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

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

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

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

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

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

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

[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 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 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.

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

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

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

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship. The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term “should.” Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

[15] The rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under an obligation or to discard an otherwise applicable rule.

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

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

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

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

[20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is not in issue in a case does not signify that the rule was not intended for application. A lawyer should act in accordance with the rule of professional conduct even in the absence of a specific request by a client to do so. When the court deems additional guidance appropriate. These comments are not adopted, but will be published and may be consulted for guidance in interpreting and applying the Rules of Professional Conduct for Attorneys.

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

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

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

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

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

(dm) “Flat fee” denotes a fixed amount paid to a lawyer for specific, agreed-upon services, or for a fixed, agreed-upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed-upon stage in the representation. A flat fee, sometimes referred to as “unit billing,” is not an advance against the lawyer’s hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, including SCR 20:1.5 (f) or (g) and SCR 20:1.5 (h), SCR 20:1.15 (f) (3) b. 4., and SCR 20:1.16 (d).

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

(f) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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

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

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

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

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

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

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

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

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

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

(p) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.
Note: The above annotation cites to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04–07.


Wisconsin Committee Comment: The Committee has added definitions of “consent,” “informed consent,” and “prosecutor” in order to be more consistent with the Model Rule. In the definition of “firm,” the phrase “including a government entity” is added to make the point that the member firms of the rule are reasonably adequate to receive the alphabetical arrangement, caution should be used when referring to the alphabetical arrangement, caution should be used when referring to the ABA Comment.

ABA Comment: Confirmed in Writing. [1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement among associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule if the same lawyer should not represent opposing parties in litigation because it would not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] In respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty as to whether the identity of the client is preserved. For example, it may not be ascertainable whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, its special services, compositions of different components of it may constitute a firm or firms for purposes of these Rules.

[5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damage or relied on the misrepresentation or failure to inform.

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. See SCR 20:1.5 (b). Because the provision of the Rule are reasonably adequate to receive the alphabetical arrangement, caution should be used when referring to the alphabetical arrangement, caution should be used when referring to the ABA Comment.

SCR 20:1.7 (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 communication should 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 questions that the client or other person may have, and an explanation 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 decisions. In some circumstances it may justify providing the 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 making decisions of the type involved, and whether the client or other person is independently represented by other counsel or by the lawyer. Normally, succeeded 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 or other person. Consent may be inferred, however, from the subsequent conduct of a client or other person who has reasonably adequate information about the matter. A number of the Rules of Professional Conduct require that a client’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).

Screened. [8] This definition applies to situations where screening of a personally disassociated lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the screening of any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is
ments of the jurisdictions in which the services will be performed, particularly relating to confidentiality information. [Created by Sup. Ct. Order No. 15–03, 2016 WI 76, effective. 1–1–17.]

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibilities therefor. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. [Created by Sup. Ct. Order No. 15–03, 2016 WI 76, effective. 1–1–17.]

Maintaining Competence. [8] To maintain the requisite knowledge and skill, a lawyer shall keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

SCR 20:1.2 Scope of representation and allocation of authority between lawyer and client. (a) Subject to pars. (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. The client’s informed consent must be in writing except as set forth in sub. (1).

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

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

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

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

d. the representation is provided by the state public defender pursuant to Ch. 977, Stats., including representation provided by a private counsel to an appointee by the state public defender; or

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

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

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

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

Wisconsin Committee Comment to Supreme Court Rule 20:1.2 (e) (2014): With respect to subparagraph (c), a lawyer providing limited scope representation in an action before a court should consult s. 802.045, Stats., regarding notice and with withdrawal requirements.

The requirements of subparagraph (c) that require the client’s informed consent, in writing, to the limited scope representation do not supplant or replace the requirements of SCR 20:1.5 (b).

Note: Sup Ct. Order No. 13–10 states that “the Comments to SCRs 11.02, 20:1.1, 20:1.2 (c), and 20:1.16 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.”

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

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

Note: Sup Ct. Order No. 13–10 states that “the Comments to SCRs 11.02, 20:1.1, 20:1.2 (c), and 20:1.16 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.”

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

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

History: Sup. Ct. Order No. 04–07, 2007 WI 4, 293 Wis. 2d 237, 724 N.W.2d 692, eff. 7–1–07.

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


Wisconsin: The Model Rule does not include paragraph (e). Paragraph (e) was added to clarify the obligations of counsel for an insurer, in conjunction with the decision to retain Wisconsin’s “insurance defense” exception in SCR 20:1.8 (f).


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Independence from Client’s Views or Activities. [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client’s views or activities need not prevent a lawyer from pursuing a matter on behalf of a client. The lawyer must not be denied the opportunity to make good faith decisions about the matter which are of reasonable importance to the client and the lawyer and the client have not agreed that the lawyer will handle the matter without regard for the views or activities. See SCR 20:1.2(d)(3).

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 means may include 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, reasonable notice must be given to the client. The lawyer may not continue assisting a client in conduct that the lawyer originally supposed was permitted or required by the law but later learns is unlawful, fraudulent, or in violation of the lawyer’s own professional standards. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. A client’s objective is limited to securing general information about the law the client needs in order to handle a particular legal problem. If the client’s interests are served in a way that is not consistent with the lawyer’s professional obligations, the lawyer must withdraw from the representation. See SCR 20:1.1.0(e).


Criminal, Fraudulent and Prohibited Transactions. [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Nor does the lawyer’s duty under this paragraph extend to every course of action that is criminal or fraudulent of itself. A lawyer may represent a client who is not a criminal defendant or who has not been charged with a crime. To prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a brief telephone consultation. Such a consultation, 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 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.

[10] When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may continue to represent a client in a course of action that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16. In some circumstances, however, an earlier withdrawal might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] When the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary. Paragraph (d) applies whether or not the defrauded party is a party to the transaction. If the client is representing or is about to represent another client in a transaction to effectuate or further a crime or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. A lawyer may continue to represent a client in a course of action that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16. In some circumstances, however, an earlier withdrawal might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer’s own services are required to vindicate a client’s cause or endeavor, 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 20:1.3 Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

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

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 reasonable action may be necessary 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 promptness requires the lawyer to 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 and promptly. See Rule 1.3.

[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 changes in circumstances, 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 needlessly 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 terminated in 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 the client’s behalf under the lawyer’s prior advice or in the event 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 subsequent proceedings on the client’s behalf, 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 nature of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for representation. See, e.g., RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 28 (2002) (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan provided by the lawyer to prevent neglect of the interests of the clients of a deceased or disabled lawyer).
child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

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

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

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

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

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

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

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

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

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

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

1. the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or
2. the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or
3. pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

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

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

1. Upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client a notice in writing containing all of the following information:
   a. The amount of the advanced payment.
   b. The basis or rate of the lawyer’s fee.
   c. Any expenses for which the client will be responsible.
   d. The lawyer’s obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation.
   e. The lawyer’s obligation to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of the dispute.
   f. The ability of the client to file a claim with the Wisconsin Lawyers’ Fund for Client Protection if the lawyer fails to provide a refund of unearned advanced fees.

2. (2) Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following:
   a. A final accounting, or an accounting from the date of the lawyer’s most recent statement to the end of the representation, regarding the client’s advanced fee payment.
   b. A refund of any unearned advanced fees and costs.
   c. Notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting.
   d. Notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration.

3. (3) Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer’s receipt of the written notice of dispute from the client.
(4) Upon receipt of an arbitration award requiring the lawyer to make a payment to the client, the lawyer shall pay the arbitration award within 30 days, unless the client fails to agree to be bound by the award of the arbitrator.

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

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

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

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

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

(3) If a client makes a personalized and reasonable objection to the disbursement described in SCR 20:1.5(h) (1), the disputed portion shall remain in the trust account until the dispute is resolved. If the client makes a personalized and reasonable objection to a disbursement described in SCR 20:1.5(h) (1) or (2) within 30 days after the funds have been withdrawn, the disputed portion shall be returned to the trust account until the dispute is resolved, unless the lawyer reasonably believes that the client’s objections do not present a basis to hold funds in trust or return funds to the trust account under SCR 20:1.5(h).

The lawyer will be presumed to have a reasonable basis for declining to return funds to trust if the disbursement was made with the client’s informed consent, in writing. The lawyer shall promptly advise the client in writing of the lawyer’s position regarding the fee and make reasonable efforts to clarify and address the client’s objections.


Case Notes: Section 20:1.5(e) does not apply to division of fees in concluding the affairs of a partnership because until that process is complete the lawyers remain in the same firm. Gull v. Van Epps, 185 Wis. 2d 609, 517 N.W.2d 531 (Cl. App. 1994). A “lodestar” methodology to determine what constitutes reasonable compensation is adopted. The “lodestar” figure is the sum of the reasonable hours expended on the litigation multiplied by a reasonable hourly rate, which provides an objective basis on which to make an initial estimate of the value of a lawyer’s services. The parties may adjust this lodestar figure up or down to account for any remaining factors not embodied in the lodestar calculation. Kolupar v. Wilde Pontiac Cadil- lac, 2004 WI 112, 275 Wis. 2d 58, 683 N.W.2d 191–2–1915.


Note: The above annotations cite to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 84–07.

Not all of the SCR 20:1.5(a) factors must be considered when a court reviews a contingent fee agreement as long as the court reviews all of the circumstances of the case to determine whether the contingency fee amount is a just and reasonable figure. In this case only review of (1) the time and labor involved, (2) the amount of money involved, and (3) the attendant risks involved was necessary. Maynard Steel Casting Co. v. Sheedy, 2007 WI App 27, 307 Wis. 2d 746, N.W.2d 816, 66, 307 Wis. 2d 746.


Wisconsin Committee Comment: Paragraph (b) differs from the Model Rule in requiring that fee and expense information usually must be communicated to the client when the total cost of representation will be $100 or less. Advanced fee arrangements are permitted if a reasonable basis exists. When a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference or any other effective means. paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer may consider the factors that are reasonably necessary to determine whether a particular fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer may consider the factors that are reasonably necessary to determine whether a particular fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer. Paragraph (a) also requires that fees for which the client will be charged must be reasonable. A lawyer may not charge a fee based on a contingency if any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

ABA Comment: Reasonableness of Fee and Expenses. [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The fee and expenses must be specified in (1) through (8). Not all of the SCR 20:1.5(a) factors must be considered when a court reviews a contingent fee agreement as long as the court reviews all of the circumstances of the case to determine whether a fee is reasonable. The lawyer charges fees that are reasonable under the circumstances. Paragraph (e) also requires that expenses for which the client will be charged must be reasonable. A lawyer may make reasonable efforts to clarify and address the client’s objections.

Basis or Rate of Fee. [2] When the lawyer has regularly represented a client, they may also have an understanding concerning the nature of the representation and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a short memorandum or copy of the lawyer’s customary fee arrangements that state the general nature of the legal services to be performed, the expenses, and the fees for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a short memorandum or copy of the lawyer’s customary fee arrangements that state the general nature of the legal services to be performed, the expenses, and the fees for which the client will be responsible.

Terms of Payment. [3] A lawyer may require advance payment of a fee, but otherwise return any unearned portion to the client. Rule 1.16(d). A lawyer may make an agreement with the client that the lawyer will take all action necessary, not only to secure payment in accordance to Rule 1.18. However, a fee in payment of expenses, such as a fee, often have the essential qualities of a business transaction with the client.

Division of Fee. [4] A lawyer may require advance payment of a fee, but otherwise return any unearned portion to the client. Rule 1.16(d). A lawyer may make an agreement with the client that the lawyer will take all action necessary, not only to secure payment in accordance to Rule 1.18. However, a fee in payment of expenses, such as a fee, often have the essential qualities of a business transaction with the client.
and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer must also return funds to the client or third-party payor of the advanced fees as set forth in SCR 20:1.5(g). Additional requirements for advanced fees paid to the lawyer must comply with SCR 20:1.5(g)(1), specifically excluding such fees from the funds that the supreme court requires lawyers to hold in trust accounts. However, by order dated May 30, 2003, the supreme court amended SCR 20:1.5(g)(1) as follows: “Advanced fees paid by one or more identifiable trust accounts as provided in sub. (3) maintained in the state in which the office of the lawyer’s fees is subject to review at the request of the parties or the court, such as bankruptcy, formal probate, and proceedings in which a guardian ad litem’s fees may be subject to judicial review. In any proceeding in which the lawyer’s fees are challenged in a separate action, the lawyer must deposit advanced fees in trust or use the alternative protections for advanced fees in this subsection. The lawyer’s fees must be subject to the reasonableness of costs in the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act or to prevent reasonably likely death or substantial bodily harm; or in substantial injury to the financial interest or property of another.

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

1. To prevent reasonably likely death or substantial bodily harm;

2. To prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

3. To secure legal advice about the lawyer’s conduct under these rules;

4. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client regarding fees, or to prevent the lawyer from committing a criminal or fraudulent act or to prevent reasonably likely death or substantial bodily harm; or in substantial injury to the financial interest or property of another.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. Rule 20:1.6 Confidentiality. (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act or to prevent reasonably likely death or substantial bodily harm; or in substantial injury to the financial interest or property of another.

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

1. To prevent reasonably likely death or substantial bodily harm;

2. To prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

3. To secure legal advice about the lawyer’s conduct under these rules;

4. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client regarding fees, or to prevent the lawyer from committing a criminal or fraudulent act or to prevent reasonably likely death or substantial bodily harm; or in substantial injury to the financial interest or property of another.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
examples of those circumstances. Paragraph (c)(6), unlike its counterpart, also recognizes that in certain circumstances, lawyers may need to disclose limited information to clients and former clients to detect and resolve conflict of interests. Under those circumstances, such disclosure should ordinarily include no more information than is necessary to establish the threat or reduce the number of victims.

Paragraph (c)(7) recognizes that in certain circumstances, lawyers may disclose limited information to clients and former clients to prevent the threat. Lawyers should err on the side of protecting confidentiality.

Paragraph (c)(8) recognizes that in certain circumstances, lawyers may disclose limited information to clients to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (c)(8) (3) provides exceptions. Paragraph (c)(8) (1) recognizes the overriding value of life and physical integrity established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. Paragraph (c)(8) (6) recognizes that lawyers in different firms may need to disclose limited information to a third party to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (c)(8) (6) does not restrict the use of information acquired by means independent of the client−lawyer relationship. Paragraph (c)(8) (7) recognizes that lawyers in different firms may need to disclose limited information to a third party to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (c)(8) (7) also does not restrict the use of information acquired by means independent of the client−lawyer relationship.
While courts sometimes can override a defendant’s choice of counsel when deemed necessary, nothing requires them to do so. Requiring a court to disqualify an attorney because of a conflict of interest would infringe upon the defendant’s right to retain counsel of his choice and could leave the accused with the impression that the legal system had conspired against him or her. State v. Demmerly, 2006 WI App 181, 296 Wis. 2d 153, 724 N.W.2d 692, 05–0181.

Similarly, a defendant who validly exercises the right to conflict-free representation also waives the right to claim ineffective assistance of counsel based on the conflict, although there may be instances in which counsel’s performance is deficient and the conflict materially affected the outcome of the case. See State v. Demmerly, 2006 WI App 181, 296 Wis. 2d 580, 724 N.W.2d 692, 05–0181.

**Note:** The above annotations cite to SCR 20 as it existed prior to the adoption of R. 1.04–07.


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

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

**[2]** Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) identify clearly the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken or continued; (4) determine if a conflict of interest exists between the client whose representation may be undertaken or continued and another client or a third person or from the lawyer’s own interests. For specific Rules regarding concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(e) and (b).

**[3]** The duty of confidentiality continues after the client–lawyer relationship terminates. See Rule 1.9(c) (2). See Rule 1.9(c) (1) for the prohibition against using such information to the disadvantage of the former client.

**SCR 20.17 Conflicts of interest current clients.** (a) Except as provided in (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. The representation of one client will be directly adverse to another client; or
2. There is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

1. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. The representation is not prohibited by law;
3. The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. Each affected client gives informed consent, confirmed in a writing signed by the client.

**History:** Sup. Ct. Order No. 04–07, 2007 WI 4, 293 Wis. 2d 62 e.v.

**Case Notes:** An attorney who prosecutes the father of nonmaternal children for paternity, even where the county in child support actions may not also represent the children as their guardian ad litem. LaCrosse County DSS v. Rose K. 196 Wis. 2d 171, 537 N.W.2d 142 (Ct. App. 1995).

Simultaneous representation of a criminal defendant and a witness in that case in an unrelated civil case resulted in an actual conflict. State v. Street, 202 Wis. 2d 534, 551 N.W.2d 830 (Ct. App. 1996).

An attorney disqualified claim which is not raised in a timely manner may result in waiver. In re Marriage of Batchelor v. Batchelor, 213 Wis. 2d 251, 570 N.W.2d 897 (1997).

A person judged incompetent so that a guardian of the person and protective placement were required was incapable of making a knowing and voluntary waiver of a conflict of interest. Guerrero v. Cavey, 2000 WI App 203, 238 Wis. 2d 449, 617 N.W.2d 849.

A conflict of interest resulting from a single attorney’s representation of multiple clients with opposing co-counsel, without obtaining consent of the respective clients. Guerrero v. Cavey, 2000 WI App 203, 238 Wis. 2d 449, 617 N.W.2d 849.

The circuit court may, in the proper exercise of its discretion, deny a criminal defendant’s request for a disqualification, provided that the substance relationship standard if the motion is untenable. The likelihood of an actual conflict of interest is an appropriate factor to take into account in deciding whether to deny as untenable a disqualification, but a prosecutor bears some of the burden of proof. Guarin v. State, 1996 WI 76, 292 Wis. 2d 453, 713 N.W.2d 172, 05–2314.

When a disqualification motion against a prosecutor based on the substantial relationship standard is denied, the circuit court must, in good faith, make the following findings of fact: (a) the disqualification request was made in good faith, (b) the state’s evidence is not materially limited, (c) the disqualification request was not made for improper reasons, (d) there is a genuine question as to the best interests of the defendant, and (e) the disqualification motion was not made in an attempt to avoid the conflict. State v. Medina, 2006 WI App 76, 292 Wis. 2d 453, 713 N.W.2d 172, 05–2314.

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fere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer’s Responsibilities to Former Clients and Other Third Persons. [9] In addition to conflicts with other current clients, a lawyer’s duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 and representation to third persons under Rule 1.10. A lawyer in representing multiple clients should take reasonable steps to ensure that the representation of one client will not materially limit the lawyer’s representation of another client. In deciding whether common representation is in the client’s interests.

Personal Interest Conflicts. [10] The lawyer’s own interests should not be permitted to override the interests of the other clients in the representation. In particular, the way in which the nature of the lawyer’s role with respect to the interests of a client, or a client’s role with respect to the nature of the representation of a client, may be considered by the affected client in determining whether common representation is in the client’s interests.

Prohibited Representations. [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts may be so grave that the client should not be permitted to consent to the representation. Whether consent is obtained in each instance will depend on the conflict of interest.

Consent Notified in Writing. [20] Paragraph (b) requires the lawyer to obtain the consent of a client in writing if the lawyer is or may be directly or indirectly interested in the matter. If the lawyer is or may be interested in the matter, the lawyer must disclose to the client the nature of the interest and the action that the lawyer proposes to take in the matter. If the action is not prohibited by these Rules, the lawyer may act in the matter, and the lawyer shall provide the client with the information required by Rule 1.0 (e) (informed consent). The information required depends on the nature of the conflict, the effect of the common representation on the confidentiality of the representation, and the client’s reasonable expectations in retaining the lawyer. If the action is prohibited by these Rules, the lawyer shall not act in the matter.

Conflict of Interest. When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action, the lawyer shall consult with the members of the class and obtain their informed consent to the class action in writing. If an order is sought or obtained allowing the lawyer to represent a class, the lawyer shall promptly notify each known member of the class and afford such members a reasonable opportunity to object to the action of the lawyer in the litigation. If the lawyer prevails on the motion for class certification, the lawyer shall promptly notify the court and the other parties to the action.

Conflicts in Litigation. When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action, the lawyer shall consult with the members of the class and obtain their informed consent to the class action in writing. If an order is sought or obtained allowing the lawyer to represent a class, the lawyer shall promptly notify each known member of the class and afford such members a reasonable opportunity to object to the action of the lawyer in the litigation. If the lawyer prevails on the motion for class certification, the lawyer shall promptly notify the court and the other parties to the action.

Conflicts in Transactions. When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action, the lawyer shall consult with the members of the class and obtain their informed consent to the class action in writing. If an order is sought or obtained allowing the lawyer to represent a class, the lawyer shall promptly notify each known member of the class and afford such members a reasonable opportunity to object to the action of the lawyer in the litigation. If the lawyer prevails on the motion for class certification, the lawyer shall promptly notify the court and the other parties to the action.

Nobilities Conflicts. [26] Conflicts of interest under paragraphs (a) (1) and (2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and nature of the lawyer’s representation of the clients, the nature of the relationship to the parties involved, the nature and significance of the conflict, the extent of the lawyer’s relationship with the clients, the likelihood that disagreements will arise and the likelihood prejudice to the client from the conflict. The question is often one of proportionate and reasonable. See Comment [9].

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lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

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

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client–lawyer confidentiality and the attorney–client privilege. With regard to the attorney–client privilege, the prevailing Rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation events between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost always be impossible if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of the information that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise the client that information will be shared and that the lawyer has set aside all if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients. [34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent thereof or any individual or subsidiary. See Rule 1.12. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the lawyer should be considered a client of the affiliate even if the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, or the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.

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

SCR 20:1.8 Conflict of interest: prohibited transactions.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

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

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

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

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

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

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

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

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

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

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

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no lo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

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

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

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

Text from the 2015–16 Wis. Stats. database updated by the Legislative Reference Bureau. Report errors at (608) 266–3561.
(l) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

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

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

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

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

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

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

Note: The above annotations cite to SCR 20 as it existed prior to the adoption of SCR 20:1.8.

Wisconsin Comment: This rule differs from the Model Rule in four respects.

Paragraph (a) incorporates the decisions in State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968), and State v. Beaty, 33 Wis. 2d 148, 191 N.W.2d 842 (1971). Paragraph (a) (1) a reference to an attorney retained at government expense and retains the “insurance defense” exception from prior Wisconsin law. But see SCR 20:1.2 (c).

Paragraph (b) prohibits a lawyer from making an agreement limiting the client’s right to report the lawyer’s conduct to disciplinary authorities. Paragraph (j) (2) includes language from ABA Comment [19].

Wisconsin Comment, 2016

Note: Sup. Ct. Order No. 15-01 excuses that the Comments “are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rules.”

ABA Comment [8] states that Model Rule 1.8 “does not prohibit a lawyer from seeking to have the lawyer or partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position.” This language is consistent with the Model Rule.

In other words, a lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, provided that such a gift be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer’s benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer or one or more than one of them shall apply to all of them.

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[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer or one or more than one of them shall apply to all of them.
ment of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s relationship to the third−party payer (for example, when the lawyer represents the third−party payer as a co−client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non−controversial under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregates Settlements. [13] Differences in willingness to make or accept an offer of settlement may make it difficult to predict to what extent client confidences will be protected and which liens are authorized by law. These may include liens granted by statute, liens acquired by contract with the client, or liens arising in common law and liens acquired by contract with the client. When a law firm regularly consults with that lawyer concerning the organization’s legal matters. [14] Rule 1.6 applies when a lawyer seeks informed consent. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the right to arbitrate under the terms of the agreement does not prevent the client from receiving a settlement or plea offer or from rejecting a settlement or plea offer if the settlement or plea offer is no more favorable to the client than an offer made without arbitration. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client–lawyer relationship with the many clients are unable to accept or reject an offer of settlement, which liens are authorized by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability. [15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation. [16] Paragraph (i) states the traditional rule that lawyers are prohibited from acquiring a proprietary interest in the subject of the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (c). In addition, paragraph (j) sets forth forms of ownership authorized by law to secure the lawyer’s fees to the extent required by law and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens acquired by contract with the client, or liens arising in common law and liens acquired by contract with the client. [17] The relationship between lawyer and client is personal and is not applied to associated lawyers. If a defense attorney knowingly fails to disclose to a client or the circuit court his or her former role in prosecuting the client, the attorney is subject to discipline from the court. [18] Sexual relationships that predate the client−lawyer relationship are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation. [19] Rule 1.6 applies when a lawyer seeks informed consent. 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the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are “substantially related” for purposes of this Rule if they involve the same or similar dispute or if there otherwise is a substantial risk that the 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 client in obtaining environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded from representing substantial related matters, 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 disqualified. 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.

[4] When Lawyers Have Different Sets of Clients. 14 Whenever lawyers have been associated with a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. The lawyer previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonably corresponding loyalties. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers work in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be an undue limitation of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has been privy to confidential factual information. Rules 1.6 and 1.9 require a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer involved in the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two conflicts. See Rule 1.10 (b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation’s particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to all information actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9 (c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of employment may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0 (e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

SCR 20:1.10 Imputed disqualification: general rule. (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 unless:

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

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

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

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

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

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

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

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

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

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


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

ARS Comment: Definition of “Firm.” [1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or an in-house legal department of an entity, including an institution of higher education. See Rule 1.0 (c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comment [4].

Principles of Imputed Disqualification. [2] The Rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9 (b) and 1.10 (b).

[3] The Rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case was owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The Rule in paragraph (a) also does not prohibit representation by others in the firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary.

[5] Rule 1.10 (b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9 (c).

[6] Rule 1.10 (c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.6. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7 (b) and that such affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that disqualification may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0 (c).

[7] A lawyer who has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11 (d), where a lawyer represents the government after having served clients in private practice or another governmental employment, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.
SCR 20:1.11 Special conflicts of interest for former and current government officers and employees. (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

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

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

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

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

(2) written notice is promptly given to the appropriate government agency to enable it to ascertian compliance with the provisions of this rule.

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

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

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

(2) shall not:

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

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

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

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

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

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

History: Sup. Ct. Order No. 04-07, 2007 WI 14, 293 Wis. 2d xv.


Wisconsin Committee Comment: Paragraph (f) has no counterpart in the Model Rules, although it is based on statements made in paragraph [2] of theABA Comment.

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SCR 20:1.12 RULES OF PROFESSIONAL CONDUCT

(c) If a lawyer is disqualified by par. (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

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

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

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

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

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

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that the parties that the lawyer knows that the organization is likely to be substantially injured by action or impliedly authorized by the organizational client in order to carry out the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6. [4] Where the client and lawyer reasonably believe that the best interest of the organization does not require that the matter be referred to a higher authority, the lawyer may act as such in the lawyer's province. Paragraph (h) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or in violation of law that might be imputed to the lawyer, the lawyer must take steps to refer the matter to the higher authority.

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as if reasonably necessary in the best interest of the organization. Under the circumstances reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to a higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act in behalf of the organization as determined by applicable law.

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

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

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

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

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

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

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

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

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

ABA Comment: The Entity as the Client. [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and, in the case of organizations other than corporations, the other constituents of the entity. For the purposes of this rule, a corporation means the positions equivalent to officers, directors, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the lawyer’s organization in that person’s organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of such investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6. [3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or in violation of law that might be imputed to the lawyer, the lawyer must take steps to refer the matter to the higher authority.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibilities of the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be inappropriate for the lawyer to make such a referral, in which event the lawyer应当 seek the necessary authority to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to a higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to ensure that the matter reviewed by a higher authority in the organization is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not com-
SCR 20.1.14 Client with diminished capacity. (a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client–lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act on the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by SCR 20.1.6. When taking protective action pursuant to par. (b), the lawyer is impliedly authorized under SCR 20.1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

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

ABA Comment: [1] The normal client–lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client–lawyer relationship may not be possible in all respects. The client who lacks sufficient mental capacity to make legally binding decisions and have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client. For example, a child who is young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their personal affairs. So also, it is recognized that a client with diminished capacity may not be incapable of handling routine financial matters while needing special legal protection concerning matters of major consequence.

[2] The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of a client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not defeat a protective shield and disclosure of the client’s condition is not necessary. In such cases, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct. See Rule 1.2 (c).

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct. See Rule 1.2 (d).

Taking Protective Action. [5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a minor client–lawyer relationship cannot be maintained as provided in paragraph (a), the lawyer shall, in the client’s best interests and the goals of intruding into the client’s decision–making autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.

[6] In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; and, the substantive fairness of the proposed action in light of the known–long–term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] Disclosure of the client’s diminished capacity could adversely affect the client’s interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for removal of the representative. In such circumstances, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.
Emergency Legal Assistance. [9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client–lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person’s behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an emergency situation has the same duties under these Rules as the lawyer would with respect to a client. [10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel disclosing them only to the extent necessary to accomplish the intended protective action. A lawyer may disclose to a client in such an emergency when the client or entity consulted with will act adversely to the client’s interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

SCR 20:1.15 Safekeeping property; trust accounts and fiduciary accounts. (a) Definitions. In this section:
(1) “Draft account” means an account from which funds are withdrawn through a properly payable instrument or an electronic transaction.

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

(c) “Fiduciary account” means an account in which a lawyer or law firm that receives trust funds shall maintain at least one draft account, other than the trust account, for funds received and disbursed other than in a trust capacity, which shall be entitled “IOLTA,” “IOTA,” or “LTAB,” without further elaboration, as “IOLTA,” “IOTA,” or “LTAB,” without further elaboration, does not clearly designate the account as a client account or trust account. Each trust account shall be maintained in a financial institution that is authorized by federal or state law to do business in Wisconsin and that is located in Wisconsin or has a branch office located in Wisconsin and which agrees to comply with the overdraft notice requirements of sub. (h). A trust account may be maintained at a financial institution located in the jurisdiction where the lawyer principally practices law if that jurisdiction has an overdraft notification requirement.

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

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

(f) “Insurance and safekeeping requirements.” Each trust account shall be maintained at a financial institution that is insured by the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Share Insurance Fund (NCUSIF), the Securities Investor Protection Corporation (SIPC), or any other investment institution financially guaranty insurance. IOLTA accounts shall also comply with the requirements of sub. (d) (3).

(g) Lawyers using the alternative to the E-Banking Trust Account shall comply with the requirements of sub. (f) (3) c. Except as provided in subs. (b) (4) and (d) (3) b. and c., trust property shall be held in an account in which each individual owner’s funds are eligible for insurance.

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

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

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

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

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

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

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

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

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

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

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

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

(d) INTEREST ON LAWYER TRUST ACCOUNT (IOLTA) REQUIREMENTS. (1) Location. An IOLTA account shall be maintained only at an IOLTA participating institution.

(2) Certification by IOLTA participating institutions. a. Each IOLTA participating institution shall certify to WisTAF annually that the financial institution meets the requirements of sub. (d) (3) to (6) for IOLTA accounts and that it reports overdrafts on draft trust accounts and draft fiduciary accounts of lawyers and law firms to the office of lawyer regulation, pursuant to the institution’s agreements with those lawyers and law firms. WisTAF shall by rule adopted under SCR 13.03 (1) establish the date by which IOLTA participating institutions shall certify their compliance.

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

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

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

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

c. WisTAF shall publish annually, no later than the date on which the state bar mails annual dues statements to members of the bar, a list of all financial institutions that have certified, and have been confirmed by WisTAF as IOLTA participating institutions. WisTAF shall update the published list located on its website to add newly confirmed IOLTA participating institutions and to remove financial institutions that WisTAF cannot confirm as IOLTA participating institutions.

d. Prior to removing any financial institution from the list of IOLTA participating institutions or failing to include any financial institution on the list of IOLTA participating institutions, WisTAF shall first provide the financial institution with notice and sufficient time to respond. In the event a financial institution is removed from the list of IOLTA participating institutions, WisTAF shall notify the office of lawyer regulation and provide that office with a list of the lawyers and law firms maintaining IOLTA accounts at that financial institution. The office of lawyer regulation shall notify those lawyers and law firms of the removal of the financial institution from the list, and provide time for those lawyers and law firms to move their IOLTA accounts to an IOLTA participating institution.

e. Lawyers and law firms may rely on the most recently published list of IOLTA participating institutions for purposes of compliance with sub. (c) (1), except when the office of lawyer regulation notifies the lawyer or law firm of removal, in accordance with sub. (d) (2) d.

(3) Safekeeping requirements. a. An IOLTA participating institution shall comply with the insurance and safety requirements of sub. (b) (5).

b. A repurchase agreement utilized for an IOLTA account may be established only at an IOLTA participating institution deemed to be “well−capitalized” or “adequately capitalized” as defined by applicable federal statutes and regulations.

c. An open−end money market fund utilized for an IOLTA account may be established only at an IOLTA participating institution in a fund that holds itself out as a money market fund as defined under the Investment Act of 1940 and, at the time of investment, has total assets of at least $250,000,000.

(4) Income requirements. a. ‘Beneficial owner.’ The interest or dividends accruing on an IOLTA account, less any allowable reasonable fees, as allowed under par. (5), shall be paid to WisTAF, which shall be considered the beneficial owner of the earned interest or dividends, pursuant to SCR Chapter 13.

b. ‘Interest and dividend requirements.’ An IOLTA account shall bear the highest non−promotional interest rate or dividend that is generally available to non−IOLTA customers at the same branch or main office location when the IOLTA account meets or exceeds the same eligibility qualifications, if any, including a minimum balance, required at that same branch or main office location. In determining the highest rate or dividend available, the IOLTA participating institution may consider factors in addition to the IOLTA account balance that are customarily considered by the institution at that branch or main office location when setting interest rates or dividends for its customers, provided the institution does not discriminate between IOLTA accounts and accounts of non−IOLTA customers and that these factors do not include that the account is an IOLTA account. However, IOLTA participating institutions may voluntarily choose to pay higher rates.
c. ‘IOLTA account.’ An IOLTA participating institution may establish an IOLTA account as, or convert an IOLTA account to, any of the following types of accounts, assuming the particular financial institution at that branch or main office location offers these account types to its non-IOLTA customers, and the particular IOLTA account meets the eligibility qualifications to be established as this type of account at the particular branch or main office location:

1. A business checking account with an automated or other automatic investment sweep feature into a daily financial institution repurchase agreement or open-end money market fund. A daily financial institution repurchase agreement must be invested in United States government securities. An open-end money market fund must consist solely of United States government securities or repurchase agreements fully collateralized by United States government securities, or both. In this para. c.1., “United States government securities” include securities of government-sponsored entities, such as, but not limited to, securities of, or backed by, the Federal National Mortgage Association, the Government National Mortgage Association, and the Federal Home Loan Mortgage Corporation;
2. A checking account paying preferred interest rates, such as money market or indexed rates;
3. An interest-bearing checking account such as a negotiable order of withdrawal (NOW) account or business checking account with interest; and
4. Any other suitable interest-bearing or dividend-paying account offered by the institution to its non-IOLTA customers.

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

1. Establish the comparable product for qualifying IOLTA accounts, subject to the direction of the lawyer or law firm; or,
2. Pay the highest non-promotional interest rate or dividend, as defined in sub. (d) (4) b., less any allowable reasonable fees charged in connection with the comparable highest interest rate or dividend product, on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Prohibited transactions. a. ‘Cash.’ No withdrawal of cash shall be made from a trust account or from a deposit to a trust account. No check shall be made payable to “Cash.” No withdrawal shall be made from a trust account by automated teller or cash dispensing machine.
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b. ‘Telephone transfers.’ 1. Except as provided in SCR 20:1.15 (f) (2) b. 2., no deposits or disbursements shall be made to or from a pooled trust account by a telephone transfer of funds. 2. Wire transfers may be initiated by telephone, and telephone transfers may be made between non−pooled trust accounts that a lawyer maintains for a particular client.

c. ‘Electronic transfers by 3rd parties.’ A lawyer shall not authorize a 3rd party to electronically withdraw funds from a trust account. A lawyer shall not authorize a 3rd party to deposit funds into the lawyer’s trust account through a form of electronic deposit that allows the 3rd party making the deposit to withdraw the funds without the permission of the lawyer.

(3) Electronic transactions. A lawyer shall not make deposits to or disbursements from a trust account by way of an electronic transaction, except as provided in SCR 20:1.15 (f) (3) a. through c.

a. ‘Remote deposit.’ A lawyer may make remote deposits to a trust account, provided that the lawyer keeps a record of the client or matter to which each remote deposit relates, and that the lawyer’s financial institution maintains an image of the front and reverse of each remote deposit for a period of at least six years.

b. ‘E−banking trust account.’ A lawyer may accept funds paid by credit card, debit card, prepaid or other types of payment cards, and other electronic deposits, and may disburse funds by electronic transactions that are not prohibited by sub. (f) (2) c., provided that the lawyer does all of the following:

1. Maintains an IOLTA account, which shall be the primary IOLTA account, in which no electronic transactions shall be conducted other than those transferring funds from the primary IOLTA to the E−Banking Trust Account for purposes of making an electronic disbursement, or those transactions authorized by SCR 20:1.15 (f) (3) a., (3) b. 4. a., and (3) b. 4. d.

2. Maintains a separate IOLTA account with commercially reasonable account security for electronic transactions, which shall be entitled: “E−Banking Trust Account.”

3. Holds lawyer or law firm funds in the E−Banking Trust Account reasonably sufficient to cover monthly account fees and fees deducted from deposits and maintains a ledger for those account fees.

4. Transfers the gross amount of each deposit within 3 business days after the deposit is available for disbursement, and if necessary, adds funds belonging to the lawyer or law firm to cover any deduction of fees and surcharges relating to the deposit, in accordance with all of the following:

a. All advanced costs and advanced fees held in trust under SCR 20:1.5 (f) shall be transferred to the primary IOLTA account by check or electronic transaction.

b. Earned fees, cost reimbursements, and advanced fees that are subject to the requirements of SCR 20:1.5 (g) shall be transferred to the business account by check or by electronic transaction.

c. Any funds that the client has directed be disbursed by electronic transfer shall be promptly disbursed from the E−Banking Trust Account by electronic transaction.

d. All funds received in trust other than funds identified in SCR 20:1.15 (f) (3) a., b., and c. shall be transferred to the primary IOLTA account by check or by an electronic transaction.

e. Except for funds identified in SCR 20:1.15 (f) (3) a. and b., a lawyer or law firm shall not be prohibited from deducting electronic transfer fees or surcharges from the client’s funds, provided the client has agreed in writing to accept the electronic payment after being advised of the anticipated fees and surcharges.

5. Identifies the client matter and the reason for disbursement on the memo line of each check used to disburse funds; records in the financial institution’s electronic payment system the date, amount, payee, client matter, and reason for the disbursement for each electronic transaction; and makes no disbursements by credit card, debit card, prepaid or other types of payment cards, or any other electronic payment system that does not generate a record of the date, amount, payee, client matter, and reason for the disbursement in the financial institution’s electronic payment system.

6. Replaces any and all funds that have been withdrawn from the E−Banking Trust Account by the financial institution or card issuer, and reimburses the account for any shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal within 3 business days of receiving actual notice that a chargeback, surcharge, or ACH reversal has been made against the E−Banking Trust Account; and reimburses the E−Banking Trust Account for any chargeback, surcharge, or ACH reversal prior to accepting a new electronic deposit or transferring funds from the primary IOLTA to the E−Banking Trust Account for purposes of making an electronic disbursement.

c. ‘Alternative to E−Banking Trust Account.’ A lawyer may deposit funds paid by credit card, debit card, prepaid or other types of payment cards, and other electronic deposits into a trust account, and may disburse funds from that trust account by electronic transactions that are not prohibited by sub. (f) (2) c., without establishing a separate E−Banking Trust Account, provided that all of the following conditions are met:

1. The lawyer or law firm maintains commercially reasonable account security for electronic transactions.

2. The lawyer or law firm maintains a bond or crime insurance policy in an amount sufficient to cover the maximum daily account balance during the prior calendar year.

3. The lawyer or law firm arranges for all chargebacks, ACH reversals, monthly account fees, and fees deducted from deposits to be deducted from the lawyer’s or law firm’s business account; or the lawyer or law firm replaces any and all funds that have been withdrawn from the trust account by the financial institution or card issuer within 3 business days of receiving actual notice that a chargeback, surcharge, or ACH reversal has been made against the trust account; and the lawyer or law firm reimburses the account for any shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal. The lawyer shall reimburse the trust account for any chargeback, surcharge, or ACH reversal prior to disbursing funds from the trust account.

4. The lawyer or law firm identifies the client matter and the reason for disbursement on the memo line of each check used to disburse funds; records in the financial institution’s electronic payment system the date, amount, payee, client matter, and reason for the disbursement for each electronic transaction; and makes no disbursements by credit card, debit card, prepaid or other types of payment cards, or any other electronic payment system that does not generate a record of the date, amount, payee, client matter, and reason for the disbursement in the financial institution’s electronic payment system.

(4) Availability of funds for disbursement. a. ‘Standard for trust account transactions.’ A lawyer shall not disburse funds from any trust account unless the deposit from which those funds will be disbursed has cleared, and the funds are available for disbursement.

b. ‘Exception: Real estate transactions.’ In closing a real estate transaction, a lawyer’s disbursement of closing proceeds from funds that are received on the date of the closing, but that have not yet cleared, shall not violate sub. (f) (4) a., provided that the lawyer complies with sub. (f) (4) c., and that the closing proceeds are deposited no later than the first business day following the closing and are comprised of any of the following types of funds:

1. A cashier’s check, teller’s check, money order, official check or electronic transfer of funds, issued or transferred by a financial institution insured by the FDIC or a comparable agency of the federal or state government.

2. A check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state.
3. A check issued by the state of Wisconsin, the United States, or a political subdivision of the state of Wisconsin or the United States.

4. A check drawn on the account of or issued by a lender approved by the Federal Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee in Wisconsin, or from a title insurance agent of the title insurance company, if the title insurance company has guaranteed the funds of that title insurance agent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Compliance with SCR 20:1.15. Each state bar member shall acknowledge on the annual dues statement, or another form approved by the supreme court, that the member is aware of all of the following requirements of this rule:

a. That SCR 20:1.15 establishes fiduciary obligations for trust and fiduciary property that comes into the member’s possession, including the duty to hold that property in trust separate
from the member’s own property, to safeguard that property, to maintain complete records of that property, to account fully for that property, and to promptly deliver that property to the owner.

b. That SCR 20:1.15 requires a member to maintain each IOLTA account in an IOLTA participating institution, to file an overdraft agreement with the office of lawyer regulation for each account that is subject to SCR 20:1.15 (h) and (k) (10), and to annually report all trust and fiduciary accounts to the state bar of Wisconsin that are not subject to an exception under SCR 20:1.15 (m).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


Note: Sup. Ct. Order No. 14–07 states that “the Comments to SCRs 20:1.10, 20:1.15, 20:1.15, and 22:39 are not adopted, but will be published and may be considered for guidance in interpreting and applying the rule.”

Wisconsin Comment, 2016:

A lawyer must hold the property of others with the care required of a professional fiduciary. All property that is the property of clients or third parties cannot be commingled with the lawyer’s own business and personal property and, if monies, in one or more fiduciary or trust accounts. Lawyers have duties to keep clear, distinct, and accurate records of all trust transactions, and to be able always to account for the trust property or have a security interest in it. Lawyers have duties to assure that the lawyer complies with all state and federal laws relating to trust accounts.

SCR 20:1.15 (b) (2) Electronic transaction. The types of electronic transactions are developing. For examples of current types of electronic transactions see the record–keeping guidelines published by the office of lawyer regulation.

SCR 20:1.15 (b) (1) Separate accounts. With respect to probate matters, a lawyer’s role may be to serve in a fiduciary capacity as the personal representative, to represent an estate’s personal representative, or to act as both personal representative and attorney for an estate. SCR 20:1.15 (k) applies to funds and property which a lawyer may hold for a client or third party and distributes while serving in the fiduciary role of personal representative. Such funds and property may include, but are not limited to, bank and investment accounts, stocks, and bonds. SCR 20:1.15 (b) (1) applies to funds and property that are received in connection with a probate matter. A lawyer is subject to all applicable requirements of this section to hold funds and property in trust, contrary to SCR 20:1.15 (b) (1). This presumption can be rebutted by the lawyer’s production of records or an accounting that overcomes this presumption by clear, satisfactory, and convincing evidence. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

SCR 20:1.15 (b) (5) Insurance and safekeeping requirements. Pursuant to SCR 20:1.15 (b) (5), trust accounts are required to be held in financial or IOLTA participating institutions that are insured by the FDIC, the NCUSIF, the SIPC or any other investment institution financial guaranty insurance. However, since federal law dictates the amount of insurance coverage available from the FDIC, the NCUSIF and the SIPC, funds in excess of those limits are not insured. Federal law also limits the types of losses that are covered by SIPC insurance. Consequently, the purpose of the insurance requirements is not to guarantee that all funds are insured.

Rather, it is to assure that trust funds are held in reputable financial or IOLTA participating institutions and that the funds are eligible for the insurance that is available from the institutions. In addition, the lawyer needs to assure that the lawyer complies with all state and federal laws relating to such transactions, including, but not limited to, Regulation Z of the Truth in Lending Act, 12 CFR. § 206.

SCR 20:1.15 (b) (3) (c) Alternative E-Banking Trust Account. As an alternative to establishing an E-Banking Trust Account for the purposes of receiving and holding funds, a lawyer may establish an IOLTA account that could occur through chargebacks or reversals against a credit card account, or other electronic withdrawals. Specifically, the lawyer must either establish agreements with the lawyer’s financial institution and with payment providers to deduct fees, surcharges, and chargebacks from the lawyer’s business account or reimburse the account for such deductions with funds belonging to the lawyer or lawyer firm within 3 business days after notice of the deductions. In addition, the lawyer must establish an agreement with the financial institution to block debits from the IOLTA account in the event that the lawyer’s financial institution does not participate in the IOLTA program. Such an exception was created in recognition of the fact that real estate transactions in Wisconsin require a simultaneous exchange of funds. However, even under this exception there are requirements to ensure that the real estate transaction is consummated, i.e., the lender’s check, draft, wire transfer, etc., must be deposited no later than the first business day following the date of the closing. In refinancing transactions, the lender’s funds must be deposited as soon as possible, but not later than 2 business days after the closing date.

SCR 20:1.15 (b) (2) Record production. The duty of the lawyer to produce client trust account records for inspection under SCR 20:1.15 (g) (2) is a specific exception to the lawyer’s responsibility to maintain the confidentiality of the client’s information required by SCR 20:1.15 (b) (9).

SCR 20:1.15 (g) (2) Record production. The duty of the lawyer to produce client trust account records for inspection under SCR 20:1.15 (g) (2) is a specific exception to the lawyer’s responsibility to maintain the confidentiality of the client’s information required by SCR 20:1.15 (b) (9).

SCR 20:1.15 (g) (3) Burden of proof. A lawyer’s failure to comply with the record production requirements of SCR 20:1.15 (g) (2) or to provide an accounting to a client and to a third party in the event that the lawyer’s property is held in trust, contrary to SCR 20:1.15 (b) (1). This presumption can be rebutted by the lawyer’s production of records or an accounting that overcomes this presumption by clear, distinct, and accurate records of all trust transactions, and to be able always to account for the trust property or have a security interest in it. The lawyer is free to deliver the property to the person to whom it belongs.

SCR 20:1.15 (e) Prompt notice and delivery of property. Third parties, such as a client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law, including SCR 20:1.15 (e), to protect such 3rd-party claims against wrongful interference by the client, and accordingly, may refuse to surrender the property to the client. However, a lawyer would not unilaterally assert a claim to property belonging to a third party. If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or has a security interest in it, the lawyer is free to deliver the property to the person to whom it belongs.
RULES OF PROFESSIONAL CONDUCT SCR 20:1.17

[1] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished with mitigating the consequences to the client. The lawyer may take all reasonable protective action as provided in Rule 1.14.

[2] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished with mitigating the consequences to the client. The lawyer may take all reasonable protective action as provided in Rule 1.14.

[3] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished with mitigating the consequences to the client. The lawyer may take all reasonable protective action as provided in Rule 1.14.

[4] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished with mitigating the consequences to the client. The lawyer may take all reasonable protective action as provided in Rule 1.14.

[5] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished with mitigating the consequences to the client. The lawyer may take all reasonable protective action as provided in Rule 1.14.

[6] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished with mitigating the consequences to the client. The lawyer may take all reasonable protective action as provided in Rule 1.14.

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[10] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished with mitigating the consequences to the client. The lawyer may take all reasonable protective action as provided in Rule 1.14.
sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

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

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the practice of selling the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also consider lawyers so situated, states may permit the sale of the practice if the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).

[5] If a lawyer or law firm sells a practice, if any area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of their files, the Rule requires an order from a court having jurisdiction that the sale is judicially approved by the purchaser.

[6] The Rule requires that the seller’s entire practice, or an entire area of practice, be sold. The prohibition against sales of a particular practice area protects those clients whose matters are not as lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all matters in the same or a substantially related area of practice subject to client consent. The consent requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Autonomy, Consent and Notice. Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to information relating to the representation, such as the client’s file, however, requires client consent. The Rule provides that before such information can be disclosed to the seller to the purchaser the client must be given actual written notice of the contemplated sale, including who the purchaser is, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time frame, consent to the sale is presumed.

[7] Formerly a lawyer ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client’s legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which an order can be obtained needs to be established in jurisdictions in which it presently does not exist).

[9] All elements of client autonomy, including the client’s absolute right to discharge a lawyer who fails to perform the representation to another, survive the sale of the practice or area of practice.

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

Other Applicable Ethical Standards. [11] Lawyers participating in the sale of a law practice or an area of practice are subject to the ethical standards applicable to a lawyer considering whether or not to undertake a new matter should limit the initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial consultation may be.

[12] If a lawyer is participating in a sale of a law practice, he or she may not directly or indirectly induce a current or former client to retain the lawyer in the new firm. See Rule 1.10. Regardless of whether the lawyer has an ongoing client-lawyer relationship with respect to a matter is a prospective client relationship, Rule 1.10(a) is not required to be followed.

Rule 1.17. Application of the Rule. [13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer or co-counsel or by assuming joint responsibility for such matters.

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

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

SCR 20.1.17. Duties to prospective client. (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information learned in the consultation, except as SCR 20.1.9 would permit with respect to information of a former client.

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

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

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

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

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

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

[11] All elements of client autonomy, including the client’s absolute right to discharge a lawyer who fails to perform the representation to another, survive the sale of the practice or area of practice.

[12] If a lawyer is participating in a sale of a law practice, he or she may not directly or indirectly induce a current or former client to retain the lawyer in the new firm. See Rule 1.10. Regardless of whether the lawyer has an ongoing client-lawyer relationship with respect to a matter is a prospective client relationship, Rule 1.10(a) is not required to be followed.

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer or co-counsel or by assuming joint responsibility for such matters.

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

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

SCR 20.1.18. Duties to prospective client. (a) A person who consults with a lawyer about the possibility of forming a
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SCR 20:2.1 Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

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

ABA Comment: Scope of Advice. [1] A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves weighing alternative courses of action that a client may reasonably be expected to take, and advising in such a way that the client understands the advice given. Proper legal advice, therefore, may sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

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

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

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer’s advice at its best often consists of recommending a course of action that is consistent with the lawyer’s role as a lawyer and with the lawyer’s responsibilities to third persons and the duty to disseminate the evaluation was made according to the legal profession.

SCR 20:2.2 Omitted.

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

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

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

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

ABA Comment: Definition. [1] An evaluation may be performed at the client’s direction or when implicitly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser. The lawyer may render the information to the client or for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

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

Duties Owed to Third Person and Client. [3] When the evaluation is intended for use by a person, a legal duty to third persons may arise. The lawyer must satisfy as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications, particularly the lawyer’s responsibilities to third persons and the duty to disseminate

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b. That the lawyer does not represent either party to the mediation.

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

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

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

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

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

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

Note: Sub. (c) is created eff. 7–1–17 by Sup. Ct. Order No. 16–04. History: Sup. Ct. Order No. 04–07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 16–04, 2017 WI 2–21–17, eff. 7–1–17.

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

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

[3] Unlike nonlawyers who serve as third–party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third–party neutral and a lawyer’s service as client representative. The danger of confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer–neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who have used dispute–resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required.

When drafting documents pursuant to this rule, subsection (c) (3) imposes duties of competence and diligence in connection with the drafting of such documents. A lawyer who fails to fulfill such duties violates SCR 20:2.4 (c) (4).

Filing documents pursuant to this subsection can often be accomplished most efficiently by a lawyer familiar with the documents and, as long as done with the consent of the parties to the mediation, may be accomplished by the mediator without impairing his or her neutrality. However, any appearance by a lawyer on behalf of one or more parties is so closely associated with advocacy that it could compromise the appearance of neutrality and/or provide an occasion to depart from the role the lawyer has served as a mediator may file documents with the court, such a lawyer may not appear in court on behalf of one or both of the parties. A lawyer who has served as a third party neutral, such as a mediator in a matter, may not thereafter represent any party at any stage of the matter. See SCR 20:1.12. Because the lawyer–mediator does not have a client–lawyer relationship with any of the parties, SCR 20:1.2 (cm) does not apply. Subsection (5) makes it clear that the lawyer–mediator must make an equivalent disclosure. Filing of documents by a lawyer–mediator pursuant to this rule does not constitute an appearance in the matter.

SUBCHAPTER III

ADVOCATE

SCR 20:3.1 Meritorious claims and contentions. (a) In representing a client, a lawyer shall not:

1. knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;

2. knowingly advance a factual position unless there is a basis for doing so that is not frivolous;

3. file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.

(a) A lawyer providing limited scope representation pursuant to SCR 20:1.2 (c) may rely on the otherwise self–represented person’s representation of facts, unless the lawyer has reason to believe that such representations are false or materially insufficient, in which instance the lawyer shall make an independent reasonable inquiry into the facts.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in deprivation of liberty, may nevertheless so defend the proceeding as to require that every element of the case be established.

Wisconsin Supreme Court: This Wisconsin Supreme Court Rule differs from the Model Rule in expressly establishing a subjective test for an ethical violation.

ABA Comment: [1] The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may operate. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.

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Rules of Professional Conduct SCR 20:3.3

SCR 20:3.2 Expediting litigation. A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of their clients.

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

ABA Comment: [1] Dilatory practices bring the administration of justice into disrepute. There will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates.

(c) does not specify when the duties expire. For this reason, ABA Comment [13] is inapplicable.

ponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempts to have the case tried in a timely manner. It is, however, proper for a lawyer to request a postponement when it is ethically proper to do so. ABA Model Rule 3.4(a)(4) is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose to the client’s interest. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

SCR 20:3.3 Candor toward the tribunal. (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer knows to 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 knows of evidence that the client intends to engage, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (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.

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

Comment: Lawyers Have Over Candor to Tribunals. Dietrich. Wis. Law. Aug. 2005 Wisconsin Comment: Unlike its Model Rule counterpart, paragraph (c) does not specify when the duties expire. For this reason, ABA Comment [13] is inapplicable.

ABA Comment: [1] This Rule governs the conduct of a lawyer who is representing a client in proceedings of a tribunal. See Rule 1.0 (m) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary pro-
ceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a) (3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence in a deposition that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to represent the client zealously within the bounds of the law. Typically, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a case, the lawyer must not allow the tribunal to be misled by false statements of law or fact on which the lawyer knows the facts are false.

Representations by a Lawyer. [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein. A lawyer who engages in the preparation of pleadings, or other documents of a similar nature, on behalf of the client is responsible for ensuring that the pleadings or other documents avoid the presentation of false assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer.

Rule 3.2.1. However, an assertion purporting to be on the law- yer’s own knowledge, as in an affidavit or a statement, in which a lawyer may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresenta-
tion. The obligation prescribed in Rule 1.2 (d) not to counsel a client to commit or assist the client in committing a fraud applies in this situation. Regarding compliance with Rule 1.2 (d), see the Comment to that Rule. See also the Comment to Rule 8.4 (b).

Legal Argument. [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent controlling authorities. Furthermore, as a legal premise properly applied to the facts in issue, the statement of the controlling authority is not required to be disinterested. The lawyer may choose to rely on a premise and omit the particular controlling authority. Offering Evidence. [5] Paragraph (a) (3) requires that a 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 present false evidence, the lawyer should seek to persuade the client that the evi-
dence 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 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.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have held that a lawyer is not required to present the accused as a witness if the lawyer believes that the person is guilty and the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subject to such requirements.

[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 evi-
dence is false, however, can be inferred from the circumstances. See Rule 1.0 (f).

[9] Although paragraph (a) (3) only prohibits a lawyer from offering evidence that the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other evidence that the lawyer reasonably believes is false. Offering such evidence would be contrary to the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence. If the lawyer knows or has reason to believe that a withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably nec-
sary to remedy the situation, even if the delay or refusal to make such disclosure would otherwise be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[10] The disclosure of a client’s false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps conviction for perjury. If the lawyer is not informed that the client is providing false testimony, the lawyer will struggle to provide an effective defense and will risk disqualification of the lawyer by the court and depriving the client of the opportunity to contest the accuracy of the client’s evidence. The client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of Adjudicative Process. [11] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the
integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

**Duration of Obligation.** [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

**Ex Parte Proceedings.** [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision, the conflicting positions is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the cumulative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

**Withdrawal.** [15] Normally, a lawyer’s compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer’s disclosure. The lawyer may, however, be required by Rule 1.16 (a) to seek permission of the tribunal to withdraw if the lawyer’s compliance with this Rule’s duty of candor results in an extreme deterioration of the lawyer-client relationship that the lawyer reasonably believes cannot be repaired. See also Rule 1.16 (b) (2) for the client’s circumstances in which the lawyer will be permitted to seek a tribunal’s permission to withdraw. In connection with a request for permission to withdraw that is premised on Rule 1.16 (a), a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

**SCR 20:3.4 Fairness to opposing party and counsel.** A lawyer shall not:

- (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.
- (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 to the other party or the other party’s counsel;
- (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 or that the court reasonably should not believe is relevant to the cause, the credibility of a witness, the culpability of a civil or criminal defendant, or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  1. the person is a relative or an employee or other agent of a client; and
  2. the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

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

**Case Note:** It is a violation of the lawyer’s code of ethics for a lawyer to tell a jury what he or she believes is the truth of the case, unless it is clear that the lawyer’s belief is merely a comment on the evidence before the jury. State v. Jackson, 2007 WI App 145, 302 Wis. 2d 766, 735 N.W.2d 178, 06−1240.

**ABA Comment:** [1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competently by the contending parties. Fair competition between the parties cannot be secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

- (2) temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.
- (3) With regard to paragraph (b), it is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law. The common−law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying that and it is improper to pay an expert witness a contingent fee.
- (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.

**SCR 20:3.5 Impartiality and decorum of the tribunal.** A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule the matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
  1. the communication is prohibited by law or court order;
  2. the juror has made known to the lawyer a desire not to communicate; or
  3. the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

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

**Case Note:** The violation of the rules under chs. 20 and 62 can be a basis for the court to impose a sanction for a contempt of court in the underlying proceeding. The court may require the attorney to show cause why the lawyer should not be held in contempt of court.

**Wisconsin Committee Comment:** Paragraph (b) differs from the Model Rule in the degree it expressly imposes duty on any party in the event of an ex parte communication with a judge concerning scheduling.

**ABA Comment:** [1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Offenses are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

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

**Case Note:** This case is based on an interpretation of the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

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

**Case Note:** This case is based on an interpretation of the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
and their associates. [5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness; [2]
(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement of a defendant or suspect or that person’s refusal or failure to make a statement; [4]
(c) the performance or results of any examination or test, or the identity of a witness, or the expected testimony of a party or witness; [6]
(d) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and [6]
(e) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty. [5]

Rule 20:3.7 Lawyer as witness. [a]

(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]
(2) the testimony relates to the nature and value of legal services rendered in the case; or [3]
(3) disqualification of the lawyer would work substantial hardship on the client. [b]

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

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

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

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a) (1) through (a) (5). Paragraph (a) (1) recognizes that if the testimony will not be contested, the ambiguity of the dual role are purely theoretical. Paragraph (a) (2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter at issue; hence, there is less dependence on the adversary process to test the credibility of the testimony of the proceeding is so limited.

[4] Apart from these two exceptions, paragraph (a) (3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the oppos-

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SCR 20:3.7 RULES OF PROFESSIONAL CONDUCT

 SCR 20:3.7 Special responsibilities of a prosecutor. (a) A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute a charge that the prosecutor knows is not supported by probable cause.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Editor’s Note: Section 3 of Supreme Court Order No. 08–24 states: “The following comments to SCR 20:3.8 (g) and (h) are not adopted, but will be published and
may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct for Attorneys:"

**Wisconsin Comment:** Wisconsin prosecutors have long embraced the notion that the duties contained in both holding officers accountable and enforcing the law. The new Rule 20.3.(b) and (h) reinforces this notion. The Wisconsin rule differs slightly from the new Model Rule.

This rule was not designed to address significant changes in the law that might affect the incarceration status of a number of prisoners, such as where a statute is declared unconstitutional.

**ABA Comment:** [1] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor’s jurisdiction committed the crime, the prosecutor should promptly disclose to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in this jurisdiction, paragraph (g) requires the prosecutor to promptly disclose the evidence to the court and, absent court—authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to the court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of new, credible and material evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must take reasonable steps to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, reapplication for a post-conviction petition, or representation of the defendant for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor’s independent judgment, made in good faith, that the new evidence did not affect the trial of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

**SCR 20:3.9 Advocate in nonadjudicative proceedings.** A lawyer representing a client before a legislative body of an administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of SCR 20:3.3 (a) through (c), SCR 20:3.4 (a) through (c), and SCR 20:3.5.

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

**ABA Comment:** [1] A lawyer is required to disclose to the court or other appropriate authority that the lawyer represents a client who is a witness in a nonadjudicative proceeding in which the lawyer represents another client. Paragraph (g) requires the prosecutor to promptly disclose the evidence to the court and, absent court—authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to the court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor’s jurisdiction committed the crime, the prosecutor should promptly disclose to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in this jurisdiction, paragraph (g) requires the prosecutor to promptly disclose the evidence to the court and, absent court—authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to the court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[9] A prosecutor’s independent judgment, made in good faith, that the new evidence did not affect the trial of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

**SCR 20:3.10 Omitted.**

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

**SUBCHAPTER IV**

**TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

**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;

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.

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

**Wisconsin Committee Comment:** Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. See SCR 20:1.2 (d). This is allowed even in circumstances in which the conduct involves some forms of deception, for example, the use of tests to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception, the lawyer faces serious questions arise. Paragraph SCR 20:8.4 (c). Paragraph SCR 20:8.4 (c). Paragraph SCR 20:8.4 (c) (1) provides that where the lawyer expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception.

A lawyer representing a client in an investigation or legal activity may involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

**Scr 20:4.2 Communication with person represented by counsel.** (a) In representing a client, a lawyer shall not communicate about the subject of the representation with the 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.

(b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1.2 (c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the other party of the arrangement.

**History:** Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv.; Sup. Ct. Order No. 13−10, 2014 WI 45, filed 6−27−14, eff. 1−1−15.

**Case Notes:** Contact by an attorney with a client’s children who were represented by a guardian ad litem without the guardian’s consent violated this rule. Disciplinary Proceedings Against Kinsa, 2015 Wis. 2d 36, 350 N.W.2d 387 (1995).

Defendant’s attorney’s negotiation with plaintiff’s divorce attorney in regard to the protection action where a frivolous claim was being pursued by the plaintiff’s attorney violated this section. Kelly v. Clark, 2012 Wis. 2d 633, 531 N.W.2d 455 (Ct. App. 1995).

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

**ABA Comment:** [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has been represented by a lawyer in a matter against possible overreach by other lawyers who are participating in the matter, interference by those lawyers with the lawyer—client relationship and the uncontrolled 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 investigate the nature of the representation with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private individual, or between two organizations, does not prohibit a lawyer from communicating with nonlawyer representatives of the other regarding a separate matter.

[5] Nor does this Rule preclude communication with a represented person who is not able to advise a lawyer who is not otherwise representing the client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See SCR 8.4 (a). Parties to a matter may communicate directly with each other only if a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to so do.

[6] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to commun
SCR 20:4.2 RULES OF PROFESSIONAL CONDUCT

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

(b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1.2 (c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies otherwise.


A lawyer is unrepresented if he or she has not chosen to retain counsel. SCR 20:1.2 (c) provides, in pertinent part, that a lawyer is unrepresented if the lawyer acts for himself or herself, a client to whom the lawyer is not an adversary, or an unrepresented person. Under SCR 20:4.3 (b), a lawyer must inform unrepresented persons of the lawyer’s role in the matter and must make reasonable efforts to correct any misunderstanding. The rule also prohibits a lawyer from giving legal advice to an unrepresented person; however, a lawyer is permitted to provide nonlegal advice, such as advice on how to secure counsel.

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individual represents, and shall act in, the individual’s best interests, even if doing so is contrary to the individual’s wishes. A lawyer so appointed shall comply with the Rules of Professional Conduct that are consistent with the lawyer’s role in representing the best interests of the individual rather than the individual personally.

**History:** Sup. Ct. Order No. 04–07, 2007 W1 4, 293 Wis. 2d xv.

Wisconsin Comment: The Model Rules do not contain a counterpart provision. This rule reflects established case law that a guardian ad litem in Wisconsin is a lawyer who represents the best interests of an individual, not the individual personally. See Panje K.B. v. Molek, 212 Wis. 2d 289 (1998); In re Steven R.A. 190 Wis. 2d 171, 537 N.W.2d 142 (Ct. App. 1995). Supreme Court Rules, Chapters 35–36, govern eligibility for appointment as guardian ad litem in certain situations.

This rule expressly recognizes that a lawyer who represents the best interests of the individual does not have a client in the traditional sense but must comply with the Rules of Professional Conduct to the extent the rules apply.

**SUBCHAPTER V**

**LAW FIRMS AND ASSOCIATIONS**

**SCR 20:5.1 Responsibilities of partners, managers, and supervisory lawyers.** (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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

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

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

**History:** Sup. Ct. Order No. 04–07, 2007 W1 4, 293 Wis. 2d xv.

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

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

**SCR 20:5.3 Responsibilities regarding nonlawyer assistance.** With respect to a nonlawyer employed or retained by or associated with a lawyer:

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

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

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

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

**History:** Sup. Ct. Order No. 04–07, 2007 W1 4, 293 Wis. 2d xv;
Sup. Ct. Order 15–03, 2016 W1 76, filed 7–21–16, eff. 1–1–17.

ABA Comment: [1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Policies and procedures should include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[2] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm’s structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4 (a).

[5] Paragraph (c) defines the duty of a partner or another lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter primarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the matter. A supervisor is required to intervene on the basis of the consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervising lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2 (a).

**SCR 20:5.2 Responsibilities of a subordinate lawyer.**

A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

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

**History:** Sup. Ct. Order No. 04–07, 2007 W1 4, 293 Wis. 2d xv.

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

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

**SCR 20:5.3 Responsibilities regarding nonlawyer assistance.** With respect to a nonlawyer employed or retained by or associated with a lawyer:

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

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

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

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

**History:** Sup. Ct. Order No. 04–07, 2007 W1 4, 293 Wis. 2d xv;
Sup. Ct. Order 15–03, 2016 W1 76, filed 7–21–16, eff. 1–1–17.

ABA Comment: [1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all nonlawyers in the firm will conform to the Rules of Professional Conduct if engaged in by a lawyer.

[2] Lawyers generally employ assistants in their practice, including secretaries, information workers, lawyers, student assistants, or any work of an essentially clerical or professional nature. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in super-
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vising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or para-professional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with clients), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer. [Created by Sup. Ct. Order No. 15−03, 2016 WI 76, effective 1−1−17.]

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

SCR 20:5.4 Professional independence of a lawyer. (a)

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

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

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

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

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

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

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

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

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

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

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

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


Note: The above annotations cite to SCR 20 as it existed prior to the adoption of SCR 10.01, 10.03(4)(f), 15−03.

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

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

SCR 20:5.5 Unauthorized practice of law; multijurisdictional practice of law. (a) A lawyer shall not:

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

(2) assist another in practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by this rule or other law, establish an office or maintain a systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to the practice of law in this jurisdiction.

(c) Except as authorized by this rule, a lawyer who is not admitted to practice in this jurisdiction but who is admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or for medical incapacity, may not provide legal services in this jurisdiction except when providing services on an occasional basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; or

(2) are in, or reasonably related to, a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or

(3) are in, or reasonably related to, a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of, or are reasonably related to, the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within subsections (c) (2) or (c) (3) and arise out of, or are reasonably related to, the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, who is not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or medical incapacity, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates after compliance with SCR 10.03(4)(f), and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law or other rule of this jurisdiction.

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

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


Note: The above annotations cite to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04−07.
The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, the practice of law varies from jurisdiction to jurisdiction. This Rule does not prohibit a lawyer from employing the services of para-professionals and delegating functions to them, so long as the lawyer supervises the delegate to provide pro bono services that the lawyer is unable or unwilling to perform. Lawyers desiring to provide pro bono legal services on a temporary basis in this jurisdiction, and may therefore be permissible under paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or state law, which includes statute, rule or any other law under which a lawyer may practice law in that jurisdiction. For this paragraph to apply, however, the lawyer must obtain admission to practice law temporarily in this jurisdiction by lawyers who are admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Paragraph (d) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer’s officers or directors. The paragraph applies to in−house corporate lawyers, law firms, and others who are employed to render legal services to the employer. The lawyer’s ability to represent the employer outside the jurisdiction in which the lawyer is admitted generally serves the interests of the employer, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

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restrictions incident to provisions concerning retirement benefits for service with the firm.
[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

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

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

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

(1) The name and address of the organization.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


Case Note: LLCs, LLPs and SCs: The Rules for Lawyers Have Changed. Williams, Wis. Law. May 1997.

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

Wisconsin Committee Comment: This Wisconsin Supreme Court Rule has no counterpart in the Model Rules. Model Rule 5.7, concerning law-related services, is not part of these rules.

SCR 20:5.8 Responsibilities regarding law-related services. (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person other than the lawyer knows that the services are not legal services and that the protections of the client–lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Historical: Sup. Ct. Order No. 15–03, 2016 WI 76, filed 7–21–16, eff. 1–1–17.

ABA Comments

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client–lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer in the provision of the law-related services is subject to those Rules that are generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer’s provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client–lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity’s operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client–lawyer relationship do not apply. A

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50 hours of pro bono publico legal services per year. In fulfilling this responsibility the lawyer should:

- provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:
  1. persons of limited means or
  2. charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- provide any additional services through:
  1. delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate;
  2. delivery of legal services at a substantially reduced fee to persons of limited means; or
  3. participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

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

ABA Comment: [1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay for personal involvement in the practice of law in those circumstances where the potential rewards of the experience justify the potential for significant cost.

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

[3] Persons eligible for legal services under paragraphs (a) (1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines set below for such programs but cannot afford commercial legal services. Such services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that provide those persons assistance in the exercise of their constitutional or governmental “organizational” includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a) (1) and (2). Accordingly, services rendered can only be considered pro bono if an attorney’s fee is uncollectible or the entity cannot afford to pay a lawyer’s fees. Services rendered to courts or legal service entities for professional fees in a case in which the lawyer’s compensation is derived from a fixed fee arrangement, as is the case with most pro bono services, may not be considered pro bono.

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

[6] Paragraph (b) (1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept public sector legal services for the same reasons as those eligible under paragraphs (a) (1) and (2). Legal services contributed in assisting those persons of limited means by providing that a substantial majority of the legal services provided shall be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[7] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services for reasons of time or other matter.
SCR 20:6.2 RULES OF PROFESSIONAL CONDUCT

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client–lawyer relationship or the lawyer’s ability to represent the client.

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

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

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

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

SCR 20:6.3 Membership in legal services organization.

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

(a) if participating in the decision would be incompatible with the lawyer’s obligations to a client under SCR 20:1.7; or

(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

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

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

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

SCR 20:6.4 Law reform activities affecting client interests.

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

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

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

SCR 20:6.5 Nonprofit and court-annexed limited legal services programs.

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

(1) is subject to SCR 20:1.7 and SCR 20:1.9 (a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to SCR 20:1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by SCR 20:1.7 or SCR 20:1.9 (a) with respect to the matter.

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

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

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

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

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

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

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

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

SUBCHAPTER VII

INFORMATION ABOUT LEGAL SERVICES

SCR 20:7.1 Communications concerning a lawyer’s services.

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

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

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

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

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

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

Wisconsin Committee Comment: Paragraphs (b) through (d) of the Wisconsin Supreme Court Rule are not contained in the Model Rule.

ABA Comment: [1] Rule 7.1 has no application to communications about a lawyer’s services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.
SCR 20:7.2 Advertising. (a) Subject to the requirements of SCR 20:7.1 and SCR 20:7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

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

1. pay the reasonable cost of advertisements or communications permitted by this rule;

2. pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

3. pay for a law practice in accordance with SCR 20:1.17; and

4. refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if

i. the reciprocal referral arrangement is not exclusive;

ii. the client gives informed consent;

iii. there is no interference with the lawyer’s independence of professional judgment or with the client–lawyer relationship; and

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

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

2015−16 Wis. Stats. ch. 80, § 80.09(1)(d)

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

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

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

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

Note: ABA Comment: (1) A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet search.

(2) There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact with a person, or is likely to influence, intimidate, and over-reach.

This potential for abuse is heightened when the lawyer is asking to be retained by the client, or is attempting to communicate with a person who has not made known to the lawyer that a desire not to be solicited by the lawyer is made known to the lawyer; or

(7) This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of, and details concerning the plan the lawyer’s firm has established or is willing to establish. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity serving as supplier of legal services for others, who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information permitted to the individual is functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement in Rule 7.3 (c) that certain communications be marked “Advertising Material” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute advertising soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

(9) Paragraph (d) of this Rule permits a lawyer to participate in an organization where the personal contact to solicit memberships or subscriptions for a legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned or directed by the lawyer, and the lawyer must not participate in a legal service plan that is in fact an in-person or telephone solicitation plan.

[a. Paragraph (e) of this Rule permits a lawyer to participate in an organization in which the lawyer participates in the plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned or directed by the lawyer, and the lawyer must not participate in a legal service plan that is in fact an in-person or telephone solicitation plan.

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

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

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

Note: ABA Comment: (1) Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in one particular field, or will not accept matters except in a specified field or fields, the lawyer may state that the lawyer practices only in that field or fields. If a lawyer has expertise in more than one field, or will accept matters in multiple fields, the lawyer may state that the lawyer has expertise in multiple fields.

(b) Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the United States Patent and Trademark Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[2] This provision does not authorize a lawyer to represent another lawyer in a matter in which the lawyer has an interest that is adverse to the interest of the other lawyer.

[3] This is in addition to Rule 7.3 (c) of this Rule, which prohibits a lawyer from using advertising that is false or misleading, or that constitutes coercion, duress or harassment. Such communications may be subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.


[5] A lawyer engaged in admiralty practice may use the designation “admiralty,” “proctor in admiralty” or a substantially similar designation.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.2, or which involves communications that are not in a legal plan, is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives notice that a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives notice that a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited.
is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

SCR 20:7.5 Firm names and letterheads. (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates SCR 20:7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of SCR 20:7.1.

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

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

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

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

ABA Comment: [1] A firm may be designated by the names of all or some of its members, or by the names of deceased members where there has been a continuing success, which includes making and soliciting political contributions to candidates for public office if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of SCR 20:7.1.

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

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

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

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

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

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

SCR 20:8.3 RULES OF PROFESSIONAL CONDUCT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) If the information revealing misconduct under subs. (a) or (b) is confidential under SCR 20:1.6, the lawyer shall consult with
the client about the matter and abide by the client’s wishes to the extent required by SCR 20:1.6.

(d) This rule does not require disclosure of any of the following:

(1) Information gained by a lawyer while participating in a confidential lawyers’ assistance program.

(2) Information acquired by any person selected to mediate or arbitrate disputes between lawyers arising out of a professional or economic dispute involving law firm dissolutions, termination or departure of one or more lawyers from a law firm where such information is acquired in the course of mediating or arbitrating the dispute between lawyers.

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


Wisconsin Comment: The change from “having knowledge” to “who knows” in SCR 20:8.3 (a) and (b) reflects the adoption of the language used in the ABA Model Rule. See also SCR 20:1.0 (g) defining “knows.” The requirement under paragraph (c) that the lawyer consult with the client is not expressly included in the Model Rule.

Paragraph (d) (1) differs slightly from the Model Rule. It deletes reference to judges. The reference to judges is limited to the reporting obligation to judicial misconduct.

Paragraph (d) (2) deletes the requirement that the lawyer consult with the client in cases where the lawyer has a duty to consult with the client. Paragraph (d) (2) is modeled after SCR 20:1.0 (g). It follows from the proposition that the duty to consult with the client is discharged when the lawyer has a duty to petitioner, client, or prosecutor to disclose information to the extent required by SCR 20:1.6.

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


TRADITIONAL DISCIPLINARY RULES

NATURE OF DISCIPLINARY AUTHORITY

A lawyer’s personal duty to report misconduct is governed by the Rules applicable to the client−lawyer relationship. The duties of a lawyer to the public or to the legal system have their source in the lawyer’s professional character as defined by society. Such a situation is governed by the Rules applicable to the client−lawyer relationship.

Information about a lawyer’s or judge’s misconduct or fitness may be received by a lawyer in the course of representing a client, participating in an approved lawyers’ assistance program, or by a lawyer who is a member of the discipline committee of the office of lawyer regulation as required by SCR 22.03 (2). A lawyer who has received such information has a duty to report any violation of this rule. Paragraph (a), however, does not prohibit a lawyer from reporting misconduct to an organization or official or to achieve results by means that violate the Rules of Professional Conduct.

The undisputed fact of conversion of a client’s money demonstrates the existence of the following violations: (a) the violation of the duty of confidentiality to the client; (b) the violation of the duty of loyalty to the client; and (c) violation of the duty of a lawyer to represent a lawyer whose professional conduct is in question. A violation of the duty of confidentiality to the client is a violation of paragraph (d) of SCR 22.001 (9) (b).

SCR 22.001 (9) (b), SCR 22.03 (2), SCR 22.03 (6), or SCR 22.04 (1); or

(f) if the lawyer is admitted to the bar of only this state, the rules to be applied shall be the rules of this state.

Text from the 2015−16 Wis. Stats. database updated by the Legislative Reference Bureau. Report errors at (608) 266−3561.
(ii) if the lawyer is admitted to the bars of this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices, except that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is admitted to the bar, the rules of that jurisdiction shall be applied to that conduct.

(iii) if the lawyer is admitted to the bar in another jurisdiction and is providing legal services in this state as allowed under these rules, the rules to be applied shall be the rules of this state.

(c) A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

Wisconsin Comment: SCR 20:8.5 differs from the ABA Model Rule 8.5. Due to substantive and numbering differences, special care should be taken in consulting the ABA Comment. [Re Order No. 06–06, effective January 1, 2009]

ABA Comment: Disciplinary Authority. [1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

RULES OF PROFESSIONAL CONDUCT SCR 20:8.5

Choice of Law. [2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer’s conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognizing the appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer’s conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of or in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. [Re Order No. 06–06, effective January 1, 2009]