

# Wisconsin Formal Ethics Opinion EF-17-02: Duty of Confidentiality; Identities of Current and Former Clients.

*April 4, 2017*

## **Synopsis**

*The ethical duty of confidentiality protects all information relating to the representation of the client, whatever its source, including the identity of the client. SCR 20:1.6 prohibits the disclosure of a client's identity unless the client gives informed consent to the disclosure, the disclosure is impliedly authorized in order to carry out representation, or the disclosure falls within certain stated exceptions. Whether a client's identity is protected by the lawyer-client privilege under Wis. Stat. § 905.03 is beyond the scope of this opinion.*

*Ethics Opinion E-93-5 is withdrawn.*

## **Introduction**

Lawyers may wish to disclose information about the clients they represent, including the identity of current or former clients, for a variety of reasons not related to the representation of those clients, such as listing representative clients in marketing materials or providing client references to prospective clients. This opinion discusses whether client identity is protected by Supreme Court Rule ("SCR") 20:1.6 and also discusses the scope of information protected by SCR 20:1.6.

## **Opinion**

The lawyer's professional duty to protect the confidentiality of information relating to the representation of clients is governed by SCR 20:1.6. The Rule states, in relevant part:

### 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.

(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 interests 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, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a court order; or

(6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

The Rule contains a general prohibition on disclosing information relating to the representation of clients, then sets forth one mandatory disclosure provision and several circumstances in which disclosure is permissive. In the course of representing clients, lawyers disclose information in ways that are reasonably necessary to achieve the lawful objectives of the clients, such as negotiating with adversaries, arguing the case in court or representing the client's interests before governmental agencies. Such disclosures are "impliedly authorized" under SCR 20:1.6(a) and do not violate the Rule. The mandatory and permissive disclosure provisions of SCR 20:1.6(b) and (c) also permit disclosure when applicable.

This opinion, however, will focus on whether client identity (and other information relating to the representation of current or former clients) is protected when a lawyer wishes to disclose client identity for the lawyer's own purposes when disclosure is not necessary to further the client's objectives. One example of such a situation is the listing of representative clients in marketing materials.

#### **Information relating to the representation of a client**

SCR 20:1.6 is noteworthy in that it does not categorize information as "confidential" and "non-confidential" information – it simply prohibits lawyers from revealing information relating to the representation of a client. It is therefore necessary to determine the scope of "information relating to the representation of a client" and whether client identity falls within this category.

While the Rule itself does not define "information relating to the representation of a client, Comment [3] states, "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Thus, information received from third parties, learned from opposing parties or gathered from other sources is protected provide that the information relates to the representation of the client. This extremely broad definition, coupled with the term "confidential," can lead to confusion as to the scope of the rule. The next sections of the opinion discusses some common questions about the scope of information protected by SCR 20:1.6.

#### **What if the lawyer believes that the identity of a client is not protected by the lawyer-client privilege?**

Lawyers sometimes misunderstand the duty to protect information because they confuse the duty of confidentiality with the lawyer-client privilege. It is important to understand the distinction between the evidentiary rule of lawyer-client privilege and the ethical duty of confidentiality

ABA Comment [3] to SCR 20:1.6 notes the differences between these bodies of law:

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The

confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Being a rule of evidence, not ethics, lawyer-client privilege only applies in proceedings in which the rules of evidence govern and only determines whether certain types of evidence may be admitted or compelled in such proceedings. Lawyer-client privilege does not therefore guide lawyers in determining what information about a client that a lawyer may voluntarily reveal. SCR 20:1.6, which governs a lawyer's duty of confidentiality, applies in all other situations, and governs what information relating to the representation of clients lawyers may voluntarily reveal.

Much information relating to the representation of a client is not covered by the lawyer-client privilege, but nonetheless is protected by SCR 20:1.6. This means that when considering "information related to the representation of a client," the privileged or non-privileged nature of the information is not determinative of whether the information is protected by the duty of confidentiality.

#### **What if the identity of the client has already been disclosed in public?**

In Formal Ethics Op. 04-430 (2004), the ABA's ethics committee noted the scope of confidentiality in analyzing a lawyer's duty to a report a lawyer not engaged in the practice of law:

We also note that Rule 1.6 is not limited to communications protected by the attorney-client privilege or work-product doctrine. Rather, it applies to all information, whatever its source, relating to the representation. Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.

(Footnotes omitted)

ABA Formal Ethics Op. 04-430 makes the point that even information that may be available from public sources remains protected as long as it is information relating to the representation of a client.

Wisconsin case law has also addressed this issue.<sup>1</sup> In one disciplinary case, the Respondent lawyer was charged with violating his duty of confidentiality by revealing information relating to the representation of a former client. The Respondent argued that he was free to reveal that information because it had previously been placed in the public record in a different case. The Wisconsin Supreme Court rejected this argument, holding as follows:

We agree with Referee Jenkins' interpretation of this rule and her conclusion that the information obtained by Attorney Harman from his client, S.W., even if not protected or deemed confidential because it had previously been filed in the Wood County case, could not be disclosed without S.W.'s permission because that information was obtained as a result of the lawyer-client relationship he had with S.W.

Thus the Wisconsin Supreme Court has recognized that whether information has been previously publicly disclosed does not prevent the information from being protected by the Rule. If the publicly disclosed (or available) information relates to the representation of a client, it is protected by SCR 20:1.6.<sup>2</sup> Similarly,

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<sup>1</sup>*Disciplinary Proceedings against Harman*, 244 Wis.2d 438, 628 N.W.2d 351 (2001)

<sup>2</sup> Other jurisdictions have also recognized that the protections of the confidentiality rule extends to publicly available information. See, e.g., *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995); *Iowa Supreme Court Attorney Disciplinary Bd.*

information remains protected even if known by others or available from other sources. This also illustrates another important distinction between privilege and confidentiality – disclosure does not constitute waiver of confidentiality. Generally when the privilege is waived, it is waived forever and for all purposes, but when information protected by SCR 20:1.6 is disclosed for a permitted purpose, the information does not lose its protected status.<sup>3</sup>

#### **What if the lawyer wishes to disclose the identity of a prospective or former, rather than current, client?**

The protections of SCR 20:1.6 may also arise outside the temporal confines of a lawyer-client relationship. SCR 20:1.18 sets forth the duties owed by lawyers to prospective clients. SCR 20:1.18(b) states:

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

Thus the Rules specifically apply the same duty of confidentiality owed to former clients to prospective clients even when no lawyer-client relationship ensues. Needless to say, this Rule also protects information learned in discussions with prospective clients when a lawyer-client relationship does ensue. Similarly, a lawyer may learn information from a former client that relates to the representation of that client, such as when a former client calls to ask the lawyer questions about the matter and provides the lawyer with additional information. The determinative factor is whether the information relates to the representation of a client.

The protections of the Rule do not end at the end of the representation of the client.<sup>4</sup> SCR 20:1.9(c)(2) states:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:  
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The duty of confidentiality continues beyond the death of the client.<sup>5</sup>

#### **What if the client has not specifically requested that their identity not be disclosed?**

The Rule also operates automatically and protects information even if the client has not requested that the information be held in confidence or does not consider it confidential.<sup>6</sup> There is no requirement in the language of either the Rule or Comment of SCR 20:1.6 requiring that the client request information be kept confidential in order to trigger the protections of the Rule. Thus, in order to disclose information relating to the representation of a client, it is the obligation of the lawyer to obtain the client's informed consent or determine that the information falls within one of the stated exceptions.

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*v. Marzen*, 779 N.W.2d 757 (Iowa 2010); *In re Bryan*, 61 P.3d 641, (Kan. 2003); *Akron Bar Ass'n v. Holder*, 810 N.E.2d 426, (Ohio 2004).

<sup>3</sup> See e.g. *Newman v. Maryland*, 863 A.2d 321 (Md. 2004).

<sup>4</sup> See SCR 20:1.6 Comment [18]. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2)

<sup>5</sup> See Wisconsin Ethics Op. E-89-11.

<sup>6</sup> See Nevada Ethics Op. 41 (2009)

### **What if the disclosure of the client’s identity would be harmless?**

Also, whether a lawyer believes that a disclosure would be “harmless” is not relevant to the analysis of whether such a disclosure would be permissible. This is demonstrated by the way the duty under SCR 20:1.6 differs from its predecessor, DR 4-101, which prohibited the lawyer from disclosing “confidential” or “secret” information. Confidential information previously was defined as information protected by the lawyer-client privilege and secrets were defined as information which may be detrimental or embarrassing to the client or which the client has requested be held in confidence. Unlike DR 4-101, SCR 20:1.6 is not limited to information communicated in confidence by the client and does not require the client to indicate what information is protected. Moreover, unlike DR 4-101, SCR 20:1.6 does not permit the lawyer to speculate whether particular information might be embarrassing or prejudicial if disclosed. As long as the information relates to the representation, it is protected by the duty of confidentiality.

### **Relevant Rules**

Of particular relevance to this question is the recently adopted SCR 20:1.6(c)(6), which states:

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

(6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

The Wisconsin Committee Comment provides guidance:

Paragraph (c)(6) differs from its counterpart, Model Rule 1.6(b)(7). Unlike its counterpart, paragraph (c)(6) is not limited to detecting and resolving conflicts arising from the lawyer’s change in employment or from changes in the composition or ownership of a firm. Paragraph (c)(6), like its counterpart, recognizes that in certain circumstances, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest. ABA Comment [13] provides 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, any such disclosure should ordinarily include no more than the identity of the clients or former clients.* The disclosure of any information, to either lawyers in different firms or to other clients or former clients, is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client. ABA Comment [13] provides examples of when the disclosure of any information would prejudice the client. Lawyers should err on the side of protecting confidentiality.

(Emphasis added)

The fact that a provision allowing permissive disclosure in certain circumstances is necessary to permit lawyers to disclose identities of current or former clients clearly demonstrates that client identities are protected.

Paragraph [2] of the ABA Comment to SCR 20:7.2, the advertising rule, also recognizes that client identity is protected by the duty of confidentiality.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references *and, with their consent,*

*names of clients regularly represented*; and other information that might invite the attention of those seeking legal assistance.

(Emphasis added)

The Committee has long recognized this fact, opining in Wisconsin Ethics Opinion E-90-03 that client identity and information concerning fees are protected by SCR 20:1.6(a). This position is also consistent with opinions from other jurisdictions.<sup>7</sup>

### **Conclusion**

The ethical duty of confidentiality under SCR 20:1.6 is thus extremely broad: it protects all information relating to the representation of the client, whatever its source. It protects information irrespective of whether that information is privileged, or if the lawyer believes that disclosure would be “harmless.” It protects information that is known to others or may be available from public sources. This duty of confidentiality extends to information relating to the representation of former clients as well by virtue of SCR 20:1.9(c)(2), which prohibits lawyers from revealing information relating to the representation of former clients except as permitted or required by the Rules. Thus, information relating to the representation of former clients is protected to the same extent as that relating to current clients.

It is hard to imagine information more closely relating to the representation of a client than the identity of the client. Therefore, a client’s identity, as well as a former client’s identity, is information protected by SCR 20:1.6 and the disclosure of a client’s identity is prohibited unless the client gives informed consent to the disclosure, the disclosure is impliedly authorized in order to carry out representation, or the disclosure falls within certain stated exceptions. Lawyers must be mindful of the duty of confidentiality owed to current and former clients when considering the use of such information for purposes such as marketing, authoring articles, or presentations.

The State Bar’s Standing Committee of Professional Ethics (the “Committee”) previously addressed revealing the identity of current and former clients in Wisconsin Ethics Opinion E-93-5. That opinion, which incorrectly states that client identity is not considered to be information relating to the representation of that client, is withdrawn.

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<sup>7</sup> Ellen J. Bennett, Elizabeth J. Cohen, Martin Whittaker, Annotated Model Rules of Professional Conduct 98 (7th ed. ABA Center for Professional Responsibility); Ill. Ethics Op. 12-03 (2012) (client's identity is protected information that may not be disclosed to members of reciprocal referral business networking group without client's informed consent); New York State Ethics Op. 907 (2012) (lawyer may not disclose client's identity when making anonymous charitable donation on client's behalf); Nevada Ethics Op. No. 41 (2009) (lawyer may not reveal information relating to the representation of the client even if the information is generally known and not to the disadvantage of the client); Ill. Ethics Op. 97-1 (1977); Iowa Ethics Op. 97-4 (1977). A former client’s identity is also protected under SCR 20:1.6 because SCR 20:1.9(c)(2) prohibits a lawyer from disclosing information except as the rules would permit with respect to a client.