Richard P. Clem Continuing Legal Education
www.richardclem.com

Wisconsin Ethics Refesher 2012: Conflicts and Confidentiality

This CLE covers the Rules 1.0 through 1.12 of the Wisconsin Rules of Professional Conduct. Since Minnesota, Iowa, and most other states have adopted the same ABA Model Rules, most of the information in this program is relevant in those states as well. Of course, practitioners in other states should consult their own rules for any differences.

The Rules of Professional Conduct begin with a Preamble which states, in general terms, the obligations of lawyers. It also contains some advice as to how the rules should be construed. Paragraph 9 concedes that in many cases, various requirements of the rules can be seemingly in conflict with one another:

> 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.

In short, there are many situations where a lawyer needs to step back, and perhaps get outside legal advice as to how to proceed. One particularly useful service available to Wisconsin attorneys is the ethics hotline maintained by the Wisconsin Bar Association.

One resource that will be of special interest to Minnesota lawyers, but also to lawyers in other states, is the new e-book Minnesota Legal Ethics by William Wernz. This e-book, which is still in progress, is available for free download at http://minnesotalawyering.com/ethics/ .

Rule 1.0: Terminology.

The first section of the rules contains definitions of many terms used elsewhere in the rules, and should be consulted in determining the exact meaning of the rules.

Rule 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.

ABA Comment: “Expertise in a particular field of law may be required in some circumstances”, but a lawyer “may accept representation where the requisite level of competence can be achieved by reasonable preparation.”

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

A lawyer “shall abide by a client's decisions”, and the representation “does not constitute an endorsement of the client's political, economic, social or moral views or activities.” However, a lawyer may not assist in “conduct that the lawyer knows is criminal or fraudulent”. However, a lawyer may discuss the legal consequences of any proposed course of conduct and assist a client to make a good faith effort to determine the scope, meaning, or application of the law.

A lawyer may limit the scope of the representation if reasonable and if the client gives informed consent.

Wisconsin adds a specific provision for cases in which the lawyer is retained by an insurer to defend its insured. In such a case, “the representation may be limited to matters related to the defense of claims made against the

insured", but the client must be informed of this.

Rule 1.3: Dilligence.

This rule states in its entirety, "A lawyer shall act with reasonable diligence and promptness in representing a client."

As the ABA Comment notes: "Perhaps no professional shortcoming is more widely resented than procrastination."

Rule 1.4: Communication

A lawyer must communicate with his client in the following situations:

1. Any time the client needs to consent to some action under the rules.
2. Tell the client how his or her objectives are going to be carried out.
3. Keep the client informed about the status of the matter.
4. Comply with reasonable requests for information.
5. Let the client know of any relevant limitations on the lawyer's conduct.

ABA Comment: The client should have "sufficient information to participate intelligently in decisions. However, "not be expected to describe trial or negotiation strategy in detail."

Rule 1.5: Fees.

Fees and expenses must not be "unreasonable". The following factors are relevant to determine whether the fee is reasonable: Time and labor required, novelty and difficulty, whether the representation will prevent the lawyer from taking other employment, customary charge in the locality, amount involved and results obtained, time limitations, nature and length of relationship with the client, the lawyer's experience and reputation, and whether fixed or contingent.

These factors are not exclusive.

Fee and scope of representation shall be communicated in writing. In Wisconsin, however, if the reasonably forseeable cost will be less than $1000, this may be communicated orally.

Contingent fee agreements must be in writing and signed by the client, and the rule contains specific requirements for this written contract.

Contingency fees are not allowed in the following types of cases:

1. Family law cases
2. Criminal cases

Splitting fees between more than one attorney must be based upon the services provided by each lawyer, or in cases in which each lawyer maintains ethical responsibility for the case.

Rule 1.6: Confidentiality:

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated" elsewhere in the rule.

However, as the ABA comment states, “Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions.” Therefore, a lawyer **shall** reveal information if the lawyer believes it is necessary to prevent the client from commiting a criminal or fraudulent act that will result in death or serious bodily injury or substantial financial or property damage.

A Wisconsin lawyer **may** reveal other information relating to the representation to prevent death or substantial bodily harm or to prevent, mitigate, or rectify substantial financial or property injury.

A lawyer may also reveal client confidences "to secure legal advice about the lawyer's conduct under these rules." and "to comply with other law or a court order". However, in the case of a court order, the ABA comment points out that even then, “the lawyer must consult with the client about the possibility of appeal”.

Rule 1.7: Conflicts of Interest with current clients.

A lawyer may not represent a client if the representation is directly adverse to another client, or if there is a "significant risk" that the representation of one or more clients may be "materially limited".

If the clients give informed consent, the lawyer may represent both parties unless the representation involves the assertion of a claim by one client against another client in the same litigation.

As might be expected, the seemingly simple rule prohibiting conflicts of interest can lead to many gray areas. The ABA comments regarding this rule are quite lengthy, and do discuss a number of specific situations that might arise.

Rule 1.8: More specific rules on conflicts of interest

A lawyer may not enter into a transaction with a client in which he acquires an interest adverse to the client (such as a security interest), unless the transaction is fair and reasonable, the client is advised in writing to obtain outside advice, and the client gives written consent.

Gifts from clients (including testamentary gifts)

With respect to gifts from clients, Wisconsin has departed somewhat from the ABA Model Rules, in that it has adopted the substantive law of Trusts and Estates as part of its disciplinary rules. So in Wisconsin, a lawyer would be subject to discipline in essentially the same cases in which a will or other instrument would be held to be invalid.

A lawyer may not "solicit any substantial gift" from a client, or prepare an instrument (such as a will) giving a gift to the lawyer unless all of these requirements are met:

1. The client is a relative and "natural object of the bounty of the client".

2. There is no reasonable ground to believe the instrument will be contested, or that the public will "lose confidence in the integrity of the bar".

3. The amount of the gift is reasonable and natural.

Until a case is concluded, a lawyer may not receive literary rights based upon the representation.

A lawyer may not provide financial assistance to a client, other than advancing certain costs and expenses.

If a lawyer's fee is paid by someone other than the client, all of the following requirements must be met:

1. The client must consent (Wisconsin includes an exception to this rule if the lawyer is appointed at government expense). (In Wisconsin, if the lawyer is being paid by an insurance company or similar, then the prior agreement with the insurance company meets the consent requirement.)

2. It does not interfere with the lawyer's independence.

3. Confidential information is maintained properly.

If a lawyer is representing more than one party, then any aggregate settlement must be approved by all of the clients.

A lawyer may not ask a client to prospectively waive malpractice claims (unless the client is independently represented when making that waiver) or to agree not to report the lawyer's conduct to disciplinary authorities.

A lawyer may not acquire a proprietary interest in a cause of action, except for the following:

1. An attorney's lien for his or her fee, if authorized by law.

2. A reasonable contingent fee in a civil case.

A lawyer may not have sexual relations with a client (unless the relationship predated the legal representation). This includes the person(s) who supervise the lawyer, in the case of an institutional client.

With the exception of the last paragraph, these prohibitions also apply to all lawyers in the same firm.

Rule 1.9: Duties to former clients

A lawyer who has represented a former client may not represent another person in the same or substantially related matter without the informed written consent of the former client. Wisconsin adds that such consent must be signed by the former client.

If the firm in which a lawyer had represented a person, then the lawyer may not represent a person materially adverse to that person about whom the lawyer had acquired certain confidential information. Note: As the ABA comments state, with respect to the former client of a former firm, "the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel."

A lawyer may not use information relating to the representation of a former client to the former client's disadvantage, unless as otherwise permitted by the rules (or when the information has become generally known).

A lawyer may not reveal information relating to a representation of a former client (other than would be permitted with respect to a current client).

Rule 1.10: Imputed Disqualification.

In general, if a lawyer in a firm is prohibited from representing a client under Rule 1.7 or 1.9, then the same prohibition extends to all lawyers in the firm.

There are two exceptions to this disqualification:

1. The other lawyers in the firm are not disqualified if the prohibition is based on a personal interest of the prohibited lawyer, and there is not a significant risk that the representation by the other lawyers would be materially limited.

2. If the lawyer is disqualified under Rule 1.9 (duties to former clients), then the other lawyers are not disqualfied if all three of the following conditons are met:

i. The personally disqualified lawyer performed only minor and isolated services in the earlier matter, and only with the former firm.

ii. That lawyer is screened from any participation in the new matter, and receives no fee from it.

iii. Written notice is given to the former client.

In general, if a lawyer is no longer part of a firm, then the firm is not disqualified because the former member's having represented a client. However, the former firm might be disqualified in one of the following four situations:

1. The matter is the same or substantially related to the matter in which the formerly associated lawyer represented the client.

2. One of the firm's remaining lawyers has certain confidential information.

3. The conflict has been waived, in the same manner as the waiver under Rule 1.7.

4. In the case of Government lawyers, a different rule (1.11) applies.

Rule 1.11: Special rules regarding former and current government officers and employees.

Rule 1.9(c) (use of information gained from a previous representation) does apply in the case of a former government attorney. Also, in general, such a lawyer may not represent a client in connection with a matter in which that lawyer participated personally, unless the government agency gives its written informed consent.

If one lawyer in a firm is disqualified under the previous paragraph, then the firm is also disqualified, unless both of the following conditions are met:

1. The disqualified lawyer is screened, and shares no portion of the fee.

2. Written notice is given to the government agency.

If a lawyer has gained confidential government information about a person during his government employment, then he may not represent a private client whose interests are adverse to that person, if the information could be used to that person's material disadvantage. In this case, the lawyer's firm may represent such a client, if the disqualified lawyer is screened and does not share in the fee.

Current government lawyers are bound by Rules 1.7 and 1.9. Such a lawyer may not participate in matters in which he participated outside of government, unless the agency gives its written informed consent.

Current government lawyers may not negotiate for employment with any person involved in a matter in which he is participating. (There is an exception for current judicial law clerks, subject to conditions.)

Wisconsin adds a provision making clear that the conflicts of a current government lawyer are NOT imputed to other lawyers in that agency. However, the lawyer must be screened from any participation in that matter. This explicit Wisconsin rule is based upon ABA comments to the rule, which states that it would be “prudent” to screen the lawyer.

Rule 1.12: Former judges, arbitrators, mediators, and neutrals.

In general, a lawyer should not represent anyone in a matter in which he or she served as a judge, arbitrator, mediator, or neutral. A lawyer shall not negotiate for employment with such a person (with an exception for law clerks, subject to conditions). In many states, such a lawyer may participate in the matter, if the conflict is waived. However, in Wisconsin, this conflict cannot be waived.

If a lawyer is disqualified under this rule, then the rest of the lawyer's firm is also disqualified, unless the lawyer is screened and shares no part of the fee, and notice is given.

In general, a partisan arbitrator in a multi-member arbitration panel may subsequently represent that party in the same matter. In Wisconsin, however, consent of all parties is required.