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**E-94-1      Duty to advise court of adverse authority**

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**Question**

When does a lawyer's duty to inform the court of adverse authority from the controlling jurisdiction terminate?

**Opinion**

Under SCR 20:3.3(a)(3), “[a] lawyer shall not knowingly . . . 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.” As noted in the comment to the rule, the purpose of the requirement is to permit a discussion of the legal premises properly applicable to the case.

Unlike its Model Rule counterpart, SCR 20:3.3 does not provide that duties arising under the rule terminate at the conclusion of the proceeding. (See committee comment to SCR 20:3.3.) MR 3.3(a) and SCR 20:3.3(a) impose a number of duties in addition to the duty to inform the court of adverse legal authority. The rules generally prohibit a lawyer's participation or acquiescence in fraud on a tribunal, including, for example, offering perjurious testimony. If a lawyer later learns that material evidence previously offered is false, a duty to take reasonable remedial measures arises under both rules.

Although the language of SCR 20:3.3 provides no specific guidance, the committee believes that the duty to disclose adverse legal authority under SCR 20:3.3(a)(3) continues until such time as the disclosure of the adverse authority would no longer be useful to the tribunal. The purpose of the rule is to prevent or, in some cases, correct legal errors by the tribunal. When there is no further opportunity to achieve a legally well-informed decision in the matter, the disclosure requirement of SCR 20:3.3(a)(3) serves no practical purpose and should be given no further effect. Among the factors to be considered in determining whether the duty is a continuing one are whether an appeal has been taken and whether relief from a court's judgment or order is available under section 806.07 of the Wisconsin Statutes. As long as a decision can be reached in the matter applying controlling legal authorities, the duty to disclose those controlling authorities applies.

This approach is consistent with the duty imposed by SCR 20:3.3(a)(4) to take reasonable remedial measures when a lawyer later learns that material evidence previously offered is false. If disclosure of adverse legal authority cannot possibly have any “remedial” effect, no duty would seem to arise. If some remedial purpose may be served, the duty to disclose applies.