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AMC 2023

Plenary

Survivor 2023:
The Law Firm Challenge

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About the Presenters...

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.

Annie Jay joined the Dane County District Attorney's Office in July 2022 as an Assistant District Attorney prosecuting serious felony cases. Ms. Jay previously worked as an Assistant Attorney General in the Wisconsin Department of Justice and as an Assistant District Attorney in the Kenosha County District Attorney's Office. In addition to prosecuting cases, Ms. Jay also trains prosecutors and law enforcement across Wisconsin. In 2021, she received an award from the International Homicide Investigators Association for her successful prosecution of a bodiless homicide in Portage County. Ms. Jay received the Lee and Lynn Copen Family Justice Award from Women and Children's Horizons in Kenosha for her work with victims of domestic violence and sexual assault. She has a Bachelor's degree in Political Science with a minor in German from the University of Delaware and received her J.D. from the University of Wisconsin Law School.

Aviva Meridian Kaiser is Ethics Counsel at the State Bar of Wisconsin. Prior to joining the State Bar in 2013, she taught at the University of Wisconsin Law School for 25 years. She taught Professional Responsibilities, Ethical and Professional Considerations in Writing, Problem Solving, and Risk Management. From 1992 until 2002, she was the Director of the Legal Research and Writing Program. Aviva received her B.A. in Chinese from the University of Pittsburgh and her J.D. from the State University of New York at Buffalo Law School. She clerked for the Honorable Louis B. Garippo in People v. John Wayne Gacy and clerked for the Honorable Maurice Perlin in the Illinois Appellate Court. She practiced law in Chicago before beginning her full-time teaching career at IIT Chicago/Kent College of Law. Aviva is a member of the State Bar of Wisconsin, a Wisconsin Law Fellow, an American Bar Foundation Fellow, and a frequent speaker on matters of professional ethics.

Emil Ovbiagele is the founder of OVB Law & Consulting, S.C. He works with closely-held businesses entrepreneurs, and individuals. Emil practices in the areas of corporate law, small business and real estate acquisitions, employment counseling/litigation, and commercial litigation. Emil obtained his B.A., MBA, and JD from Marquette University. He currently serves on the Boards of the Wisconsin State Bar-Young Lawyer Division, the Milwaukee Young Lawyers Association, and Wisconsin Voices. Emil also serves as an Adjunct Assistant Professor at Marquette University Law School. In 2017 and 2018, Emil was recognized by Super Lawyers as a "Rising Star" and was selected in 2017 by the Wisconsin Law Journal as an "Up and Coming Lawyer." Beyond the practice of law, and beyond accomplishments, as an individual, Emil is a curious being with an innate desire to push the boundaries of excellence-- personally and professionally.

David H. Perlman, Judicial Education, Madison.

Timothy J. Pierce has been Ethics Counsel for the State Bar of Wisconsin since 2004. He received his undergraduate degree from the University of Wisconsin–Madison and his law degree, *cum laude*, from the University of Wisconsin Law School. Mr. Pierce was previously a Deputy Director at the Office of Lawyer Regulation in Milwaukee and Madison. He has also been employed as the Ethics Administrator for Milbank, Hadley, Tweed & McCloy, in New York, and as an Assistant State Public Defender in Racine. He is a member of the State Bar of Wisconsin. He is a frequent speaker on matters of professional ethics and has given hundreds of CLE presentations to a wide variety of groups on professional responsibility law. He serves as reporter for the State Bar's Committee on Professional Ethics and writes the monthly "Ethical Dilemmas" column for the State Bar of Wisconsin. He has also taught Professional Responsibilities at the University of Wisconsin Law School since 2011 and currently serves as a Volunteer Subject Matter Expert for the MPRE.

Stacie H. Rosenzweig is a shareholder at Halling & Cayo, S.C., in Milwaukee. Her practice emphasizes representation of regulated professionals, including lawyers and health care professionals, facing possible disciplinary action by licensing authorities, as well as ethics and compliance counseling. Stacie graduated second in her class from Marquette University Law School and received an English degree with middle and high school teacher certification from Beloit College.

Timothy C. Samuelson is the Director of the Office of Lawyer Regulation. The Wisconsin Supreme Court appointed Samuelson to serve as OLR Director in August 2021. He was formerly the Civil Chief Assistant United States Attorney in the Western District of Wisconsin, an Assistant Attorney General with the Wisconsin Department of Justice, and a Dane County Circuit Court Judge. He graduated from Valparaiso University (B.A., 1995) and Indiana University McKinney School of Law (J.D., 1998).

Thomas J. Watson is President and CEO of Wisconsin Lawyers Mutual Insurance Company (WILMIC). He has been with WILMIC since 2005. Before becoming CEO, he served as the organization's Senior Vice President in charge of Marketing, Communications and Risk Management. Tom was Public Relations Coordinator at the State Bar of Wisconsin for almost eight years, and was in private practice before joining WILMIC. He is a 1981 Marquette University graduate with a degree in Journalism and Broadcast Communications and a 2002 graduate of Marquette University Law School.

T.R. Williams, The Health Initiative, Boston, MA.

Survivor 2023: Law Firm Challenge

The Final Tribal Council
Featuring Champions Law LLC

Champions don't become champions when they win a case.
Champions become champions in the hours, weeks, months, and years they spend preparing for it.

Challenge # 1: "No More Mr. Nice Guy"

- I am the managing partner of the plaintiff's personal injury practice at Champions Law. With assistance from our legal technology, we have been able to file more lawsuits more efficiently.
- As you may know, the insurance industry drags out the cases as long as possible because it generates billions of dollars a year on the "float." Float is the money held by insurance companies that has not yet been paid out to claimants. This means that insurance companies take the money they owe our clients and invest it in the markets instead of timely paying our clients.
- Our statistics show that the length of time between filing a suit and settlement has increased substantially. I believe that it is primarily because we are agreeing to requests for extensions. Insurance companies are asking for blanket litigation extensions that push back payments to plaintiffs.
- Our clients need their money now to put their lives back together, and they hire us to recover the money owed to them as quickly as possible so they can move on with their lives.
- After giving this much thought, I sent the following internal memo to all lawyers in our firm.

> I want to make it unequivocally clear that we will not be giving an inch to insurance companies ever again. Not one inch.
>
> Specifically, as a matter of policy we will not be agreeing to any extensions of any sort for any reason. Under no circumstances will we be agreeing to any continuances, discovery extensions, or requests to extend deadlines to answer. It

will be a serious internal offense if we find any courtesies being extended to insurance companies.

We may want to help the human being defense attorneys because we know them and maybe like them, but we will not because they work for an enemy who is heartless and ruthless.

If there are extenuating circumstances that would benefit our client only, please reach out to me for prior approval.

- Champions, however, will always comply with the Rules of Professional Conduct. I understand that there is a call for civility, but the reality is that we should not help the insurance companies profit by delaying justice for our clients. Surely, I'm not required to help opposing counsel.

Challenge # 2: "What's reputation got to do with it, got to do with it?"

- I am a senior associate at Champions Law LLC and have been there seven months. I was an associate at another firm for several years before I was recruited by Champions with a promise of partnership in a year or less.
- I have worked hard to develop a reputation for my legal knowledge and skill, and for being civil, fair, reasonable and a straight shooter, which led to my recruitment by Champions. Consequently, I was shocked when I received the memo from the managing partner last week ordering all lawyers to not agree to any continuances, discovery extensions, or any requests to extend deadlines.
- I never would have expected Champions - of all law firms - to engage in this type of behavior. I understand how competitive the personal injury practice area is, and I understand the lawyer's duty to competently and diligently represent our clients. But I also know that a lawyer does not have to press for every advantage that might be realized for the client.
- I am concerned that the mandate from the managing partner, without regard to the circumstances of each case, may violate the Rules of Professional Conduct. As a subordinate lawyer, I believe I have a responsibility to discuss my concerns with the managing partner, even though I do not want to jeopardize my job or chance of partnership.
- When I casually asked the partner who supervises most of my work, the partner told me that the managing partner "knows what's right," and that I "should not question the managing partner's orders." I do not believe that I can simply rely on the fact that I was following the orders of the managing partner and the partner who supervises my work, and simply assume that the managing partner would not violate the Rules.
- And if this isn't bad enough, just yesterday, the firm announced that it has hired a litigation attorney who is a registered professional cage fighter to promote its new marketing campaign: "Don't you deserve a Champion gladiator in your corner?" The campaign features a short video of the new lawyer, shirtless, demonstrating his aggressiveness in the cage.
- The new marketing campaign also invokes Abraham Lincoln. The campaign explains that Lincoln, who is enshrined in the National Wrestling Hall of Fame, was a successful lawyer because he was a successful wrestler.
- The campaign tells the story of one verified wrestling match, which happened shortly after Lincoln moved to New Salem, Illinois, and started working at a general store. The owner of the store bet that Lincoln, then a rough-and-tumble, sinewy frontier guy, could take on the toughest of the Clary's Grove Boys, a group of local thugs, in a wrestling match. The opponent was Jack

Armstrong, the most feared wrestler on the frontier. Nearly the whole town turned out to watch the contest. As the match went on, it got rougher and rougher. Eventually Lincoln got the best of Armstrong and pinned him. After it was over, Lincoln had earned the respect of the men.

- I believe that this new advertising campaign may violate the Rules. Not only is it demeaning to the profession, but it is also misleading.
- I am worried about damage to my reputation. I am proud of my reputation because it truly reflects my professional identity. I do not think I can behave in a way that is antithetical to my core values and professional identity. Yet, I cannot afford to lose my job, especially after only seven months. I believe that this constitutes a conflict of interest.

Challenge # 3 "R-E-S-T-R-I-C-T: Just A Little Bit"

- I am a partner at Champions Law LLC. My practice is primarily business transactions, and I have drafted many employment contracts for the businesses I represent.
- I have been asked by the managing partner to draft an employment contract that the firm will require our newly hired lawyers to sign. The employment contract is designed primarily to instruct the new hires about their obligations to the firm. It is also designed to protect our client base, particularly for our personal injury practice area.
- In the past year, two associates with several years of experience in our personal injury practice area have left Champions for other firms and have taken some fairly valuable cases with them. Another senior associate in our business transaction practice area also left and took two of our lucrative business clients. The managing partner has heard that other firms are requiring their new hires to sign employment contracts that contain provisions regarding lawyers who leave the firm and take clients with them.
- I have drafted the following specific provisions to include in the employment contract that will protect our client base yet will not violate the Rules.

> Attorney acknowledges that Champions will expend a considerable amount of time and money to assist in Attorney's education in the assigned practice areas. Additionally, Attorney acknowledges that Champions will transfer to Attorney current cases which have a significant amount of current work in process and that Champions is not prorating or penalizing Attorney's bonus program for work in process. Further, Champions will transfer to Attorney considerable technological information both substantive and operational. Finally, Attorney acknowledges that Champions has spent and will spend considerable sums of money in marketing and advertising in the assigned practice area(s). Attorney also acknowledges that under the Rules of Professional Conduct, a client is free to choose, in the event a lawyer leaves the employment of a firm, whether the client will stay with the firm, go with the departing lawyer, or retain another law firm. Attorney specifically agrees to the following should Attorney leave Champions for any reason.
>
> 1. Upon a client choosing to have Attorney represent the client in the future, the client, consistent with the engagement agreement with Champions, shall within 30 days pay to Champions any funds advanced to the client for costs incurred. Attorney agrees to sign a promissory note to protect Champions' interest in receiving reimbursement for costs advanced from any final settlement or judgment received by the client.

2. Attorney agrees to pay to Champions 70% of the fees Attorney may receive from continued representation of the client in the matter for which Champions was representing the client at the time of Attorney's departure. If this amount is greater than the amount of money that the firm could obtain as a legal fee, then the balance of the monies paid by Attorney to Champions under this provision shall be considered as compensation to Champions for the marketing, advertising, technological, and other information and knowledge provided by Champions to Attorney during employment at Champions and as consideration for the work in process provided to Attorney on the cases Attorney was assigned to at the beginning of employment.
3. In the event that Attorney and Champions cannot amicably resolve disputes over the division of legal fees, Attorney agrees to submit the dispute to binding arbitration.

- Adding these provisions regarding lawyers who leave the firm and take clients with them will provide our new hires with a better understanding of their obligations to the firm and protect our investment in the training and advertising of our new hires.

Challenge # 4 "A Lessened Utility Is A Strong Possibility When You Are Old and Gray"

- I'm the H.R. Partner here at Champions. I make sure the employment agreements are on the up-and-up, and I handle division of fees after people leave, retirement agreements, and severance if we need to.
- I'm really worried about a partner, Norman. Norman is, how do I put this nicely, getting on in years, and it's starting to show. He's still great with clients when they're on the golf course or at the city club. But his work—to the extent he's doing any—is sloppy. He still insists on reviewing associate work, but the problem is, he sometimes makes the work worse. He adds incorrect information, even misinterprets court holdings. We have to go behind his back to file things correctly.
- He's also having some trouble with personal interactions. He's started to call our receptionist "sweetheart" and he's even commented on my skirt length. It's creepy and inappropriate, and we've told him he needs to stop calling our receptionist "sweetheart," even though she does not mind. Unfortunately, he just replies that he's old-fashioned and this is the way it's always been. But it's not.
- I don't think he's mishandling money. For now. I don't want him to get to that point. He's clearly declining.
- I want to make sure I'm not overstepping, but I want to make sure that I am fulfilling my professional duties, and I don't want to embarrass Norman even as he's starting to embarrass the rest of us.
- And, let's face it, he makes a ton of money. So what do we do? How do we confront him about this? Does he need a chaperone when working with others? Do we need to report him to the OLR? So many questions and I have no answers.
- I'm considering just urging him to take emeritus status, and we'll put together a nice retirement party, his wife and his family can come, and oh we'll do a quiet retirement agreement where he gets a nice soft landing, he'll be comfortable for the rest of his life, we get to keep his name on

the door (he can keep making it rain), and we won't report him to the Office of Lawyer Regulation for any of the funny business we've seen.

- All good?

Challenge # 5: "Water Under the Bridge" or "Bridge Over Troubled Waters"

- I am a partner at Champions. While I was working on a new client matter, I remembered a similar issue in a former client's matter that a second-year associate who I supervised handled about a year ago.
- I pulled the former client's file and reviewed the notes, research, and documents. I was unpleasantly surprised to discover that the purchase agreement for the former client omitted a critical provision.
- My notes instructed the associate to include three critical provisions. Two were included, but one was not. I have tried to review the final drafts of all younger associates and mark them as approved with my initials. Again, to my unpleasant surprise, the file does not reflect that I reviewed the final draft of the purchase agreement. Had I reviewed the final draft, I am sure that I would have caught the omission.
- Unfortunately, after I negotiated the former client's purchase agreement, I caught Covid before I could draft the agreement. I was out of the office for six weeks and unable to work at all for the first two weeks. While I tried to work from home while sick, I was not well enough to keep up with all my responsibilities.
- Thankfully, the engagement agreement clearly limited the representation to the negotiation and drafting of the purchase agreement. The file also contained the closing letter.
- Hopefully, all will go well, and the omitted provision will not be needed. Even though almost a year has passed, if a certain event occurs within the next year, the omission of that provision could be catastrophic for the former client.
- I have decided not to notify the former client because I am not ethically obligated to do so and because this former client is not a regular client of the firm.

AUTHORITIES

Selected Rules of Professional Conduct and ABA Comments

SCR 20:1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

SCR 20:1.3 and ABA Comment [1]

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

ABA Comment

[1] . . . A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

SCR 20:1.4 Communication

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) reasonably consult with the client about the means by which the 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; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

SCR 20:1.7 Conflicts of interest current clients and ABA Comment [10] - [12]

(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.

ABA Comment

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning

possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

SCR 20:1.8(e) and (h)

(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**.**

(h) A lawyer shall not:

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

Wisconsin Formal Ethics Opinion EF-21-01

A lawyer commits misconduct by entering into any agreement to not report such misconduct.

***In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (Ill. 1988**)

The attorney was suspended for one year for failing to report misconduct of another attorney pursuant to a settlement agreement.

SCR 20:1.16(a)(1) and (2)

(a) Except as stated in par. (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

SCR 20:3.1(a)(3)

(a) In representing a client, a lawyer shall not:

(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.

SCR 20:3.2 ABA Comment [1]

[1] Dilatory practices bring the administration of justice into disrepute. Although 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. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct 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 other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

SCR 20:3.4(d)

A lawyer shall not:

(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;

SCR 20:3.5(d) and ABA Comment [3]

A lawyer shall not:

(d) engage in conduct intended to disrupt a tribunal.

ABA Comment

[3] The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics. The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

SCR 20:4.4(a) and ABA Comment [1]

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but

they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

SCR 20:5.1 Responsibilities of partners, managers, and supervisory lawyers and ABA Comment [5]

(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.

ABA Comment [5]

[5] Paragraph (c)(2) defines the duty of a partner or other 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 ordinarily 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 misconduct. A supervisor is required to intervene to prevent avoidable 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.

SCR 20:5.2 Responsibilities of a subordinate lawyer and ABA Comment [1]

(a) 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 supervisory lawyer's reasonable resolution of an arguable question of professional duty.

ABA Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct 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 subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or 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 20:5.6 (a)

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

North Carolina Formal Ethics Opinion 2008-8

A provision requiring the departing lawyer to sign a promissory note for the costs advanced was discussed in North Carolina Formal Ethics Opinion 2008-8 (citing North Carolina Ethics Decision 2000-6). The opinion concluded that such a provision violated Rule 5.6.

> Such a provision would have a chilling effect on the departing lawyer's willingness to continue the representation of a client. By conditioning the departing lawyer's ability to represent client on the satisfaction of client's financial obligation to former firm, the provision imposes financial penalty that will discourage continued representation of clients. However, the firm may pursue any legal claim that it has against the client and the employment agreement may require the departing lawyer to protect the firm's interest in receiving reimbursement for costs advanced from any final settlement or judgment received by the client.

Some general principles are articulated in North Carolina Formal Ethics Opinion 2008-8.

> The procedure or formula for dividing a fee must be reasonably calculated to protect the economic interests of the law firm while not restricting the right to practice law. It should fairly reflect the firm's investment of resources in the client's representation as of the time of the lawyer's departure and the investment of resources that will be required for the departing lawyer to complete the representation.

The opinion concluded that the provision did not satisfy the reasonableness standard. The provision required the departing lawyer to pay 70% of any fee received from the continued representation of a client regardless of whether the departing lawyer provided the majority of the legal representation of the client after the lawyer's departure from the firm. Because it applied a "one size fits all" formula for the allocation of the fees and failed to take into account the amount of work performed and the resources expended on the representation before and after the lawyer's departure, the provision was likely to discourage a lawyer from taking any case that requires substantial additional legal work.

Two related Wisconsin cases are distinguishable: ***Markwardt v. Zurich American Ins. Co.,* 2006 WI App 200, 296 Wis. 2d 512, 724 N.W.2d 669** and the unpublished disposition, ***Gende v. Cannon & Dunphy, S.C.,* 2007 WI App 203, 305 Wis. 2d 377, 738 N.W.2d 190**. [The *Markwardt* case involved the cases that Gende had taken with him when he left Cannon & Dunphy.] *Markwardt v. Zurich American Ins.* considered the fee allocation formula in the Separation Agreement. Under the Separation Agreement, for all but one case, Gende would keep twenty percent of the fee recovered. As to one case venued in Illinois, he was to keep twenty-five percent of the fee. The Separation Agreement allowed Gende to delay reimbursement of those costs until the particular case was concluded.

> ¶ 28 We have previously concluded that when an attorney ends employment with a law firm, the firm and the departing attorney may enter into a **separation agreement** that allocates between them the fees to be earned on contingent-fee cases which the departing attorney retains after the conclusion of employment. *Piaskoski,* 275 Wis.2d 650, ¶ 25, 686 N.W.2d 675. The law firm, and the departing attorney, do not violate public policy by contracting for a method to allocate between them fees on cases that have not been completed. *See id.,* ¶¶ 1, 5, 20. Where "both parties compromised any potential claims to more than [the agreed percentage of the specific client's] fee, providing consideration for their contract to divide the fee [as agreed]," this court has enforced a fifty percent agreed upon division between the firm and departing counsel. *Id.,* ¶ 17. An agreed percentage allocation between the original and successor counsel, which does not increase the fee due from the client, must still produce a reasonable fee, as applied to the group of cases subject to the agreement. [Emphasis added.]
>
> ¶ 31 As to the fee allocation formula contained in the Separation Agreement, Gende does not argue that his Separation Agreement with Cannon & Dunphy resulted in higher fees to the client than were set forth in the Retainer Contract. The record also confirms that each client was only charged the one-third contingency fee. Nor does Gende argue that the one-third contingency fee is unreasonable.[12] As noted above, the undisputed facts demonstrate the differences among the cases in the time between the beginning of the action and settlement of each case. (*See* discussion, *supra,* ¶¶ 19–23.) The undisputed facts also demonstrate the differences in the time during which work was done by Cannon & Dunphy and work was done individually by Gende. (*See id.*) By entering into the Separation Agreement, Cannon & Dunphy and Gende, as original counsel and successor counsel, respectively, sought to save the time and expense that would be required to litigate the exact division of each fee at the conclusion of each case. This savings was consideration for each party agreeing to a set percentage allocation to be applied to all cases. We find nothing inherently unreasonable in such an agreement.

Neither *Markwardt n*or *Gende* even mentioned SCR 20:5.6. In *Markwardt,* Gende argued that Cannon & Dunphy's liens established in the Retainer Contracts with the clients were invalid because both the Employment Agreement and the Separation Agreement were contrary to public policy and therefore unenforceable. Gende argued, without any authority, that the Employment Agreement violated public policy because the terms of his employment were not disclosed to the clients. The court of appeals concluded:

> We fail to see any logical reason why, generally, an associate attorney's employment contract with his or her employer should, as a matter of professional

responsibility, be disclosed to a client of the firm. Nor do we see how that assertion is relevant to the attorney lien established in the Retainer Contract. Accordingly, on the facts of this case, we reject this argument.

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.

South Carolina Bar Ethics Advisory Opinion No. 11-05, Decision, 2011 ILRC 2347

> While the "effectiveness and taste in advertising are matters of speculation and subjective judgment," Rule 7.1 expressly provides that an attorney must ensure that the communication does not contain any false, misleading, deceptive or unfair information about the lawyer or her services.

Attorney Grievance Commission v. Ficker, 572 A.2d 501, 507 (Md. 1990)

> We agree with the court that Ficker's ads were tasteless. "Bad taste," however, is not a synonym for "misleading," nor does "crassness" necessarily equate with "false advertising."

Utah Ethics Opinion 01-07 (8/29/01) (reaffirmed by Opinion 22-02) Summarized Document

> A lawyer may use a trade name such as "Legal Center for the Wrongfully Accused" in court pleadings if it is used uniformly for all alleged unlawful-conduct cases, and not just selected clients. Similarly, a lawyer may use the trade name "Legal Center for Victims of Domestic Violence" if it is used uniformly for all matters relating to domestic violence. Questions of taste are no longer within the purview of the ethics rules on lawyer advertising. Rules 7.1, 7.2, 7.5; *DR 2-102(A)*; ABA Model Rule 7.1.

SCR 20:7.2 ABA Comment [3]

> [3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

SCR 20:8.3(a) and (c)

(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.

(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 20:8.4(c)

It is professional misconduct for a lawyer to: **"**(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"

SCR 20:8.4(g)

It is professional misconduct for a lawyer to: "(g) violate the attorney's oath."

SCR 40.15 Attorney's Oath

The oath or affirmation to be taken to qualify for admission to the practice of law shall be in substantially the following form:

I will support the constitution of the United States and the constitution of the state of Wisconsin;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;

I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God. [Emphasis added.]

SCR 20:8.4(i)

It is professional misconduct for a lawyer to

(i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).

Disciplinary Proceedings Against Kratz, 2014 WI 31 (sending deliberate, unwelcome, and unsolicited sexually suggestive text messages to a domestic abuse crime victim while prosecuting the perpetrator; making sexually explicit statements to a county social worker and witness in a case while acting in the capacity of district attorney);

Disciplinary Proceedings Against Isaacson, 2015 WI 33 (making religious slurs directed against judges, counsel, appointed officers and third parties in a series of documents the lawyer created or signed that were filed in cases before various federal courts).

Unlike the Model Rule 8.4, Wisconsin's SCR 20:8.4 does not prohibit "conduct that is prejudicial to the administration of justice."

Chapter 62 Standards of Courtesy and Decorum for the Courts of Wisconsin

SCR 62.01 Scope.

The uniform standards of courtroom courtesy and decorum in SCR 62.02, adopted to enhance the administration of justice by promoting good manners and civility among all who participate in the administration of justice in Wisconsin, are applicable to judges, court commissioners, lawyers, court personnel and the public in all Wisconsin courts. **Notwithstanding SCR 20:8.4 (f), the standards under SCR 62.02 are not enforceable by the office of lawyer regulation.** [Emphasis added.]

SCR 62.02 Standards.

(1) Judges, court commissioners, lawyers, clerks and court personnel shall at all times do all of the following:

(a) Maintain a cordial and respectful demeanor and be guided by a fundamental sense of integrity and fair play in all their professional activities. [Emphasis added.]

(b) Be civil in their dealings with one another and with the public and conduct all court and court-related proceedings, whether written or oral, including discovery proceedings, with civility and respect for each of the participants.

(c) Abstain from making disparaging, demeaning or sarcastic remarks or comments about one another.

(d) Abstain from any conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive.

(e) While in court or while participating in legal proceedings, dress in a manner showing proper respect for the court, the proceedings and the law. Judges shall wear black robes while presiding on the bench except when exceptional circumstances exist.

(f) Advise clients, witnesses, jurors and others appearing in court that proper conduct and attire is expected within the courthouse and, where possible, prevent clients, witnesses or others from creating disorder or disruption.

(g) In scheduling all hearings, meetings and conferences, be considerate of the time schedules of the participants and **grant reasonable extensions of time when they will not adversely affect the court calendar or clients' interests.** [Emphasis added.]

(h) Conduct themselves in a manner which demonstrates sensitivity to the necessity of preserving decorum and the integrity of the judicial process.

(2) Judges, court commissioners and lawyers shall be punctual in convening and appearing for all hearings, meetings and conferences and, if delayed, shall notify other participants, if possible.

(3) Lawyers shall do all of the following:

(a) Make all reasonable efforts to reach informal agreement on preliminary and procedural matters. [Emphasis added.]
(b) Attempt expeditiously to reconcile differences through negotiation, without needless expense and waste of time. [Emphasis added.]
(c) Abstain from pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay.
(d) If an adversary is entitled to assistance, information or documents, provide them to the adversary without unnecessary formalities.
(e) Abstain from knowingly deceiving or misleading another lawyer or the court.
(f) Clearly identify for the court and other counsel changes that he or she has made in documents submitted to him or her by counsel or by the court.
(g) Act in good faith and honor promises and commitments to other lawyers and to the court. [Emphasis added.]

ABA Formal Opinions (Summarized)

ABA Formal Opinion 03-429 Obligations with Respect to Mentally Impaired Lawyer in the Firm (Summarized)

This opinion addresses three sets of obligations arising under the Model Rules of Professional Conduct with respect to mentally impaired lawyers. First, it considers the obligations of partners in a law firm or a lawyer supervising another lawyer to take steps designed to prevent lawyers in the firm who may be impaired from violating the Rules. Second, it addresses the duty of a lawyer who knows that another lawyer in the same firm has, due to mental impairment, failed to represent a client in the manner required by the Model Rules to inform the appropriate professional authority or to communicate knowledge of such violation to clients or prospective clients of the impaired lawyer. Third, it considers the obligations of lawyers in the firm when an impaired lawyer leaves the firm.

1. **Obligations to Adopt Measures to Prevent Impaired Lawyers in the Firm from Violating the Rules**
   a. SCR 20:5.1(a) requires that all partners in the firm and lawyers with comparable managerial authority make "reasonable efforts" to establish internal policies and procedures designed to provide "reasonable assurance" that all lawyers in the firm, not just lawyers known to be impaired, comply with the Rules.
   b. In addition to the requirement that the firm establish appropriate preventive policies and procedures, SCR 20:5.1(b) requires a lawyer having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the supervised lawyer complies with the Rules. When a supervising lawyer knows that a supervised lawyer is impaired, close scrutiny is warranted because of the risk that the impairment will result in violations.
   c. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.
   d. Some impairments may be accommodated. Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by

the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm.

2. Obligations When an Impaired Lawyer in the Firm has Violated the Rules

a. The partners in the firm or supervising lawyer may have an obligation under Rule 8.3(a) to report violations of the ethics rules by an impaired lawyer to the appropriate professional authority.

b. SCR 20:8.3(a) states:

> (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.

c. ABA Comment [3] provides guidance:

> [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

d. Only violations of the Rules that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported. If the mental condition that caused the violation has ended, no report is required.

> Thus, if partners in the firm and the supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report. "**Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Rules through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation."** [Emphasis added.]

e. **"**Thus, if the firm reasonably believes that it has succeeded in preventing the lawyer's impairment from causing a violation of a duty to the client by supplying the necessary support and supervision, there would be no duty to report under Rule 8.3(a)."

f. "If, on the other hand, a lawyer's mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Rules and he, nevertheless, continues to practice, partners in the firm or the supervising lawyer must report that violation."

g. If the matter in which the impaired lawyer violated his duty to act competently or with reasonable diligence and promptness still is pending, the firm may not simply remove the impaired lawyer and select a new lawyer to handle the matter. "**Under Rule 1.4(b), there may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility. In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer."** [Emphasis added.]

h. SCR 20:5.1(c) states:

> (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.

g. Consequently, even if the matter in which the impaired lawyer violated the Rules no longer is pending, partners and lawyers in the firm with comparable managerial authority and lawyers with direct supervisory authority over the impaired lawyer may have obligations to mitigate any adverse consequences of the violation.

3. Obligations When an Impaired Lawyer No Longer is in the Firm

a. The responsibility of the firm to the client does not end with the resignation from the firm, or the firm's termination of, the impaired lawyer. If the impaired lawyer resigns or is removed from the firm, clients of the firm may be faced with the decision whether to continue to use the firm or shift their relationship to the departed lawyer.

b. SCR 20:1.4 requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel.

c. "The firm has no obligation under the Model Rules to inform former clients who already have shifted their relationship to the departed lawyer that the firm believes the departed lawyer is impaired and consequently is unable to personally handle their matters competently."

However, the firm should avoid any communication with former clients who have transferred their representation to the departed lawyer that can be interpreted as an endorsement of the ability of the departed lawyer to handle the matter. **For example, a joint letter from the firm and the departed lawyer regarding the transition could be seen as an implicit endorsement by the firm of the departed lawyer's competence.** [Emphasis added.]

d. The firm must consider whether it has an obligation to report the impaired lawyer's condition to the appropriate disciplinary authority.

No obligation to report exists under Rule 8.3(a) if the impairment has not resulted in a violation of the Rules. Thus, if the firm reasonably believes that it has succeeded in preventing the lawyer's impairment from causing a violation of a duty to the client by supplying the necessary support and supervision, there would be no duty to report under Rule 8.3(a). Emphasis added.]

e. If the partners in the firm comply with SCR 20:8.3(c), they may voluntarily report to the appropriate authority its concern that the withdrawing lawyer will not be able to function without the ongoing supervision and support the firm has been providing. Under SCR 20:8.3(c), if the information revealing misconduct is information relating to the representation of the client, the lawyer must consult with the client and abide by the client's wishes to the extent required by SCR 20:1.6.

ABA Formal Opinion 481 (2018) A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error (Summarized)

1. **The duty of communication under SCR 20:1.4 does not apply to former clients.**
   SCR 20:1.4(a)(1)-(5) and (b) expressly refer to "the client." Nowhere does SCR 20: 1.4 impose on lawyers a duty to communicate with former clients. The ABA Comment to SCR 20:1.4 focuses on current clients and is silent with respect to communications with former clients. Had the drafters of the Rule intended it to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the Comments to the Rule.
2. **SCR 20:1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation**.
   An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. However, no similar obligation exists under Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation. ABA Formal Opinion 418.
3. **When a Material Error Relates to a Former Client**
   ABA Formal Opinion 481 states:

   > If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.