting it as proposed would require renumbering the entire rule, but it would make the provision much more understandable.

PROPOSED AMENDMENT

SCR 20:3.8 Special duties of a prosecutor

(i) A prosecutor may oversee investigative activities that serve a legitimate law-enforcement purpose and that involve deceit.

JUSTIFICATION

This is a recognized exception to SCR 8.4(c) that needs to be explicitly stated in the rules and even though a form of it is now included in SCR 4.1 that applies to all lawyers, it would be useful to have it in this rule as well.

PROPOSED AMENDMENT

SCR 20:4.1 Truthfulness in statements to others

Add a Wisconsin Comment:

The permission granted by ABA Comment [2] to attorneys to lie in negotiations about "certain types of statements that are not taken as statements of material fact" is restricted to situations in which the other party is represented or is unquestionably well informed about the "generally accepted conventions in negotiation".

JUSTIFICATION

The proposed change would allow attorneys to take advantage of what the ABA Comment calls "generally accepted conventions in negotiation"

only when the other party is not disadvantaged by thinking it can rely on the attorney's representations to be true.

PROPOSED AMENDMENT

SCR 20:7.3 Direct contact with prospective clients

(a) A lawyer shall not by in-person or live telephone or real-time electronic contact or email solicit professional employment from a prospective client 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.

JUSTIFICATION

The proposed change recognizes changing technology and prohibits most email solicitation.

PROPOSED AMENDMENT

SCR 20:8.4 Misconduct

It is professional misconduct for a lawyer to:

- (j) take retaliatory disciplinary action against an attorney who reports alleged misconduct under SCR 20:8.3.

JUSTIFICATION

This proposed change is to create protection for attorneys who report misconduct within a firm.

Respectfully submitted this ____ day of October, 2010.

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State Bar No. 1008693