Worker's Compensation Ethics Seminar
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Ethical Considerations
Applicant Attorney Perspective

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Worker's Compensation – Selected Ethical Considerations

> 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.

Preamble, American Bar Association, Model Rules of Professional Conduct (2003)

Potential Checklist of Practice Considerations before taking a case, or taking an action on a case:

1. Are there any ethical prohibitions or red flags here?
2. Is this something we can competently handle? More than avoiding malpractice, can we deliver the work product the job the client deserves, at least, if not more, than the standard of care?
3. Can we get the client his desired result; at least an opportunity to achieve a positive result; are the client's expectations realistic?
4. If the three considerations above green light the case, can we take this case and still earn a living, develop our practice, and have a life?

A. Scope of Applicant Representation

Facts

Employee Ed comes to see applicant attorney Al about a work-related back injury with permanent restrictions. As part of his story Ed mentions that he has twenty thousand dollars of unpaid pain management bills being denied by his worker's compensation carrier, and he has no health insurance. In addition, he's been denied unemployment compensation and he feels his employer, Excellent Corp, doesn't want him back because of his age.

Attorney Al likes the back injury loss of earning capacity claim but isn't enthralled with the other issues. Can Al take the back injury LOEC claim, but decline representation on the medical bill reimbursement and any ADEA claim, if so, how?

By the way, after he retained Al, Ed was so impressed, he referred his brother Bob to Al's website. Bob emailed Al through the website with questions about another matter. Is Al obligated to Bob now too?

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, 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 attorneys 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 attorneys fees, is more than 1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing. (3) A lawyer shall promptly respond to a clients 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.

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 clients 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.

…

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

ABA Comment:

Agreements Limiting Scope of Representation. 6 The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

7 Although this Rule affords the lawyer and client substantial latitude to limit the representation, **the limitation must be reasonable under the circumstances**. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. **Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.** See Rule 1.1.

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.

ABA Comment:

Thoroughness and Preparation. 5 **Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem**, and use of methods and procedures meeting the standards of competent practitioners. 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 matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2 (c).

SCR 20:1.0. Terminology.

(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.

ABA Comment:

Informed Consent. 6 Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2 (c), 1.6 (a) and 1.7 (b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. **In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel.** A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given

informed consent.

7 **Obtaining informed consent will usually require an affirmative response by the client or other person.** In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7 (b) and 1.9 (a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8 (a) and (g). For a definition of "signed," see paragraph (n).

Also see:

Wisconsin Lawyer, Vol. 80, No. 3, March 2007

New Rules of Conduct for Limiting Representation

Timothy J. Pierce, State Bar Ethics Counsel

Limited scope representation must be reasonable under the circumstances, one must observe all ethical duties. The client's informed consent should be confirmed, preferably in writing.

1) what specific services the lawyer is agreeing to provide with respect to the matter. In some circumstances, **it also may be wise to explicitly note what services the lawyer will not provide.**

2) An explanation of the material advantages and disadvantages of a proposed course of conduct.

3) An explanation of available options and alternatives.

While a client's written consent to limited scope representation is not required, there is much risk and little to be gained in failing to document the representation's scope and the client's consent.

Regarding email contacts, especially through a law firm’s website:

SCR 20:1.18. Duties to prospective client.

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

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

Also see:

Wisconsin Lawyer, Vol. 84, No. 9, September 2011

Who Is a Prospective Client?

Professional Ethics Committee

The **disclaimer** must have **two separate and clear warnings**. The disclaimer must make it clear that **there is no lawyer-client relationship** and that the **email communications are not confidential**. Moreover, the language of the disclaimer should be short and easily understood by a layperson: the longer the disclaimer gets, the more confusing it could be, and the less likely it is to be read.

24 22 ABA/BNA Law. Man. Prof. Conduct 286. Some firms use a pop-up that appears on the screen to inform the reader that the website is not intended to create an attorney-client relationship, that any email sent to the firm or its lawyers will not create an attorney-client relationship, and will not be treated as confidential. Other firms use a "click wrap" agreement. The same type of pop-up disclaimer appears when the reader attempts to send the lawyer an email, and the reader is then required to click "continue," "submit," or "I agree."

B. Informal Discovery

Facts

Employee Ed says if attorney Al will speak to co-employee Cole, all his questions about how the accident happened will be answered. Call attorney Al contact co-employee Cole who still works for Excellent Corp?

In a routine CCAP perusal, respondent attorney Roy notices that employee Ed was recently divorced; Roy wonders what insight Ed's ex, Felicity, may have to share. May respondent attorney Roy contact Felicity and how?

SCR 20:4.2. Communication with person represented by counsel.

In representing a client, **a lawyer shall not communicate** about the subject of the representation with **a person the lawyer knows to be represented by another lawyer** in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Comment:
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 obligate** 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. **Consent of the organization's lawyer is not required for communication 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 for purposes of this Rule. Compare Rule 3.4 (f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

SCR 20:4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a **lawyer shall inform such person of the lawyers role in the matter**. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyers 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**.

ABA Comment:

ABA Comment: 1 An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client 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 The **Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person'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 impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting 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. So long as the lawyer has explained that the lawyer represents an 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 require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

But see:

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 persons interests will not be adversely affected** by refraining from giving such information.

ABA Comment:
4 Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Regarding contact with employee's Ed former wife Felicity, this ethics opinion is helpful:

Ethics Opinion E-07-01: Contact with Current and Former Constituents of a Represented Organization

To summarize these duties, when contacting a constituent of a represented organization (or any unrepresented person), the applicable Rules mandate the following:

1. The lawyer must inform the unrepresented constituent of the lawyer's role in the matter (see SCR 20:4.3).

2. The lawyer must refrain from giving legal advice to an unrepresented constituent if there is a reasonable possibility that the interests of the client may conflict with those of the unrepresented constituent (see SCR 20:4.3).

3. The lawyer must not ask any questions reasonably likely to elicit information that the lawyer knows or reasonably should know is privileged and, if necessary, should caution the unrepresented constituent not to reveal such information (see SCR 20:4.4).

4. The lawyer must not make any false statements of material fact to or mislead an unrepresented constituent (see SCR 20:4.1 and SCR 20:8.4).

These guidelines are derived from the language of the Rules themselves and are the failure to follow then could therefore result in disciplinary action. As noted above, however, some courts and ethics committees that have offered guidelines to lawyers beyond the language of the Rules which may be of valuable assistance to lawyers who seek to avoid civil sanction and disciplinary enforcement, and the Committee herein offers similar suggested guidelines:

1. The lawyer should clearly identify the client and the fact that the client is adverse to the organization.
2. The lawyer should inquire as to whether the constituent has counsel of their own in the matter.
3. The lawyer should explain the purpose of interview.
4. The lawyer should inform the constituent that they need not speak to the lawyer.

There is no Wisconsin authority mandating this second set of guidelines, but the Committee hopes that by following these guidelines, lawyers will avoid grievances.

Practically speaking, a lawyer trying a case cannot also be a witness except in very limited circumstances. Even with another lawyer in firm taking a statement, the issues created may not be worth the statement. Better practice is to have an investigator take the statement, but they should still follow the guidelines outlined above.

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 lawyers firm is likely to be called as a witness unless precluded from doing so by SCR 20:1.7 or SCR 20:1.9.

C. Contact with an Unrepresented or Represented Employee

Facts

Prior to employee Ed retaining applicant attorney Al, respondent attorney Roy had some contact with Ed, including sending him a proposed full and final compromise agreement which would pay Ed PPD, but no LOEC or retraining benefits?

Now that employee Ed is represented, by Al, respondent attorney Roy realizes he can have no direct contact with the represented employee Ed, but how about the nurse case manager, the independent medical examiner and the independent vocational evaluator?

SCR 20:4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a **lawyer shall inform such person of the lawyers role in the matter**. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyers 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.

ABA Comment:
ABA Comment: 1 An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client 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 The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person'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 impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting 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. So long as the lawyer has explained that the lawyer represents an 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 require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

SCR 20:4.1. Truthfulness in statements to others.

(a) In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of a material fact **or law** to a 3rd person; or (2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by SCR 20:1.6.

(b) Notwithstanding par. (a), SCR 20:5.3 (c) (1), and SCR 20:8.4, a lawyer may advise or supervise others with respect to lawful investigative activities.

ABA Comment:
Misrepresentation. 1 A lawyer is required to be truthful when dealing 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 lawyer incorporates or affirms a statement of another person that the lawyer knows is false**. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact. 2 **This Rule refers to statements of fact**. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in **negotiation**, certain types of statements ordinarily **are not taken as statements of material fact**. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

See Also:
Ethics Opinion E-07-01: Contact with Current and Former Constituents of a Represented Organization

To summarize these duties, when contacting a constituent of a represented organization (or any unrepresented person), the applicable Rules mandate the following:

1. The lawyer must inform the unrepresented constituent of the lawyer's role in the

matter (see SCR 20:4.3).

2. The lawyer must refrain from giving legal advice to an unrepresented constituent if there is a reasonable possibility that the interests of the client may conflict with those of the unrepresented constituent (see SCR 20:4.3).

3. The lawyer must not ask any questions reasonably likely to elicit information that the lawyer knows or reasonably should know is privileged and, if necessary, should caution the unrepresented constituent not to reveal such information (see SCR 20:4.4).

4. The lawyer must not make any false statements of material fact to or mislead an unrepresented constituent (see SCR 20:4.1 and SCR 20:8.4).

These guidelines are derived from the language of the Rules themselves and are the failure to follow then could therefore result in disciplinary action. As noted above, however, some courts and ethics committees that have offered guidelines to lawyers beyond the language of the Rules which may be of valuable assistance to lawyers who seek to avoid civil sanction and disciplinary enforcement, and the Committee herein offers similar suggested guidelines:

1. The lawyer should clearly identify the client and the fact that the client is adverse to the organization.

2. The lawyer should inquire as to whether the constituent has counsel of their own in the matter.

3. The lawyer should explain the purpose of interview.

4. The lawyer should inform the constituent that they need not speak to the lawyer.

There is no Wisconsin authority mandating this second set of guidelines, but the Committee hopes that by following these guidelines, lawyers will avoid grievances and civil litigation concerning the lawyer's conduct.

Regarding attorney Roy's thought of communicating with employee Ed through the IME physician or nurse case manager:

SCR 20:4.2. Communication with person represented by counsel.

In representing a client, a lawyer **shall not** communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in

the matter, **unless the lawyer has the consent of the other lawyer** or is authorized to do so by law or a court order.

ABA Comment:
ABA Comment: 1 This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled 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 The 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.

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 the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0 (f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

9 In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

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;

See also, unpublished decision:

State v. Everts, 2001 WI App 224, P20 (Wis. Ct. App. 2001)

As Everts points out, it is improper for an opposing lawyer to communicate with a represented party ex parte about the subject matter of the representation without the

> consent of the other party's lawyer. SCR 20:4.2 (2000). Moreover, Everts correctly cites SCR 20:8.4(a) (2000) for the proposition that what an attorney cannot ethically himself or herself do, he or she cannot induce another to do.

Attorney Al can consent to nurse case manager involvement, and he can limit the consent, ie. the NCM cannot meet with Ed and his treating physician, require that NCM turn over communications to attorney Al contemporaneously when she send reports to attorney Roy or the insurance adjustor.

D. Communicating with Treating Health Care Providers

Facts

Respondent attorney Roy is somewhat perplexed by the opinion given by Ed's treating physician, Dr Doguder. Attorney Roy thinks that if he were able to speak directly with Dr Doguder, Roy might be able to clarify her position in this case and maybe even make an impression on how the young Dr. Doguder handles such matters going forward. Can he do this?

May attorney Roy have his nurse case manager do it instead?

SCR 20:4.1. Truthfulness in statements to others.

(a) In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of a material fact or law to a 3rd person; or (2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by SCR 20:1.6.

(b) Notwithstanding par. (a), SCR 20:5.3 (c) (1), and SCR 20:8.4, a lawyer may advise or supervise others with respect to lawful investigative activities.

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.

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.

Wis. Stat. § 102.13

(2) (a) An employee who reports an injury alleged to be work-related or files an application for hearing waives any physician-patient, psychologist-patient or chiropractor-patient privilege with respect to any condition or complaint **reasonably related** to the condition for which the employee claims compensation. Notwithstanding ss. 51.30 and 146.82 and any other law, any physician, chiropractor, psychologist, dentist, podiatrist, physician assistant, advanced practice nurse prescriber, hospital, or

> **health care provider shall**, within a reasonable time after written request by the employee, employer, workers compensation insurer, or department or its representative, provide that person with **any information or written material reasonably related to any injury for which the employee claims compensation**.

In Wisconsin the patient-physician privilege is a statutory rule of evidence that applies to judicial proceedings. *Steinberg, v. Jensen*, 194 Wis. 2d 439, 468-69, 534 NW 2d 361 (1995). See: Wis. Stats. Secs. 905.04 and 146.82; also see the federal HIPAA law at 45 CFR Part 160 and Part 164, Subparts A and F, which provides similar protection as Sec. 146.82. In Wisconsin worker's compensation cases, the waiver of the statutory physician-patient privilege under Wis. Stats. Sec. 102.13 is not complete, it is limited by information that is 'reasonably related' to the worker's compensation claim. But more importantly to the ex parte communication discussion, *Steinberg* has interpreted the physician's ethical obligations to confidentiality, grounded in The Hippocratic Oath, as broader than the statutory privilege, and attorneys have an obligation to respect that relationship. *Steinberg*, at 465-8.

See also:

Cerny Stoughton Trailers Inc, 1997 WI Wrk. Comp. LEXIS 443 (LIRC Claim No. 95017166, May 8, 1997)

> Section 102.13 (2)(a), Stats., provides:
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> "An employe who reports an injury alleged to be work related or files an application for hearing waives any physician-patient, [*5] psychologist-patient or chiropractor-patient privilege with respect to any condition or complaint reasonably related to the condition for which the employer claims compensation. Notwithstanding ss. 51.30 and 146.82 and any other law, any physician, chiropractor, psychologist, podiatrist, hospital or health care provider shall, within a reasonable period of time after written request by the employe, employer, worker's compensation insurer or department or its representative, provide that person with any information or written material reasonably related to any injury for which the employe claims compensation."
>
> In a footnote explaining the workers compensation act, the department states: "Any doctor, hospital, or health care provider shall furnish reports reasonably related to a compensation claim upon request. The employe by claiming compensation waives the usual practitioner patient privilege." Endnote 41 in *DILHR's Workers Compensation*

Act, WKC-1-P (R 07/95); footnote 45 in *DWD's Workers Compensation Act,* WKC-1-P (R 08/96).

The statute, in form any way, envisions a situation where an employer or insurer may simply demand records from a health care provider without [*6] obtaining a signed waiver from the injured worker. Indeed, sec. 102.13 (2)(b), Stats., sets out the penalty imposed on a health care provider that fails to or refuses to comply. In practice, as the ALJ recognized in his decisions, some employers and insurers request a release from an injured worker while others simply request relevant medical records directly from the provider citing the statute. Stoughton Trailer's standard approach was evidently to get a release from the injured worker. Transcript, page 54.

The commission notes first that the employer does not submit a certified report or testimony from a doctor indicating that the applicant's prior employment or medical history is relevant to his current claim. All the employer offered on this point was an uncertified hearsay reference by some third person as to what a doctor named Allen thought about causation. Exhibit 2. However, Dr. Allen neither prepared a medical report nor testified at the hearing; the record does not even contain a treatment note from the doctor.

The only medical expert to give an opinion was the applicant's podiatrist, Lisa Reinicke, D.P.M. She testified and reported that the applicant sustained bilateral **[*7]** tendinitis of the feet at work for the employer in early 1995, from which he had recovered by July 1995. She opined that the tendinitis was caused by the applicant standing and lifting heavy parts to build trailers during his ten hour shift. Dr. Reinicke expressly stated that the applicant's military service, and the medical records from that military service, were not relevant to his 1995 tendinitis. Transcript, pages 26 to 30.

The commission also notes that, informal practice aside, an injured worker simply is not required by statute to provide a release. Rather, the law authorizes the employer or insurer to obtain the records directly from the health care provider. There is no evidence in the record that the employer tried to obtain any medical records directly before demanding applicant sign the release or requesting a continuance. Finally, after a careful review of the record, the commission cannot tell what, if anything, ALJ Schiavoni actually ordered with respect to a release.

On this record, the commission cannot conclude that ALJ Lawrence's refusal to continue the hearing and order the applicant to provide a release was prejudicial error. **Had the employer provided a clear [*8] expert medical opinion that the disputed records were actually relevant, established that it had tried to get the information it wanted directly from other employers or health care providers and been refused, or shown that the applicant failed to comply with a clear directive from ALJ Schiavoni, a different case would have been presented.** In short, by refusing to continue the hearing in this case, ALJ Lawrence did not abuse the considerable

discretion an ALJ has with respect to his or her hearing calendar. See for example, *Nela Winchel v. Fransciscan Sisters,* WC claim no. 93066564 (LIRC, October 31, 1996) and *Gregory Allen McNabb v. Cedar Crest Specialities,* WC claim no. 92028018 (January 31, 1997).

If the applicant signs the standard DWD Voluntary and Informed Consent for Disclosure of Health Care Information form WKC-9488, the health care provider can copy all records and not concern itself with what is 'reasonably related' but there is nothing in the standard consent form to allow ex parte communication. Also note, there is nothing in the civil discovery statute waiving the privilege to allow for ex parte communication. **Wis. Stats. Sec. 804.10. Physical and mental examination of parties; inspection of medical documents.** In the absence of a waiver by utilization of the consent form, then under Sec. 102.13, the health care provider has the burden of determining what is 'reasonably related' in order to comply with the disclosure requirements. There is no other obligation, or permission, for the health care provider to engage in conversation with anyone concerning the patient's treatment. The lack of such authorization Sec. 102.13 should mean that the statutory physician-patient is intact, as well as the physician's broader ethical obligation of confidentiality.

See also:

Steinberg v. Jensen, 194 Wis. 2d 439, 474 (Wis. 1995)

> We disagree with the court of appeals' consistently expansive interpretation of the physician-patient privilege, and we now hold that defense counsel is not absolutely prohibited from communicating ex parte with a plaintiff's treating physicians. ***HN7***Statutory privileges are to be strictly and narrowly construed. *Franzen v. Children's Hospital,* 169 Wis. 2d 366, 386, 485 N.W.2d 603 (1992). The **physician-patient privilege** is a **testimonial rule of evidence**, not a substantive rule of law regulating the conduct of physicians. Therefore, its **application is limited to judicial proceedings**.
>
> [*465] Because its application is limited to judicial proceedings, the privilege **does not prohibit** defense counsel from engaging in **ex parte communications** with a plaintiff's treating physicians. Furthermore, under the privilege, a patient does not have the right to prevent his or her treating physicians from engaging in any conversation outside a judicial proceeding simply because confidential information could potentially be imparted.
>
> This does not mean, **however**, that lawyers and physicians are free to openly discuss a plaintiff's medical treatment so long as the conversation occurs outside a judicial

proceeding. [HN8]**Physicians owe an ethical duty of confidentiality to their patients that is broader than the express language of the statutory physician-patient privilege**. *See Schuster v. Altenberg,* 144 Wis.2d 223, 251, 424 N.W.2d 159 (1988). The ethical duty of confidentiality is broader than the privilege because the ethical duty **applies irrespective of whether a lawsuit has been filed**. By filing a lawsuit, a patient-plaintiff waives the privilege as to certain information, [15] but [**371] "does not automatically consent to the termination of the confidential relationship existing between [the [***31] patient] and . . . [the] physician." *Petrillo,* 449 N.E.2d 959.

The ethical duty owed by physicians is generally set forth in the Hippocratic Oath, [16] the American Medical Association's Principles of Medical Ethics, and the [*466] Current Opinions of the Judicial Council of the American Medical Association. *See Petrillo v. Syntex Laboratories, Inc.,* 499 N.E.2d 952, 957 (Ill. App. Ct. 1986). [HN9]This ethical duty generally prohibits a patient's treating physicians from disclosing confidential information without the patient's consent. However, it does not prohibit a plaintiff's treating physicians from communicating ex parte with each other or with defense counsel regarding nonconfidential information.

We will not presume that either physicians or lawyers will engage in professional misconduct by knowingly discussing confidential information about a plaintiff-patient. [17] Such a presumption would demean both the medical and the legal profession. *See* Jacqueline M. Asher et al., *Ex parte Interviews With Plaintiff's Treating Physicians--The Offensive Use of the Physician-Patient Privilege,* 67 Univ. Det. L. Rev. 501, 528 (1990).

Nonetheless, we realize that physicians are not legal technicians and, therefore, absent some safeguards, a physician participating in an ex parte conversation with an attorney could inadvertently disclose confidential information about a plaintiff-patient. Based on the ethical [***33] obligation of confidentiality and [*467] on the physician--patient privilege, the public has a right to expect that physicians will not reveal, inside or outside judicial proceedings, confidences that a patient discloses during the physician-patient relationship. *See Petrillo,* 499 N.E.2d at 957. **In order to safeguard the reasonable expectations created by the physician-patient privilege and the ethical duty of confidentiality, [HN11]we hold as a matter of public policy that when a defense attorney is involved in an ex parte conversation about the plaintiff with one or more of the plaintiff's treating physicians, the attorney should (1) inform the physician at the beginning of the conversation that he or she has the right to decline to speak with defense counsel, (2) warn that the conversation must be limited to matters that are not confidential, (3) instruct the physician not to disclose or discuss anything that he or she believes *might* possibly be confidential, and (4) take all steps reasonably practicable to ensure that the conversation does not stray into a discussion of confidential information.**

> In addition, as a matter of public policy, we hold that [HN12]**defense counsel may not engage** [***34] **in ex parte "discovery" with the plaintiff's treating physicians.** Unlike a simple ex parte communication, ex parte discovery is akin to a private question and answer session wherein the lawyer asks questions designed to elicit previously unknown information from the physician. Such a practice is improper because it can easily lead to the inadvertent disclosure and consequent discovery of confidential information. The questioning attorney simply cannot reasonably anticipate the physician's response and, therefore, cannot protect against the disclosure of confidential information. **Absent consent from the plaintiff-patient, an attorney who desires to** [*468] **ask questions of a treating physician must do so either in the presence of opposing counsel or through a writing, an** [**372] **exact duplicate of which must be sent concurrently to opposing counsel.** [18]
>
> These restrictions do not prohibit all ex parte communications between defense counsel and a plaintiff-patient's treating physicians. Defense counsel may communicate ex parte with a plaintiff's treating physician so long as the communication does not present a risk of disclosing any confidential information, and so long as the physician is not represented by counsel as a party to the lawsuit. [19] For instance, defense counsel may discuss scheduling and procedural matters and may tell a physician that he or she might be joined as a party to the lawsuit.

Unless a consent form explicitly allows for ex parte communication with a health care provider, it is not allowed under *Steinberg*. The applicability of *Steinberg* medical malpractice and personal injury cases, but there is no reason to believe its holdings would not also apply to worker's compensation cases. *Steinberg* at 446. If applicant counsel returned the standard DWD Voluntary and Informed Consent for Disclosure of Health Care Information form WKC-9488 form under cover letter citing *Steinberg* and reminding that the applicant is not permitting ex parte communication, respondent counsel would be well advised to proceed with caution in this regard.

Regarding the nurse case manager speaking to the health care providers, as stated above, if an attorney is proscribed or limited in action by the Supreme Court Rules, then he cannot direct another to do what he cannot do. There are arguments for permitting the nurse case manager direct communication with the employee's health care providers: 1) the NCM most often gets involved prior to the retention of respondent counsel so how can she be under the direction of counsel; 2) even after the retention of respondent

counsel, the NCM is not reporting to the lawyer and her work is focused on helping the patient in finding appropriate treatment and rehabilitation; 3) in some cases an employee will sign a consent form explicitly allowing for direct communication; or 4) applicant counsel is asked and he consents to the NCM having direct communication with the health care provider, occasionally for good reason.

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**;

See also, unpublished decision:

State v. Everts, 2001 WI App 224, P20 (Wis. Ct. App. 2001)

As Everts points out, it is improper for an opposing lawyer to communicate with a represented party ex parte about the subject matter of the representation without the consent of the other party's lawyer. SCR 20:4.2 (2000). Moreover, Everts correctly cites SCR 20:8.4(a) (2000) for the proposition that what an attorney cannot ethically himself or herself do, he or she cannot induce another to do.

E. Responsibility to be Candid with the Court, and Counsel

Facts

One Friday night, years ago as law school classmates, attorneys Al and Roy argued over the jamming of law library's one good photocopy machine; they have never cared for one another since. Though he's been coy about it, Al thinks Ed's claim is actually a stronger occupational than traumatic causation case and has several witnesses lined up. Conversely, Roy has a 'factual defense' to the traumatic injury but has been tight lipped about what that means. Both are planning an ambush of sorts.

Respondent attorney Roy is reviewing an IME report from Dr Rietalot. He notices that Dr Rietalot inaccurately recites multiple appointment histories and then bases his opinions in part on those misstatements. What is attorney Roy to do?

At hearing, Ed presents attorney Al with an obviously fabricated document to help defeat the respondent's labor market survey. Ed admits the recently reconciled Felicity helped him with it and based on her knowledge of people's court, insists that Al needs to use it. Al knows he is to follow his client Ed's direction, but how far?

SCR 20:3.4. Fairness to opposing party and counsel.

A **lawyer shall not**:

(a) unlawfully obstruct another partys 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) **falsify 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 persons interests will not be adversely affected by refraining from giving such information.

See also:

Ghiselli, v. Wal Mart Stores Inc, Claim No. 2008-036200 (LIRC February 25, 2010

> The surveillance was shown to the applicant for the first time at the hearing. **The civil rules of procedure governing discovery do not apply in worker's compensation**, though the worker's compensation statutes provide some rights dealing mainly with advance disclosure of reports and, **of course, a party may not be denied his or her fundamental right to due process**. See: *Klatt v. Milwaukee Composites,* WC Claim nos. 1998-065107 & 2000-012004 (LIRC, October 16, 2003). While the applicant's attorney challenged the genuineness of the tapes, the commission is satisfied that Mr. Kenney laid an adequate foundation for their admission. However, the commission declines to reverse the ALJ's finding based on the videotapes, Mr. Kenney's testimony notwithstanding. The surveillance tapes do not lead the commission to question the ALJ's determination that the applicant credibly testified she was hurt by being struck by a cart. Certainly, it is easy to see from the videotapes how such an incident could have happened. While the videotapes do not show an accident occurring at the site of the register featured [*5] on the videotapes, the commission does not believe the videotapes are sufficiently clear and complete to rebut the applicant's testimony that she was injured in the checkout area that afternoon.

Pintz v. Marigold Foods, Claim No. 90068263 (LIRC September 30, 1996)

> There is no formal discovery in worker's compensation matters. Historically, the **department has encouraged the free flow and exchange of information** between litigants so that they can effectively and efficiently prepare for a hearing. To a large degree, our system relies on the effectiveness of the communications between worker's compensation attorneys before a hearing. When **one lawyer asks another lawyer** what his theory of recovery is so that the asking lawyer has an opportunity to prepare her defense, **the asking lawyer ought to be able to rely on the information provided by the other lawyer**. She has "**the right to seasonably know the charges or claims proffered.**" [*16] Nelson Mill & Agri-Center, Inc. v. ILHR Dept., 67 Wis.2d 90, 96 (1975). Consequently, under the particular circumstances in this case, the applicant ought to be precluded from advancing a theory of recovery under Wisconsin's Safe Place Statute. It is so ordered.

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 in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the

client and not disclosed by opposing counsel; or (3) **offer evidence that the lawyer knows to be false.** If a lawyer, the lawyers client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, **the lawyer shall take reasonable remedial measures**, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, 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.

ABA Comment:

Offering Evidence. 5 Paragraph (a) (3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

6 If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

8 The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. **A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier 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 resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.**

See also:

Lawyers Owe Candor to Tribunals, Dean R. Dietrich, Wisconsin Lawyer, Vol. 80, No. 8, August 2007

Not Offering Known False Evidence. The rule continues the requirement that a lawyer shall not knowingly offer evidence that the lawyer knows to be false. The prior rule indicated that a lawyer must take reasonable remedial measures if a lawyer has offered material evidence and comes to know of its falsehood. The **new rule** places a requirement on the lawyer to **take reasonable remedial measures** if the lawyer or the lawyer's client or a witness called by the lawyer has offered material evidence that has been determined to be false. The new rule also requires the lawyer to disclose to the tribunal the fact that the evidence offered was false, if that is the only way to address and correct the situation. This requirement **only applies if the evidence is material** to the matter. The requirement would continue beyond the proceeding because there is **no expiration of the duty** to take reasonable remedial measures.

Taking Reasonable Remedial Measures. Under the new rule, a lawyer has an additional obligation if representing a client in an adjudicative proceeding. If the lawyer knows that a person (not just the lawyer's client or witness) intends to engage, is engaging, or has engaged in criminal or fraudulent conduct relating to the proceeding, the lawyer must take reasonable remedial measures to address the criminal or fraudulent conduct. This may involve disclosing the conduct to the tribunal. This rule has been changed from the prior language that required a lawyer to disclose a fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. The new rule not only concerns active engagement in a criminal or fraudulent act but also instances when an individual intends to engage in a criminal or fraudulent act related to the proceeding or has engaged in a criminal or fraudulent act related to the proceeding. In addition, the new rule applies to the lawyer's knowledge of criminal or fraudulent conduct of any person and does not limit the lawyer's obligation to an act engaged in by the client. There is no time limit on the duty of the lawyer to address the criminal or fraudulent conduct, and thus lawyers may be obligated to correct criminal or fraudulent conduct engaged in by an individual in an adjudicative proceeding regardless of the status of the adjudicative proceeding and regardless of when the lawyer becomes aware of the commission of the criminal or fraudulent act.

All of these obligations under SCR 20:3.3 apply even if compliance requires the lawyer to disclose information that would be considered confidential under SCR 20:1.6, the attorney client confidentiality rule.

Conclusion. The changes to SCR 20:3.3 place a greater burden on lawyers to ensure clear and everlasting candor to the tribunal. Lawyers may be obligated to correct criminal or fraudulent acts committed by others many years after a proceeding has been finalized and the representation has ceased. These changes to SCR 20:3.3 are important because they underscore the paramount duty of lawyers to the court system and the administration of justice.

F. Closing the File

Facts

Al and Roy settled Ed's claim with a limited compromise, leaving only future medical opens or the funding of an MSA, at the respondent Excel Corp's option.

Months go by and Al sends to Roy some outstanding medical bills that were supposed to be paid by the Excel Corp. Roy closed his file months ago and doesn't want to deal with Al or these bills. At the same time, Excel Corp's MSA submission vendor has been forwarding medical authorizations to Al for Ed's signature. Al's file is closed, does he have to get it out of storage write some letters, for free?

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

(c) A lawyer may **limit the scope of the representation** if the limitation is **reasonable** under the circumstances and the client gives **informed consent**.
ABA Comment:
Agreements Limiting Scope of Representation.
6 The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.
7 Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

SCR 20:1.16. Declining or terminating representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to **protect a clients interests**, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and

property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Comment: 1 A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. **Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded**. See Rules 1.2 (c) and 6.5. See also Rule 1.3, Comment 4 .

SCR 20:1.3. Diligence.

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

ABA Comment:
1 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.

2 A lawyer's work load must be controlled so that each matter can be handled competently.

3 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.

4 Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in

writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on 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.

SCR 20:1.4. Communication.

(a) A lawyer shall:(1) **Promptly** inform the client of any decision or circumstance with respect to which the clients **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 clients 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 lawyers conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

ABA Comment:
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 to reject the offer. See Rule 1.2 (a).

Regarding disposing of the actual file, as a practical matter, consider having client take immaterial records and have the final settlement statement address future destruction of the file.

Also see:

Closed Client Files: Hold 'em or Fold 'em, Dean R. Dietrich, Wisconsin Lawyer, Vol. 82, No. 3, March 2009

Several factors must be considered before deciding to destroy a client file. In 1977

ABA Informal Opinion 1384, the ABA Committee on Professional Ethics set forth several basic considerations for a lawyer when deciding to keep or destroy a client file. These considerations are:

- Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or on behalf of the client, the return of which the client could reasonably expect, and original documents (especially when not filed or recorded in a public records depository).

- A lawyer should not destroy or discard information that the lawyer knows or should know may still be necessary or useful in asserting or defending the client's position in a matter for which the applicable statutory limitation period has not expired.

- A lawyer should not destroy or discard information that the client may need, has not previously been given to the client, is not otherwise readily available to the client, and the client may reasonably expect the lawyer to preserve.

- In determining how long to retain or when to dispose of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than for other files, based on their obvious relevance and materiality to matters that can be expected to arise.

- A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.

- In disposing of a file, a lawyer should protect the confidentiality of the contents.

- A lawyer should not destroy or dispose of a file without screening it to determine that consideration has been given to the matters discussed above.

- A lawyer should preserve, indefinitely, an index or identification of the files that the lawyer has destroyed or disposed of.

…

The State Bar's Professional Ethics Committee has issued an opinion on the steps a lawyer should take when considering the destruction of a closed client file. E-98-1 gives guidance to Wisconsin lawyers on how to proceed with the decision of whether to destroy closed files. The considerations are similar to those outlined in the ABA Formal Opinion:

- The lawyer has specific responsibility to hold client property in trust under SCR

20:1.15. The lawyer must be satisfied that the file has been adequately reviewed. To do otherwise, such as conducting only a spot check, would run the risk that client property or original documents would be destroyed.

- The existence of client property, or **information that could not be replicated** from other sources if necessary, and the age of the materials in the file are all factors that should be considered in determining the reasonableness of the decision to destroy the file. For example, client property or original documents such as wills or settlement agreements ordinarily should not be destroyed under any circumstances, and the level of effort to locate a missing client should be more diligent if there is actual client property involved than if, for example, the file is a long-resolved collection file. *See* S.C. Ethics Op. 95-18, ABA/BNA Man. Prof. Conduct 45:1208.

- At a minimum, a file should not be destroyed until **six years** have passed after the last act that could result in a claim being asserted against the lawyer. *Cf.* Keith Kaap, *The Closed File Retention Dilemma*, 1 Wis. B. Bull. 25 (Jan. 1988).

- In the **ideal situation**, the lawyer would have **discussed** the issue of file retention and destruction in either the **engagement letter** with the client **or** in the **letter terminating** or completing the relationship or engagement. Absent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable time (perhaps six months) before taking action to destroy the file. *See* Los Angeles County Ethics Op. 475 (1993), ABA/BNA Man. Prof. Conduct 1001:1703.

- The lawyer should keep for a reasonable period of time a **record or index of files** that have been destroyed. *See* ABA Informal Op. 1384.