



AMC 2023

Session 4

**Ethically Navigating
Communication Minefields**

Moderator: Nadia Gonzalez, Michael Best & Friedrich, Madison

Panelists:

Ellen R. Atterbury, City of La Crosse Legal Department, La Crosse

Dean R. Dietrich, Weld Riley, S.C., Wausau

May Y. Lee, Lee Law Firm LLC, Wauwatosa

Christopher C. Shattuck, State Bar of Wisconsin, Madison

About the Presenters...

Ellen R. Atterbury is the Assistant City Attorney for La Crosse, Wisconsin. She is a “double Badger” who received her undergraduate and law degree from the University of Wisconsin-Madison. Among other volunteer committee involvement, Ms. Atterbury currently serves as a Director on the State Bar of Wisconsin Young Lawyers Division and Past-President of the La Crosse County Bar Association. In her free time, she enjoys participating in a trivia league and hiking in the Driftless Region.

Nadia Gonzalez is a labor and employment associate at Michael Best & Friedrich, LLP in their Madison office. She received her undergraduate degree from the University of Illinois at Urbana-Champaign in Political Science with High Distinction, and her law degree from the University of Wisconsin-Madison. Ms. Gonzalez is a current board member of the Young Lawyers Division of the State Bar of Wisconsin. In addition to being a member of the American Bar Association, State Bar of Wisconsin, and the Hispanic Bar Association, she is also active as a program volunteer for the Illinois YMCA's Youth and Government program.

Dean R. Dietrich, a shareholder with Weld Riley, S.C., has represented clients in the areas of lawyer ethics and professional responsibility for more than 45 years. He has represented attorneys in matters before the Wisconsin Supreme Court and the Office of Lawyer Regulation and consults with law firms and lawyers regarding compliance with the Rules of Professional Conduct. Dean has served as Chair of the State Bar Committee on Professional Ethics in addition to past service on the Committee appointed by the Wisconsin Supreme Court to review changes to the Wisconsin Rules of Professional Conduct for Attorneys. Dean currently serves as President-Elect of the State Bar of Wisconsin. He is a member of the ABA's Center for Professional Responsibility and the Association of Professional Responsibility Lawyers. He is a graduate of Marquette University Law School.

May Y. Lee is a criminal defense attorney and the managing attorney at LEE LAW FIRM LLC. The mission of the firm is “to speak up for and ensure justice for the individual. Attorney Lee began her legal career as an Assistant District Attorney at the Milwaukee County District Attorney's Office. She received her degree from the University of Wisconsin-Law School. She is a member of the State Bar of Wisconsin, National Association of Defense Lawyers; Wisconsin Association of Defense Lawyers; and National College for DUI Defense. Attorney Lee began law school while a mother to five children! Attorney Lee shares this as encouragement that it is never too late to pursue your dreams.

Christopher C. Shattuck has been the Law Practice Assistance Manager for the State Bar of Wisconsin since 2017. Mr. Shattuck previously managed a department and litigated cases at a creditors' rights firm in Milwaukee. In addition to providing confidential law practice consultations, he frequently writes and speaks on law practice management topics. He received his undergraduate and master of business administration degrees from the University of Wisconsin — Oshkosh and his law degree from the University of La Verne College of Law in southern California.

Ethically Navigating Communication Minefields

*State Bar of Wisconsin
Annual Meeting & Conference 2023*

Moderator: Nadia Gonzalez

Panel: Ellen R. Atterbury, Dean R. Dietrich, May Y. Lee, & Christopher Shattuck

Outline

1. Setting Ethical Boundaries

A. Hypothetical Scenario 1

- You agree to accept a pro bono misdemeanor criminal case, and your client is currently in the county jail, unable to make bail.
- After agreeing to the representation, you visit the client in jail and inform them that, according to the judge's clerk, the soonest court date to revise bail conditions would be in six weeks.
- The client becomes agitated, upset, and demands to know what you can do to expedite their hearing. You reply that it is out of your hands and that they will have to wait until the court's next available hearing date in six weeks.
- After the meeting, the client continues to call you three times a day for an entire week, despite providing them with the same information during each call. Considering this persistent behavior, you contemplate sending a letter to inform the client that there are no updates and suggest that if they wish to contact you for an update, they should do so by writing you a letter.

B. Discussion

- SCR 20:1.4 Communication
 - (a) A lawyer shall:
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests by the client for information;
- Comment [4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.
- The lawyer in this hypothetical may seek to limit the amount of time spent providing the same update to the client by requesting that the client write for an update. Additionally, the lawyer should agree to call or write if an update occurs before the next hearing date.
- It is important to set clear client boundaries while also ensuring compliance with the Rules of Professional Conduct. If you choose to take this course of action, it is crucial to document and maintain records of your communications.

- In a situation where a client files a complaint with the OLR, you will need to provide proof of setting a reasonable client boundary and demonstrate your efforts in acknowledging and responding to the repeated requests for information.
- Another helpful resource is the Wisconsin Lawyer article titled "[Solutions for Difficult Clients: When to Draw the Line](#)".

2. Disclosing Rule Violations

A. Hypothetical Scenario 2

- Client 2 hires a law firm to represent them in a personal injury case involving severe injuries sustained in a car accident. The client continues to seek treatment from multiple doctors and provides updates to the law firm.
- The law firm incorrectly calendars the client's statute of limitations deadline date, mistakenly believing there is another year to file a lawsuit.
- The day after the statute of limitations expires, the insurance company covering the responsible party in the claim contacts the law firm and informs them that no money will be paid on the claim.
- The law firm schedules a meeting with the client, only to discover that the client had an unforeseen complication from a recent surgery and passed away. The client has no heirs or family members to whom the potential settlement could pass.
- Is the law firm obligated to disclose their failure to file the lawsuit within the statute of limitations deadline to the Office of Lawyer Regulation?

B. Discussion

- 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.
- The rule only applies to the conduct of another lawyer, and not that of the lawyer.
- Lawyers in Wisconsin have no duty to self-report possible misconduct to the OLR, so there is no need to self-report serious errors to the disciplinary authorities. The only self-reporting duties in Wisconsin are with respect to criminal convictions, which pursuant to SCR 21:15(5) must be reported to the OLR within five days, and public discipline in another jurisdiction, which pursuant to SCR 22.22(1) must be reported to the OLR within 20 days of the date of the disciplinary order. Source: [Wisconsin Lawyer: What to Do After Making a Serious Error: \(wisbar.org\)](#).

3. Filing Complaints Against Judges

A. Hypothetical Scenario 3

- The judge holds a final pre-trial scheduling conference on the record the week before trial, with the plaintiff, defendant, and their respective counsel present.
- The plaintiff's attorney requests a three-month adjournment due to the imminent birth of a child.
- The defendant's attorney objects to the adjournment without providing a reason for the objection.
- The judge inquires whether the plaintiff's attorney, who is male, will be giving birth to the child, and the attorney responds in the negative.
- The judge rules that there will be no adjournment of the trial. On the record, the judge states that if the plaintiff wishes to change counsel to someone who is not hesitant to work when their partner is giving birth or recently had a child, the judge can provide several recommendations of attorneys the judge worked with back in the day.
- The hearing adjourns, and the plaintiff asks their attorney whether they must file a complaint about the judge, as the client is worried about how the judge will respond to the complaint during the trial.

B. Discussion

- SCR 60.04 A judge shall perform the duties of judicial office impartially and diligently. (1) In the performance of the duties under this section, the following apply to adjudicative responsibilities:
 - (e) A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and may not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.
- SCR 20:8.3 Reporting professional misconduct
 - (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.
- SCR 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 that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

- SCR 20:1.6 protects information that is known to others or may be available from public sources.

4. Civility in Communications

A. Hypothetical Scenario 4

- A defense attorney in a municipal court case presents evidence to the municipal judge, alleging that the city attorney's office is engaged in a pattern of excessive enforcement of building code violations against his client at multiple property sites. The defense attorney points out that similar properties owned by others, in similar conditions, have not received any citations.
- Furthermore, the defense attorney suggests, without providing proof, that the city attorney is attempting to run their client out of town because their business is based in Russia.
- In response, the city attorney denies the existence of any conspiracy and sarcastically remarks that any bias towards Russia has long ceased to exist in their office after the Cold War ended. The city attorney adds that the defense counsel would be aware of this if they had attended a law school in the United States.

B. Discussion

- SCR 62.02 – Standards provides that attorneys must, at all times, do the following:

Maintain a cordial and respectful demeanor;

Be guided by a fundamental sense of integrity and fair play in all professional activities;

Be civil in dealings with one another and with the public;

Conduct all court and court-related proceedings, whether written or oral, including discovery proceedings, with civility and respect for each of the participants;

Abstain from making disparaging, demeaning, or sarcastic remarks or comments about one another; and

Abstain from any conduct that might be characterized as uncivil, abrasive, abusive, hostile, or obstructive.

- A lawyer from Virginia was reprimanded for engaging in sarcastic behavior during a deposition. The lawyer admitted to referring to the case against his client as “crap” and calling the opposing lawyer’s position “nonsense” and “bologna.”
- In Wisconsin, chapter 62 of the Wisconsin Supreme Court Rules (Standards of Courtesy and Decorum for the Courts of Wisconsin) addresses behavior in the courtroom and provides a means for judges to address inappropriate or uncivil conduct of lawyers practicing before the court.
- Claims of conduct that violate these standards are not investigated by the Office of Lawyer Regulation and instead are handled on a case-by-case basis, with the presiding judge exercising authority over the type of discipline that should be assessed against a lawyer.
- Source: [Wisconsin Lawyer: Ethics Watch Your Words While Litigating: \(wisbar.org\)](http://wisbar.org).

5. Security of Communications

A. Hypothetical Scenario 5

- Client 5 contacts a law firm to inquire about the law firm's data security practices before engaging their services.
- The law firm contracts with an external IT firm that is responsible for promptly updating hardware and software systems when patches are released. Additionally, the IT firm conducts periodic email tests on staff to detect phishing attempts, performs vulnerability tests on systems and hardware, and provides annual security training to the law firm.
- Impressed by the law firm's IT security practices and reputable standing in the legal industry, the client agrees to hire them.
- However, three months after the law firm is hired, the IT firm discovers that confidential information belonging to the law firm's clients has been exposed on the dark web.
- What steps must the law firm take in response to this incident?

B. Discussion

- Lawyers are not required to guarantee that a breach of confidentiality cannot occur when using a cloud service provider, and they are not required to use only infallibly secure methods of communication. They are, however, required, to use reasonable efforts to protect information relating to the representation of their clients from unauthorized disclosure, regardless of the medium used.

- If there has been a breach of the provider’s security that affects the confidentiality or security of the client’s information, SCR 20:1.4(a)(3) and SCR 20:1.4(b) require the lawyer to inform the client of the breach.
- While beyond the scope of this opinion, other law, such as Wis. Stat. § 134.98, may also require a lawyer to inform the client of a breach.
- See [EF-15-01 Cloud Computing Amended.pdf \(wisbar.org\)](#) & [Wisconsin Lawyer: Technology Responding to a Data Breach: \(wisbar.org\)](#).

6. Duty to Withdraw

A. Hypothetical Scenario 6

- Client 6 seeks to engage a law firm to represent them in a motion to modify placement and child support. Law firm agrees to the representation but offers a reduced hourly rate due to their busy caseload, which would cause a two-week delay in filing the motion.
- Client agrees to engage the law firm and specifies that the motion must be filed no later than six weeks after signing the engagement letter.
- The client signs the engagement letter and continues to follow up with the law firm on a weekly basis. However, after six weeks passing with no motion being prepared, the client proceeds to file a grievance against the law firm. The law firm receives the grievance from the OLR right before they were about to file the motion.
- Does the filing of the grievance require the law firm to withdraw from representation?

B. Discussion

- In Wisconsin, when a grievance is filed against a lawyer, the lawyer is normally put on notice of the allegations and, when deemed necessary by the staff of the Office of Lawyer Regulation (“OLR”), the lawyer is asked for a response.
- Once the respondent is notified of the grievance, the lawyer must consider whether the allegations create a conflict between the lawyer and the client.
- Concurrent conflicts of interest are governed by Supreme Court Rule (“SCR”) 20:1.7, which states in relevant part:
 - (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

- Therefore, the lawyer must consider whether the lawyer's personal interests pose a significant risk of materially limiting the lawyer's ability to represent the client after the client has filed a grievance against the lawyer.
- The mere fact of the filing of a grievance does not in itself give rise to a conflict of interest under SCR 201.7(a)(2) that would require the lawyer to withdraw or seek the informed consent of the client under SCR 20:1.7(b) to continue the representation. However, the filing of a grievance may create tension between the client's interest and that of the lawyer that may be difficult to reconcile.
- In most cases, where the grievance does not raise a plausible claim that the lawyer violated a disciplinary rule, the lawyer may respond to OLR and if appropriate, address the client's concerns directly, while continuing the representation. If, however, the grievance sets forth credible allegations of misconduct, and the lawyer may attack the client's credibility or otherwise damage the client's interest, the lawyer has a conflict that would require withdrawal. In the opinion of the Committee, such conflicts may not normally be consented to by the client.
- Source: [EF-20-01 Responsibilities when a Grievance is filed.pdf \(wisbar.org\)](#).



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Moderator: Nadia Gonzalez

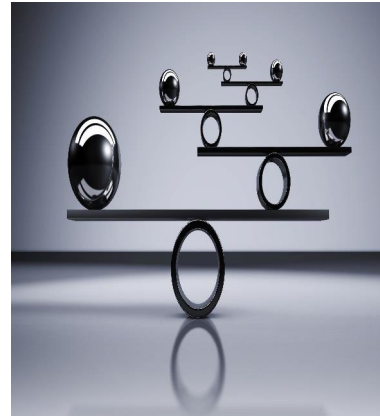
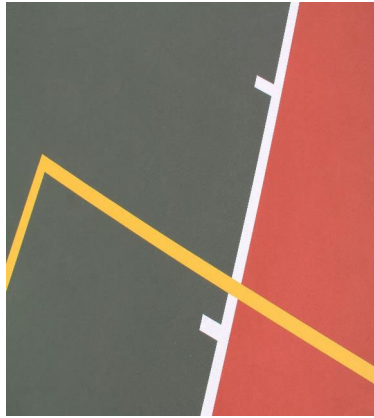
Panel: Ellen R. Atterbury, Dean R. Dietrich, May Y. Lee, & Christopher Shattuck

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Agenda

1. Setting Ethical Boundaries
2. Disclosing Rule Violations
3. Filing Complaints Against Judges
4. Civility in Communications
5. Security of Communications
6. Duty to Withdraw

2



1. Setting Ethical Boundaries

3

Hypothetical Scenario 1

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- SCR 20:1.4 Communication

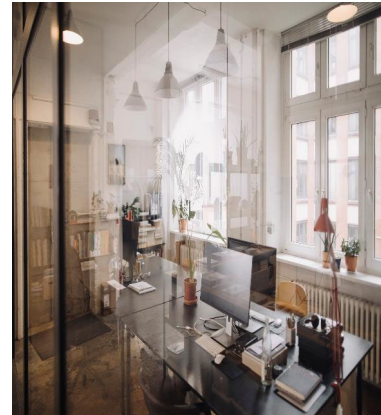
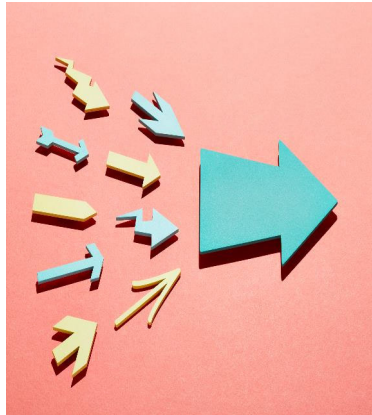
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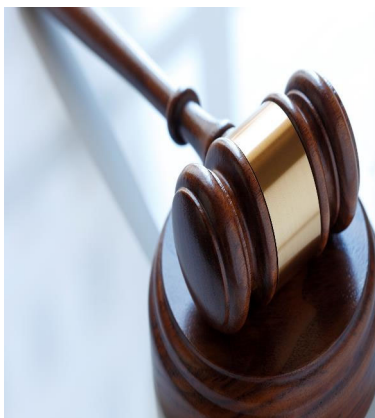
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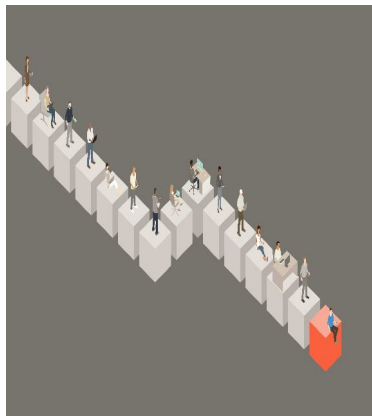
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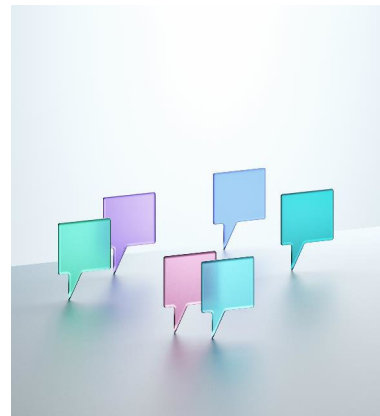
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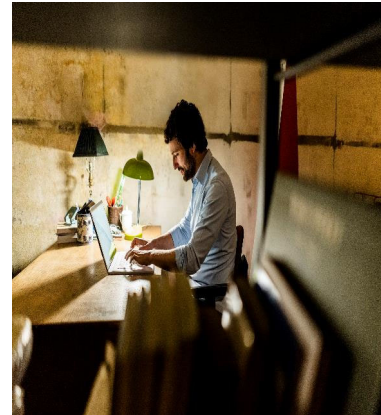
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- Does the filing of the grievance require the law firm to withdraw from representation?

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Discussion

- In Wisconsin, when a grievance is filed against a lawyer, the lawyer is normally put on notice of the allegations and, when deemed necessary by the staff of the Office of Lawyer Regulation (“OLR”), the lawyer is asked for a response.
- Once the respondent is notified of the grievance, the lawyer must consider whether the allegations create a conflict between the lawyer and the client.
- Concurrent conflicts of interest are governed by Supreme Court Rule (“SCR”) 20:1.7, which states in relevant part:
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Discussion Contd.

- Therefore, the lawyer must consider whether the lawyer’s personal interests pose a significant risk of materially limiting the lawyer’s ability to represent the client after the client has filed a grievance against the lawyer.
- The mere fact of the filing of a grievance does not in itself give rise to a conflict of interest under SCR 20:1.7(a)(2) that would require the lawyer to withdraw or seek the informed consent of the client under SCR 20:1.7(b) to continue the representation. However, the filing of a grievance may create tension between the client’s interest and that of the lawyer that may be difficult to reconcile.
- In most cases, where the grievance does not raise a plausible claim that the lawyer violated a disciplinary rule, the lawyer may respond to OLR and if appropriate, address the client’s concerns directly, while continuing the representation. If, however, the grievance sets forth credible allegations of misconduct, and the lawyer may attack the client’s credibility or otherwise damage the client’s interest, the lawyer has a conflict that would require withdrawal. In the opinion of the Committee, such conflicts may not normally be consented to by the client.
- Source: [EF-20-01 Responsibilities when a Grievance is filed.pdf \(wisbar.org\)](#).



Thank you
