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WSSFC Quality of Life/Ethics Track
Session 3

Dealing with Difficult People: 5 Fact Scenarios/Hypotheticals – Part 2

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Dealing with Difficult People
2014 Wisconsin Solo and Small Firm Conference

Hypotheticals

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For each of the hypotheticals, consider the following questions:

- What problematic personality types are presented by the client?
- What strategies can be used to manage these problematic personality types?
- What ethical issues are raised?

Hypothetical 1

Business Client is a long-standing client, and you have represented him many times before. He has hired you now to represent him in a dispute. Client has stopped paying a building contractor and owes a significant amount on the contract. Contractor has attempted to meet Client's increasingly unreasonable expectations. Contractor is contemplating a suit to collect for work performed. Client admits that the contractor has performed substantially and is owed money; the issue is whether there should be any discounts for what your client claims is shoddy workmanship (which is questionable), a failure to complete on time, and other issues.

You have scheduled a four way meeting with the opposing attorney and the Contractor. Prior to your meeting, Client tells you that he cannot stand the opposing attorney. He tells you several anecdotes that indicate his hatred for the other attorney is based on politics and personal views, and not based on anything to do with the case. When you originally discussed the case with Client, he wanted to settle the case with the Contractor, and was willing to reach a reasonable settlement to avoid court. Now that he knows this attorney is representing the Contractor, he does not want to negotiate at all. He is angry that the Contractor would even hire this attorney, and he wants you to drag this dispute out as long as possible, even proceeding to lawsuit and ultimately trial. Your fees are not a deterrent: he insists that he "is not going to give in" to this "jerk attorney" and is willing to pay whatever it takes to make this as difficult as possible.

Hypothetical 2

Part 1

At the initial client meeting, Joe and Jane Smith, husband and wife, consulted with you about bankruptcy. They had previously filed for Chapter 13 bankruptcy, which was dismissed nine months prior to this initial meeting because they failed to make scheduled payments. They had originally filed for Chapter 13 bankruptcy because Joe had previously owned a construction business. They have $50,000 of non-dischargeable income tax debt. Joe now works for a road construction company, and between their two incomes, they do not pass the "means test" for Chapter 7 bankruptcy.

They claim that their previous attorney filed an amended plan that they did not sign. This amended plan increased their payments to a point that they could not afford. The payment increase also coincided with Joe's eight-week winter layoff. They claim that they can afford reasonable plan payments now because Joe's work has picked up. The Smiths regret hiring their previous attorney because several people have since told them that he is not very good. You have been highly recommended, and they know you will be able to help them.

Part 2

The Smiths are ready and willing to pay your regular up-front fee. You are looking forward to this representation because it will be a simple process to update the previously filed petition and schedules. You execute the fee agreement, provide them with the documents to review and update. You wait for the client to return the updated documents.

Two weeks pass and you are contacted on a Friday afternoon. Jane is in tears. They "forgot" to tell you that prior to the previous Chapter 13 filing, their house had been in foreclosure. A friend was looking online and saw that a sheriff's sale for their home was scheduled for Monday morning at 10:00 a.m. The Smiths will "do anything" to save their home from foreclosure. Against your better judgment, you prepare and file an "emergency" Chapter 13 bankruptcy for the Smiths.

You have two weeks to file their new bankruptcy schedules, and you still do not have the updated information from the Smiths. You have repeatedly contacted them for the updated information. The Smiths provide excuses why they cannot provide the information. Finally, with less than 48 hours prior to the deadline, the Smiths drop off a bankers box of documents. Because of the pending deadline you and the staff immediately begin reviewing the documents. You stay late at work and miss your child's football game because you know that these schedules need to be filed.

Part 3

In reviewing the updated schedules, you notice that the parties have a 1957 Chevrolet automobile that was not listed on their original schedules. While you are getting the documents together, you realize that you do not have a current tax bill. You run a search on the County Treasurer's website and find out that Jane is a co-owner of another piece of property in addition to their homestead. You leave several messages for Jane, and she finally returns your call. She tells you that she "forgot" that after their previous bankruptcy was dismissed, her father

died. She inherited a pristine 1957 Chevy, which she and her father had restored when she was a teenager. It is "worth a lot" and has so much sentimental value to her, that she could never imagine selling it.

Also, after her father died, Jane's mother added Jane and her brother as joint tenants on her mother's homestead so that if something happened to her mother, they could avoid probate. Jane thinks it is not a big deal because she and her husband don't live there, and Jane and her brother will not get the property unless her mother dies. She believes that she does not really own the property. You know that you cannot exempt the 1957 Chevy or Jane's 1/3 share of her mother's homestead. Jane is fairly sure that her mother owns the property free and clear.

Part 4

Jane also tells you that because of all of the financial issues that Joe and she are facing, their marriage is under tremendous strain. She would prefer that you not discuss any issues about her mother's homestead with Joe because he does not even know that her mom put Jane's name on the property and she wants it to stays that way.

Hypothetical 3

Part 1

Lawyer is an experienced family law attorney. He sent out a checklist to his new client William, who was just served with summons and petition. During the initial meeting, Lawyer learned that William and his wife, Susie, were married 27 years with three grown children. William is an early retiree from Oshkosh Truck receiving $1,800 a month from his pension and $1,700 month social security subsidy. Susie has been a teacher's aide for 30 years earning $15,000 per year. They each have credit cards with over $30,000 in unsecured debt. The parties continue to reside together because they cannot afford separate residences right now, and there is significant tension.

Lawyer asked William about the current living situation. William said that Susie has marked all the food in the refrigerator and that "she is eating gourmet meals from the local food pantry while I eat franks and beans because I pay for everything." Lawyer was taking notes. Without looking up he calmly said, "You shouldn't have to pay for everything. She is earning some money as well."

Part 2

When Lawyer discussing the equal division presumption and how it applies to the Oshkosh Truck retirement, William became agitated. Lawyer saw that William was distressed, but knew that it was crucial to explain the equal division presumption. Lawyer further explained that the pension needed to be valued for planning purposes. William's anxiety continued to increase while Lawyer was speaking. Finally William frantically yelled, "If I have any reduction, I will have to

live in my car or in a cardboard box!" Lawyer has heard this before and calmly says, "You are not going to live out of a cardboard box."

Part 3

William and Susie continue to live together in the marital residence. With the help of Lawyer and opposing counsel, they negotiate a temporary order just minutes before the scheduled hearing. While no maintenance was ordered, William agreed to pay the marital debts.

Lawyer spent a significant amount of time in the initial meeting with William, in preparing for the hearing, and in negotiating the temporary order. Within 24 hours of the temporary order, William called Lawyer's office complaining about important items that Susie was taking from the home. Lawyer was working on a different matter when William called. Lawyer told his secretary, "He's go to learn that he can't completely dominate my time. I have other clients. Just take a message."

Part 4

Over the next two days, Williams continues to call and complain. He tells Lawyer's secretary that some of the missing items included half-full cans of stain and pictures that Susie had taken off the walls.

Finally Lawyer called William and angrily said, "I don't have the time, and you don't have the money to discuss missing paint cans. I have other cases and would appreciate if you would either schedule a phone appointment or leave a detailed message with the staff."

Subsequently, William left rambling messages after hours on the firm's answering machine. Staff spent significant time transcribing them. Lawyer finally called William and told him that he could no longer leave messages on the firm's answering machine.

Part 5

Because of other financial issues, Susie's attorney requested a hearing and an amended temporary order. After William's constant complaining, Lawyer finally agreed to William's request to seek a court order requiring Susie to return the personal property she had removed from the marital residence so that the property could be inventoried. For other reasons, Susie withdrew her request for the hearing, but William would not withdraw his request for a hearing about the personal property.

William's initial advanced fee has been exhausted. Although he had agreed to make monthly payments, he has not made them for several months. Moreover, everyone in Lawyer's office is sick of William.

Lawyer had a lengthy conversation with William about the pros and cons of having a hearing based solely on personal property. Subsequently, the parties agreed to a detailed temporary order about the property and the hearing was cancelled.

William and Susie stipulated to incorporate the detailed temporary order on personal property into the final property division. Lawyer drafted and circulated the agreement, which was then

signed by Susie and her attorney. William, however, refused to sign it. Lawyer threatened to withdraw although he knew it was unlikely that the court would permit him to do so because the trial was only two weeks away. At this point, William owed $10,000 in attorneys fees.

The case went to trial, and while William was awarded the marital residence, he was also ordered to pay maintenance. He wants to appeal.

Lawyer met with William a few days after the final judgment was entered. Lawyer presented William with a note and a mortgage, and told him that if he wanted to appeal the judgment, he must sign the note (2.5% interest) and grant Lawyer's firm a mortgage in the residence. Lawyer explained that even though William was willing to pay a $3,000 advanced fee for the appeal, that was not sufficient given his payment history. Lawyer told William that if did not sign the note and mortgage at that meeting, then Lawyer could not represent him in the appeal or any other post-judgment matter.

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Terminating the Lawyer-Client Relationship

A lawyer's ethical duties with respect to terminating the lawyer-client relationship are primarily governed by SCR 20:1.16 of the Rules of Professional Conduct for Attorneys. Part I of this outline reviews when a lawyer must withdraw from representation (mandatory withdrawal) and when a lawyer may withdraw from representation (permissive withdrawal). It also reviews the obligations of the lawyer upon withdrawal. Part II of this outline identifies the components of a disengagement or termination letter. The Appendix A to this outline provides some sample letters to demonstrate the type of information lawyers may consider including in termination or disengagement letters. Appendix B provides the text of SCR 20:1.16 and the ABA Comment.

I. Terminating the Lawyer-Client Relationship: A Review of SCR 20:1.16

SCR 20:1.16 emphasizes the protection of the client.[1] While lawyers are normally free to reject proposed representation for any reason, once a lawyer has accepted a matter, the lawyer's freedom is significantly restricted, and those restrictions are designed to protect the client. The Rule recognizes the client's near absolute right to fire the lawyer at any time for any reason. Lawyers, however, do not have the same freedom to fire their clients. While lawyers must withdraw under certain circumstances, they normally may terminate a representation only when there will be little or no prejudice to the client. Moreover, the lawyer is obligated to take reasonable steps to mitigate whatever harm may result from the withdrawal.

A. Mandatory Withdrawal

SCR 20:1.16(a) requires a lawyer to withdraw from representation in three circumstances, unless, as provided in paragraph (c), the lawyer is ordered by a tribunal to continue the representation. A lawyer is required to withdraw from representation if 1. the representation will result in the violation of the Rules of Professional Conduct or other law; 2. if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or 3. if the lawyer is discharged. Each circumstance is discussed below.

[1] See Preamble, SCR Chapter 20, paragraph [12], noting that legal self-governance must be conceived of in the public interest, rather than in the self-interest of the bar.

1. **First, the lawyer must withdraw when representation will result in the violation of the Rules of Professional Conduct or other law.**

   SCR 20:1.16(a)(1) requires a lawyer to withdraw from the lawyer-client relationship whenever the representation will result in a violation of any of the other rules of professional conduct or other law. Two areas of concern arise from the language of this Rule: a. the level of knowledge that triggers a lawyer's obligation to withdraw, and b. the broad and varied application of this Rule.

   a. The Rule does not specify the level of knowledge necessary to trigger a lawyer's obligation to withdraw, i.e., the standard that a lawyer must use to determine when representation "will result" in a violation.

      i. SCR 20:1.16(a)(1) requires a lawyer to withdraw from the lawyer-client relationship whenever the representation "will result" in a violation. The Rule does not state whether the lawyer must "know"[2] that a violation will result or whether the lawyer need only "reasonably believe" or be "reasonably certain" that a violation will result. There is no Wisconsin case or Ethics Opinion that clarifies what level of knowledge triggers the lawyer's obligation to withdraw under SCR 20:1.16(a)(1). Because the Rule is prospective, and because one cannot "know" the future, it seems reasonable to conclude that a lawyer must withdraw when the lawyer "reasonably believes" that a violation will result.
      ii. The Restatement (Third) of the Law Governing Lawyers §32(2)(a), which is nearly identical to SCR 20:1.16(a)(1), also requires withdrawal from the lawyer-client relationship whenever "the representation will result in a violation" of the other rules of professional conduct or other law. Unlike the Wisconsin Rule, however, the Restatement (Third) of the Law Governing Lawyers (the Restatement) specifically takes the position that a lawyer's "reasonable belief" that a violation will occur is sufficient for withdrawal, even if that belief later turns out to be wrong. See §32 Comment *f* of the Restatement.

   b. The application of the Rule is broad and varied because it is the procedural mechanism for carrying out the commands of other rules. Below are some examples that demonstrate the breadth of the Rule.

      i. SCR 20:1.16(a)(1) is one of several rules governing situations in which the client seeks the lawyer's assistance in carrying out a crime or fraud. Because providing such assistance would violate SCR 20:1.2(d), the lawyer is required by SCR 20:1.16(a)(1) to terminate representation.
      ii. The existence of a conflict that cannot be or is not cured by waiver requires a lawyer to withdraw. In *Disciplinary Proceedings against Keyes*, 332 N.W.2d 813 (1983), the Wisconsin supreme court disciplined a lawyer for failing to decline a representation that involved an obvious conflict.

[2] "Know" is defined by SCR 20:1.0(g) as "actual knowledge of the fact in question. Knowledge may be inferred from the circumstances."

iii. The lawyer must withdraw if he or she cannot provide competent representation. Courts have faulted lawyers for failing to withdraw when workload prohibits competent representation, *Mulkey v Meridien Oil,* 143 F.R.D. 257 (W.D. Okla. 1991). In addition, ethics opinions have concluded that lawyers must refuse new cases when workload prohibits competent representation, ABA Formal Ethics Op. 06-441 (2006), Wisconsin Ethics Op. E-84-11 (1984), SCR 20:1.3, Comment paragraph 2; or when the lawyer's experience, ability or resources prohibit competent representation.

iv. The lawyer must withdraw if the client insists on pursuing a frivolous action. SCR 20:3.1(a) prohibits a lawyer from pursuing a claim if there is no basis in fact or law and no good faith argument for an extension of existing law. See e.g. *Mills v. Couter,* 647 A.2d 1118 (D.C. 1994).

2. Second, the lawyer must withdraw when the lawyer is physically or mentally unable to provide effective representation.

a. SCR 20:1.16(a)(2) recognizes that a lawyer who is too ill, either physically or mentally, to represent clients competently and diligently is at least temporarily unfit to continue a lawyer-client relationship.

b. This is part of the lawyer's duty to provide competent representation: when a lawyer's physical or mental condition prevents the lawyer from providing competent representation, it is the lawyer's duty to withdraw in order to protect the client, and failure to do so is misconduct.

c. Lawyers have been found in violation for failing to withdraw when suffering from a personality disorder, *State v. Ledvina,* 71 Wis.2d 195, 237 N.W.2d 683 (1976), when suffering from severe depression *In re Francis,* 4. P.3d 579 (Kan. 2000), when hospitalized *In re Goudy,* 822 N.E.2d 964 (Ind. 2005), and when suffering from alcoholism, *In re Biggs,* 864 P.2d 1310 (Or. 1994).

3. Third, the lawyer must withdraw when the lawyer is discharged.

a. SCR 20:1.16(a)(3) recognizes the well-established principle that a client has a nearly absolute right to discharge a lawyer for any reason or for no reason. ABA Comment [4] to SCR 20:1.16 states that a "client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."

b. Likewise, §32(1)(c) of the Restatement requires the lawyer to withdraw when the client discharges the lawyer. Clients have an almost unfettered right to discharge a lawyer at any time for any reason, and the lawyer must abide by the client's wishes in this respect or face professional discipline. *Disciplinary Proceedings against Kinast,* 192 Wis.2d 36, 530 N.W.2d 387 (1995). There are, however, certain narrow limitations on the client's right to discharge the lawyer.

c. The right to discharge a lawyer is subject to the tribunal's authority, SCR 20:1.16(c). When the rules of a tribunal require a lawyer to seek the tribunal's permission to

withdraw, the lawyer must comply with those requirements and continue to represent the client until receiving the necessary permission to terminate the relationship SCR 20:1.16(c); SCR 20:3.4(c). If the tribunal refuses to permit the lawyer to withdraw, the lawyer is obligated to continue to represent the client as competently as circumstances permit. SCR 20:1.16(c).

d. In unusual circumstances, when a client has diminished capacity, is incapable of acting in their own interests, and is at risk of substantial harm, the lawyer may take appropriate protective action, including disregarding a client's discharge of the lawyer. Comment [6] to SCR 20:1.16 provides as follows:

> If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

See also, *In re Fraser,* 523 P.2d 921 (Wash. 1974).

e. Merely because a client has the right to discharge a lawyer does not mean that the client may exercise that right without cost. Depending on the circumstances, a client may be liable for damages for wrongfully discharging a lawyer who is also an employee, and a client may be liable for services already rendered.

   i. Some courts have recognized, in certain circumstances, a cause of action for wrongful discharge of an in-house lawyer based on sex or race discrimination, or based on the refusal to engage in unethical conduct by in-house lawyers who were fired by their employer. See e.g. *Crews v. Buckman Labs,* 78 S.W.3d 852 (Tenn. 2002); *Nordling v. Northern States Power,* 465 N.W.2d 81, aff'd 478 N.W.2d 498 (Minn. 1991). Courts have generally recognized only monetary damages as a remedy, however, and have not allowed discharged lawyers to seek reinstatement because of the client's right to counsel of their choice. See *Sands v. Menard, Inc.,* 2010 WI 96, 328 Wis. 2d 647, 787 N.W.2d 384.

   ii. Comment [4] to SCR 20:1.16 recognizes a lawyer's right to payment for services when discharged by the client. However, courts have generally only allowed lawyer's to receive *quantum meruit* compensation when the lawyer was discharged without cause regardless of contrary language in the lawyer's fee agreement. Further, upon termination, lawyer's fees must be reasonable. SCR 20:1.5(a). This protects clients' right to counsel of their choice by prohibiting lawyers from imposing on clients who choose to discharge their lawyers financial burdens beyond the obligation to pay for the reasonable value of services already rendered. Lawyers are generally not permitted to get around these requirements, even with specific language in fee agreements. Put another way, a lawyer's fee agreement may not be used to contract away the lawyer's obligations under the Rules. See e.g. *Florida Bar v. Doe,* 550 So.2d 1111 (Fla. 1989)(finding fault with a clause that gave the lawyer the greater of an

hourly fee or percentage of largest settlement offer if the lawyer was discharged).[3]

iii. The most frequent area of contention with respect to fees upon discharge is in contingency fee cases. In Wisconsin, the general rule is that a lawyer discharged without cause is entitled to the value of the contract minus the reasonable value of successor counsel's services. *Tonn v. Reuter*, 6 Wis.2d 498, 95 N.W.2d 261 (1959); *Tesch v. Laufenberg, Stombaugh, & Jassak, S.C.,* 2012 AP 2539 (2013) However, Wisconsin courts have held that lawyers in contingency fee cases who are discharged for cause are not entitled to fees in the amount of the contract. When the lawyer is discharged for cause for failing to provide adequate legal services and has provided no value to the client, the lawyer is not entitled to any fees whatsoever. This is true even if the lawyer has a statutory lien under Wis. Stat. §§ 757.36 to 757.38 because the lawyer has breached the contract giving rise to the lien. *McBride v. Wausau Ins. Co.,* 176 Wis.2d 382, 500 N.W.2d 387 (Ct App. 1993). The court of appeals has, however, upheld an award of fees in *quantum meruit* for a lawyer who, although breaching the contingent fee contract by failing to provide adequate legal services, nonetheless did provide some value to the client. *Lorge v. Rabl,* 2008 WI App. 141, 758 N.W.2d 798). Further, in some circumstances in which a client would be unjustly enriched, the existence of an equitable lien for attorney's fees has been recognized in Wisconsin. *In re Edl,* 207 B.R. 611 (1997). Lawyers, however, must be cautious with respect to asserting a lien against the proceeds of a former client's settlement or judgment – Wisconsin has imposed discipline against lawyers who assert such liens without a substantial basis. *Disciplinary Proceedings against Marks,* 265 Wis. 2d 1, 665 N.W.2d 836 (2004).

iv. Similarly, lawyers who withdraw from a contingency fee case for good cause, such as a client's refusal to comply with a discovery request, are generally found to be entitled to *quantum meruit* compensation. See e.g. *Ashford v. Interstate Trucking Corp.,* 524 N.W.2d 500 (Minn. Ct. App. 1994). The lawyer who withdraws without good cause, however, such as when concluding the client is unlikely to prevail or disagreements about settlement, generally forfeits the right to compensation. See e.g. *Faro v. Romani,* 641 So. 2d 69 (Fla. 1994).

B. Permissive Withdrawal

SCR 20:1.16(b) governs when a lawyer is permitted, but not required, to withdraw from representation.[4] Paragraph (b) is also subject to the power of the tribunal to order continued representation as provided for in paragraph (c). There are seven circumstances under which a lawyer is permitted to withdraw from representation: 1. the lawyer may withdraw when there is no material adverse effect on the interests of the client; 2. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes - but does not know - is criminal or fraudulent; 3. the client has used - in the past - the lawyer's services to perpetrate a crime or fraud; 4. the client insists on taking action that

[3] The Wisconsin Supreme Court, however, appeared to implicitly recognize the propriety of a clause giving a lawyer hourly fees upon discharge in *Disciplinary Proceedings against Marks, 265 Wis.2d 1, 665 N.W.2d 836 (2004).*

[4] § 32(3) of the Restatement (Third) of the Law Governing Lawyers sets forth similar grounds for permissive withdrawal.

the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; 5. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; 6. the continued representation would place an unreasonable financial burden on the lawyer or when representation has been rendered unreasonably difficult by the client; and 7. other good cause for withdrawal exists.

While, several of the circumstances are based on the client's "fault," the first circumstance gives the lawyer maximum discretion.

1. **The lawyer may withdraw when there is no material adverse effect on the interests of the client.**

   a. A lawyer may withdraw under SCR 20:1.16(b)(1) for any reason or no reason, without client consent, as long as there is no material adverse effect on the client.

   b. Whether a withdrawal would cause "material adverse" effect on the client is a question of fact and there is no specific guidance in the language of SCR 20:1.16 or its Comment on what constitutes "material adverse effect." Comment h(ii) to §32 of the Restatement, however, provides as follows:

> Whether material adverse effect results is a question of fact. The client might have to expend time and expense searching for another lawyer. The successor lawyer might have to be paid what in effect are duplicated fees for becoming familiar with the matter. A lawyer wishing to withdraw can ameliorate those effects by assisting the client to obtain successor counsel and forgoing or refunding fees. But other material adverse effects might be beyond the withdrawing lawyer's power to mitigate. Delay necessitated by the change of counsel might materially prejudice the client's matter. An equally qualified lawyer might be unavailable or available only at material inconvenience to the client. In some circumstances, the nature of confidential information relevant to the representation might make the client reasonably reluctant to retain another lawyer.

   c. This language characterizes most consequences of withdrawal as "material," but allows a lawyer to take actions to assist the client that would ameliorate the adverse effects and thus implying that, in some circumstances, such actions may render the adverse effects non-material.

2. **The lawyer may withdraw when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes - but does not know - is criminal or fraudulent.**

   a. Unlike SCR 20:1.16(a)(1) and SCR 20:1.2(d), which require withdrawal when a lawyer "knows" that his or her services are being used to violate the law, SCR 20:1.16(b)(2) permits withdrawal when a lawyer "reasonably believes" - but does not know - that

the client is using the lawyer's services to perpetrate an ongoing crime or fraud. Withdrawal is not mandatory because the lawyer lacks knowledge. SCR 20:1.0(l) defines "reasonably believes" as when "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." In contrast, SCR 20:1.0(g) defines "knows" as "actual knowledge of the fact in question." A person's knowledge, however, "may be inferred from circumstances."

b. A lawyer is permitted to withdraw from representing the client whose conduct is more than minimally suspicious, even at some risk of harm to the client, because otherwise the lawyer would be forced to represent a person who the lawyer does not trust.

c. The Rule states that a lawyer may withdraw if the client "persists" in a course of action that the lawyer reasonably believes is criminal or fraudulent. Consequently, the Rule may imply that the lawyer has a duty to try to dissuade the client before withdrawing, if possible.

3. The lawyer may withdraw when the client has used - in the past - the lawyer's services to perpetrate a crime or fraud.

a. SCR 20:1.16(b)(3) in essence allows a lawyer to disassociate himself or herself from a client's past fraud or crime and protect his or her reputation. However, withdrawal is not mandatory as in SCR 20:1.16(a)(1).

b. The distinction between these two paragraphs of the Rule is articulated in ABA Formal Ethics Op. 92-366 (1992), which opined that a lawyer who knows that the clients is using or intends to use the lawyers services to further a crime or fraud must withdraw, whereas a lawyer who learns that a client has used the lawyer's services to further a crime or fraud but has now ceased, *may* withdraw.

4. The lawyer may withdraw when the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

SCR 20:1.16(b)(4) permits a lawyer to withdraw, even with some material adverse effect to the client, when the client insists on taking an action with which the lawyer profoundly disagrees. The Rule permits the lawyer to withdraw regardless of whether the client's action concerns the objectives of representation or the means of achieving those objectives.

a. The situations "with which the lawyer has a fundamental disagreement" are limited to those situations that seriously threaten the lawyer's autonomy, not those that are just imprudent, such as when a client refuses to follow the lawyer's advice. The language of ABA Model Rule 1.16(b)(4), which is identical to SCR 20:1.16(b)(4), was made more restrictive by the ABA's Ethics 2000 Commission in order to narrow a lawyer's grounds for withdrawal. The previous Rule allowed withdrawal under circumstances where the lawyer considered the client's actions "imprudent," whereas the current Rule permits withdrawal only when the lawyer has "fundamental disagreement" with the client. This was meant to limit withdrawal to

those situations that may seriously threaten the lawyer's autonomy.[5] There was concern that if this section was drafted or interpreted broadly, it would allow lawyers' to withdraw whenever a representation became unpleasant. Comment j to §32 of the Restatement suggests that a lawyer should only withdraw when "the action is likely to be so detrimental to the client that a reasonable lawyer could not in good conscience assist it." For example, the lawyer found repugnant the defendant's decision to forsake appeal and accept the death penalty. *Red Dog v. State*, 625 A.2d 245 (Del. 1995). However, decisions by the client that may seem simply unwise, or render the representation more difficult, do not necessarily provide grounds for withdrawal.

b. Most importantly, this section does not allow a lawyer to withdraw if a client refuses to follow a lawyer's advice with respect to settlement or insists on going to trial. See e.g., *May v. Seibert,* 264 S.E.2d 643 (W.Va. 1980). SCR 20:1.2(a) reserves the right to accept or reject on offer of settlement solely to the client, and lawyers may not circumvent this by drafting fee agreements that delegate authority on settlement to the lawyer. See e.g., North Carolina Ethics Op. 145 (1993). Nor may a lawyer's fee agreement require the lawyer's consent for settlement. New York County Ethics Op. 699 (1994). Furthermore, lawyer's fee agreement may not impose financial penalties on a client who does not follow the lawyer's advice with respect to settlement. See e.g., Nebraska Ethics Op. 95-1 (1995); Connecticut Informal Ethics Op. 95-24 (1995). Connecticut Informal Ethics Opinion 99-18 (1999) and Philadelphia Ethics Op. 2001-1 which found unethical a clause which gave the lawyer the right to withdraw and receive *quantum meruit* compensation if the client rejected the lawyer's settlement advice.

5. **The lawyer may withdraw when the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.**

SCR 20:1.16(b)(5) permits withdrawal if the client refuses to fulfill an obligation regarding representation, but the client must first be given reasonable warning and an opportunity to satisfy the obligation.

a. The most common basis for withdrawal under SCR 20:1.16(b)(5), as well as under SCR 20:1.16(b)(6), is the client's failure to pay the lawyer's fees and expenses. *State ex rel. Dressler v. Circuit Court for Racine County,* 163 Wis. 2d 622, 472 N.W.2d 532 (App. 1991).

b. The Rule requires that the client's failure be substantial, thus implying that a client who is slightly behind in fee payments doesn't provide grounds for withdrawal and requires the lawyer give reasonable notice. Further, the lawyer must alert the client to the problem and provide the client a reasonable opportunity to rectify the situation, thus allowing a delinquent client time to come current on fees is necessary before withdrawal.

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[5] See *A Legislative History: The Development of the ABA Model; Rules of Professional Conduct (2006).*

c. Some courts have held that a client's refusal to pay based upon a legitimate good-faith dispute over the lawyer's fees does not constitute a failure of the client to fulfill an obligation to the lawyer. See *In re Benjamin*, 514 N.Y.S.2d 526 (App. Div. 1987).

d. This Rule can also encompass situations such as a client's refusal to abide by an agreement limiting the scope of the representation. ABA Comment [8] to SCR 20:1.16.

6. The lawyer may withdraw when continued representation would place an unreasonable financial burden on the lawyer or when representation has been rendered unreasonably difficult by the client.

a. SCR 20:1.16(b)(6) permits withdrawal when continued representation would place an unreasonable financial burden on the lawyer.

i. SCR 20:1.16(b)(6) may at times simply provide an additional ground for lawyers who seek to withdraw based upon a client's failure to pay the lawyer's fees.

ii. A lawyer may be permitted to withdraw when the financial commitment required for continued representation is clearly greater than any reasonably foreseeable return. For example, the lawyer was permitted to withdraw from a case in which a court ruling eliminated a realistic possibility of recovering attorney's fees, after thousands of hours were expended on the case and the matter would likely require much more work. *In re Withdrawal of Attorney*, 594 N.W.2d 514 (Mich. Ct. App. 1999).

iii. When the unreasonable financial burden arises, however, because of the lawyer's miscalculation of the time or expense involved, the lawyer may not be permitted to withdraw because the lawyer should have forecasted such matters and provided for such contingencies. Courts often are reluctant, however, to permit withdrawal when a contingent fee case turns out to be more expensive, difficult or less profitable than originally anticipated. This is because contingent fees involve an element of risk for the lawyer, which justifies the sometimes very high fees in such cases, and courts may therefore view the lawyer as assuming the risk of unforeseen difficulty or expense. See, e.g., *Bell & Marra, Pllc. V. Sullivan*, 6 P.3d 965 (Mont 2000).

b. SCR 20:1.16(b)(6) also permits withdrawal when the client's conduct makes the representation unreasonably difficult, such as when the lawyer cannot locate the client after exercising reasonable diligence, when the client refuses to communicate with the lawyer, when client insists on drafting documents and appearing in court without the lawyer, and when client dictates the legal strategies and threatens to sue the lawyer if those strategies are not followed. See, e.g., Alaska Ethics Op. 2004-03 (2004).

i. While clients do not have specific rules governing their conduct in the lawyer-client relationship, clients are obliged to communicate with their lawyers, be truthful, and provide reasonable assistance in other respects, and lawyers may withdraw when clients fail to do so.

ii. Other reasons have included a client's threats to sue the lawyer *Whiting v. Lacara,* 187 F.3d 317 (2d. Cir. 1999); withholding material information and repeatedly contacting opposing counsel, *Sobol v. District Court of Arapahoe County,* 619 P.2d 765 (Colo. 1980); and the client's refusal to release medical records to own lawyer, *Admonition issued in Panel File No. 94-24,* 533 N.W.2d 852 (Minn. 1995).

7. The lawyer may withdraw when other good cause for withdrawal exists.

This catch-all provision in SCR 20:1.16(b)(7) recognizes that there are circumstances justifying a lawyer's withdrawal from a matter that are not encompassed by the other parts of the Rule.

a. SCR 20:1.16(b)(7) is most frequently used when the lawyer and client have developed an antagonistic relationship, often referred to as "irreconcilable differences" or a "break down" of the lawyer-client relationship. See e.g. Johnson v Johnson, 199 Wis.2d 367, 545 N.W.2d 239 (App. 1996); Esteves v. Esteves, 680 A.2d 398 (D.C. 1996). The lawyer acts as a fiduciary for the client, and thus the relationship must be based upon trust, which cannot exist in the face of stark antagonism. See also, Lasser v. Nassau Community College, 457 N.Y.S.2d 343 (App. Div. 1983)(the client demanded that the lawyer receive permission from another lawyer for any action).

b. A disciplinary grievance is filed against the lawyer. This is situation is not listed as a ground for withdrawal in either SCR 20:1.16 or the Restatement, but it is a frequently asked question. At root, this is really a conflict question: does the filing of a grievance by a client or another person impose a material limitation upon the lawyer's ability to represent the client? It is the generally accepted view that a client filing a grievance against a lawyer does not, in and of itself, create a conflict which requires the lawyer to withdraw. For example, ABA Formal Ethics Opinion 94-384 concluded that a grievance filed by opposing counsel did not necessarily require or permit the lawyer's withdrawal, and the same can be said for grievances filed by clients. This partly stems from the practical considerations in not allowing persons entitled to counsel to delay proceedings by continually filing grievances against successive appointed counsel. But the specific circumstances may create such antagonism in the relationship that it may constitute "good cause" for withdrawal, thus lawyers are generally allowed to withdraw when citing a client's grievance as the cause.

c. The client consents to withdrawal. While not specifically listed in SCR 20:1.16, §32(3)(c) of the Restatement explicitly recognizes that a lawyer is permitted to withdraw with a client's informed consent, subject to approval by a tribunal if necessary.

C. Notice to or Permission of the Tribunal

1. SCR 20:1.16(c) provides that a "lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." The definition of tribunal, found in SCR 20:1.0(p), includes more than just courts:

> "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

2. SCR 20:1.16(c) further provides that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Consequently, a lawyer's right to withdraw is subject to the tribunal's authority: a lawyer is required to continue representation if ordered to do so by the tribunal regardless of whether the withdrawal is mandatory under paragraph (a) or permissive under paragraph (b).

D. Requirements Upon Termination

SCR 20:1.16(d) provides that upon termination of representation, a lawyer must lawyer take steps "to the extent reasonably practicable" to protect a client's interests, "such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." The duty to minimize harm to the client is not absolute: it is qualified by the words, "to the extent reasonably practicable." However, the rule is given a generous interpretation. It protects even undeserving clients. ABA Comment [9] advises that "[e]ven if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client."

SCR 20:1.16 does not purport to provide a comprehensive list of appropriate steps. Below are reasonable steps a lawyer can take to protect the client's interests.

1. The lawyer must give reasonable notice to the client.

a. The lawyer must provide reasonable notice to the client that withdrawal is imminent and provide the client with information that the client needs to protect his or her interests.

b. A lawyer who has lost communication with the client may withdraw, but the lawyer must give the client written notice of withdrawal and mail notice to "all known addresses as well as all addresses which may be discovered by the lawyer through the exercise of reasonable diligence." Ariz. Ethics O. 01-08 (2001).

2. **The lawyer must allow time for the employment of other counsel.**

   The threat to client's interests arising from termination of representation will differ depending on timing of the termination, the type of matter, and other circumstances. Consequently, there are no specific time guidelines.

3. **The lawyer must surrender the client's papers and property.**

   a. Upon termination of representation, the lawyer has a duty to surrender promptly papers and other property "to which the client is entitled." The uncertainty in the rule arises from the language "to which the client is entitled."

   b. It is well established that the file belongs to the client. However, it is the exact contents of the file that raises questions. The file includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation. A lawyer's notes regarding legal theories, strategies, and reactions regarding opposing counsel or the opposing party are generally considered part of the file because they are necessary for the client to continue his or her representation.

4. **The lawyer must return unearned fees and unincurred expenses.**

5. **The lawyer must maintain the duties of confidentiality and loyalty.**

   When a lawyer withdraws from representation, the lawyer is required by SCR 20:1.9 to maintain the duties of confidentiality and loyalty.

6. **The lawyer should adopt the practice of writing termination letters.**

   a. While SCR 20:1.16 does not require written notice of termination, termination letters are a good practice.

   b. Moreover, other rules may require some type of written notice at the conclusion of representation. For example, SCR 20:1.5(c) provides that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination."

   c. ABA Comment [4] provides additional guidance:

      > [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a

> continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

d. Many complaints received by the Office of Lawyer Regulation concern the lawyer's failure to adequately communicate with the client. Termination or disengagement letters are a good practice to adopt: they better inform the client, and they protect the lawyer from malpractice claims and disciplinary complaints.

II. Components of a Disengagement or Termination Letter

Below are the suggested components of a disengagement or termination letter. A short discussion of each component is followed by sample language.

A. Identify the Matter

1. Even if the matter is identified in the reference line, the matter should be fully identified in the body of the letter, usually in the first sentence.

2. Sample language:

   a. "We are pleased to have represented you in [identify matter] through its conclusion."

   b. "We have been pleased to have represented you for the past [time period] in [identify matter]. Or "It has been a pleasure to represent you for the past [time period] in [identify matter].

   c. "You retained us to represent you in [identify matter].

   d. "This letter confirms our discussion on [date] regarding [identify matter]."

B. Confirm that Representation Has Terminated and Explain What That Means

1. State when the representation has ended or will end.

2. If the case is concluded according to the terms of the engagement agreement, confirm that it is concluded, that the lawyer has no future obligation to advise the client on legal matters, and that the file will be closed.

3. If the matter is still pending, confirm that the lawyer-client relationship has ended, that the lawyer has no future obligation to advise the client beyond taking steps to the extent reasonably practicable to protect a client's interests until new counsel is retained, and urge the client to seek new counsel if the client has not already done so.

4. Sample language:

   a. "Accordingly, the lawyer-client relationship between us has ended."

   b. "We have not received any communication from you, however, for the past [time period]. We have attempted to contact you by telephone and by mail, but have been unsuccessful. Our letters and telephone calls have been unanswered. Because we have unable to communicate with you, we must assume that you no longer want us to represent you in this matter."

   c. "A periodic review of our files indicate that we have performed minimal or no services for you for a substantial period of time [or since date]. This letter confirms that, pursuant to our firm's policy, our representation of you has terminated, and we no longer have a lawyer-client relationship."

   d. "This letter is to inform you, pursuant to our engagement agreement with you, that we have decided to terminate our representation. Regrettably, the difficulty we have had in communicating with your [or agreeing on an appropriate course of action] has led us to conclude that it is necessary for us to terminate our lawyer-client relationship.

   e. "This letter confirms our recent discussion regarding the termination of this firm's representation of you in connection with [identify matter]."

C. Confirm the Status of the Matter, Identify Any Deadlines That May Be Applicable, and Describe Discussions with Client about Termination

1. If the case is concluded according to the terms of the engagement agreement, confirm how it was concluded, and identify any deadlines, such as appeal deadlines, that may be applicable.

2. If the matter is still pending, inform the client of the status of the case and stress any deadlines that may be pending, such as statute of limitations deadlines, discovery deadlines, or appearance deadlines for new counsel.

3. Include a summary of the discussion with the client about termination, such as the options presented to the client on how to proceed or actions the client must take to preserve their rights.

4. Sample language:

   a. "This letter confirms our discussion on [date] regarding [identify matter]. During our discussion, I advised you [advice given]."

   b. "Please remember to promptly make any beneficiary changes on your insurance and retirement plans should you desire to do so. As we discussed, if your former spouse remains your designated beneficiary, it is likely that he will get the proceeds of those assets."

c. "Please remember that your answers to the interrogatories filed by the plaintiff are due on September 26, 2013. If you fail to respond by that date or fail to obtain an extension of time within which to respond, you …."

D. Confirm the Status of Fees and Costs (Both Collected and Outstanding)

1. Identify the payments that have been received to date from the client. State if any fees or costs are still owed, if any advanced fees are unearned, or if any expenses are unincurred. Inform the client that a statement for services rendered to the date of termination will be sent shortly.

2. Sample language:

   a. "To date, you have paid us [amount] for fees and [amount] for services."

   b. "To date, you have paid [amount] in legal fees and [amount] in expenses. As we have discussed, you have not been current since [date or time period] in your payment of the fees and expenses that have accrued pursuant to our engagement agreement.

   c. To date, the outstanding fees amount to [amount] and the outstanding expenses amount to [amount]."

   d. "I have enclosed the final statement for services rendered, costs, and disbursements. If you have any questions regarding this statement, please call me."

E. Remind Client to Keep Copies of Documents and Provide Information about the File

1. When representation has ended, suggest that the client keep all copies of the documents in a safe place where they can be easily located.

2. When representation is terminated, SCR 20:1.16(d) requires that the lawyer provide the file to the client upon request. If a file is provided to a client, document it in the letter. If a file is being transferred to a new lawyer, obtain authorization from the client and document it in the letter.

3. Inform the client of the firm's file retention policy.

4. Sample language:

   a. "Now that [description of the matter completed] is completed, I will close the file. I am returning to you with this letter [identify records, documents, items] related to this matter. I suggest that you keep all information relating to this matter in a safe place where you can easily locate it. As we discussed, I will store your file for [number] years. After that period of time, the file will be destroyed unless you request in writing that I store it for a longer period of time. Please send any such request at the earliest possible date."

b. "We will transfer your file to your new counsel, but will need a letter from you authorizing us to do so.

c. "In order to transfer your file to your new counsel, we need to obtain from you a letter of authorizing us to do to. We also need a letter from your new counsel acknowledging receipt of the file and agreeing to retain the file and make it available to us for examination at reasonable times and on reasonable advance notice."

d. "Because I am not representing you in this matter, I am returning your original documents to you. I have retained photocopies for my records."

F. Describe Measures Taken to Protect the Client's Interest While Matter Is Still Pending

1. SCR 20:1.16(d) requires that a lawyer take steps to the extent reasonably practicable to protect a client's interests until new counsel is retained.

2. Sample language:

a. "We have arranged with opposing counsel for an extension of the deadline for your response to the interrogatories, and we have confirmed the stipulation for the extension in our letter to opposing counsel dated [date]. We have enclosed a copy of letter for your convenience."

b. "To preserve your right to appeal, we have filed the appropriate notice with the Commission. A copy of that notice is enclosed. "

G. Close with a Thank You or Well Wishes, or by Restating an Important Point

1. A closing paragraph or sentence provides an effective way to end the letter by either thanking the client or restating an important point in letter.

2. Sample language:

a. "We wish you every success in your endeavors and would be pleased to assist you in the future."

b. "We regret the circumstances that have necessitated this action, but we wish you every success in your future endeavors."

c. "We hope this matter has been concluded to your satisfaction. Thank you for allowing us to represent you in this matter. If we can be of further assistance in the future, please let us know."

d. "We regret that our lawyer-client relationship with you had to end in this manner, and we wish you all the best. We will, of course, cooperate with your new attorney in the remaining claim against [identify parties] by providing him or her with

whatever information we have that might be helpful in that matter. Please have that attorney contact us."

e. "If I do not hear from you within 30 days, I will assume that you do not wish to proceed and will close the file."

H. Enclosures

Make sure that all the enclosures are listed.

I. Send Certified Mail, Return Receipt Requested

APPENDIX A
Sample Letters

Sample Termination Letter 1: Engagement Completed

Date

Client
Client's Address Line 1
Client's Address Line 2

Re: [Identify Matter Completed]

Dear Client:

I am pleased to have represented you in [identify matter completed] through its conclusion. Accordingly, our attorney-client relationship has ended. I hope that I have handled this matter to your satisfaction.

Now that [description of the matter completed] is completed, I will close the file. I am returning to you with this letter [identify records, documents, items] related to this matter. I suggest that you keep all information relating to this matter in a safe place where you can easily locate it. As we discussed, I will store your file for [number] years. After that period of time, the file will be destroyed unless you request in writing that I store it for a longer period of time. Please send any such request at the earliest possible date.

Please remember to promptly make any beneficiary changes on your insurance and retirement plans should you desire to do so. As we discussed, if your former spouse remains your designated beneficiary, it is likely that he will get the proceeds of those assets.

I have enclosed the final statement for services rendered, costs, and disbursements. If you have any questions regarding this statement, please call me.

Thank you for allowing me to represent you in this matter. If I can be of further assistance to you in the future, I hope you will call upon me.

Sincerely,
Lawyer

Enclosures:
[List all documents returned.]

Note: Send certified mail, return receipt requested.

Sample Termination Letter 2: Failure to Pay Fees

Date

Client
Client's Address Line 1
Client's Address Line 2

Re: [Identify Matter]

Dear Client:

I have been pleased to have represented you for the past [time period] in [identify matter]. To date, you have paid [amount] in legal fees and [amount] in expenses. As we have discussed, you have not been current since [date or time period] in your payment of the fees and expenses that have accrued pursuant to our engagement agreement. To date, the outstanding fees amount to [amount] and the outstanding expenses amount to [amount].

We have continued to represent you during the last [time period] even though your account has not been current because we value you as a client. While we would like to continue our relationship with you, we do not have the ability to finance your case. We have attempted to obtain from you a reasonable assurance that your account will be brought and kept current, but we have not received that assurance. As a result, we feel that we have no choice but to withdraw from representing you in this matter.

Because your case is pending before a court, we may withdraw only with the court's permission. Enclosed is a copy of the motion we intend to file within [number] of days from the date of this letter. We believe the court will grant our request for leave to withdraw. While you have time within which to obtain new counsel without jeopardizing your case, you should begin to look for new counsel immediately so that the transition may be as smooth as possible.

Of course, we will cooperate with your new counsel. Your new counsel may wish to discuss this case with us. We are willing to do so as long as satisfactory arrangements are made to compensate us for the time that will be involved. We will transfer our file to your new counsel, but will need a letter from you authorizing us to do so.

If you would like us to continue to represent you, we will do so if you make satisfactory arrangements to pay your outstanding bill and pay all future fees and expenses. Such arrangements must be made within [number- same as above] days, or we will file the motion to withdraw. We look forward to hearing from you and hope that we can continue to represent you in this matter.

Sincerely,
Lawyer

Note: Send certified mail, return receipt requested.

Sample Termination Letter 3: Client Has Retained New Counsel

Date

Client
Client's Address Line 1
Client's Address Line 2

Re: [Identify Matter]

Dear Client:

We have been pleased to have represented you for the past [time period] in [identify matter]. This letter confirms our recent discussion regarding the termination of this firm's representation of you in connection with [identify matter].

We have agreed that our representation of you in this matter has been concluded. You [have engaged or stated that you wish to engage] new counsel to pursue this matter on your behalf, and therefore, we have no further obligation to advise you in this matter. In order to transfer your file to your new counsel, we need to obtain from you a letter of authorizing us to do to. We also need a letter from your new counsel acknowledging receipt of the file and agreeing to retain the file and make it available to us for examination at reasonable times and on reasonable advance notice.

You should be mindful of deadlines that apply to this matter, including [identify any deadlines]. We have arranged with opposing counsel for an extension of the deadline for your response to the interrogatories, and we have confirmed the stipulation for the extension in our letter to opposing counsel dated [date]. We have enclosed a copy of letter for your convenience.

The need for terminating our relationship in this matter was not anticipated by either of us when we began the representation, and we regret the need to end the relationship. We wish you all the best.

Sincerely,

Lawyer

Enclosure:
[Letter]

Note: Send certified mail, return receipt requested.

Sample Termination Letter 4: Non-Engagement Letter

Date

Prospective Client
Prospective Client's Address Line 1
Prospective Client's Address Line 2

Re: [Identify Matter]

Dear Prospective Client:

Pursuant to my letter of [date], I conducted [legal research or investigation] to determine whether you have a claim that could be asserted against [identify party or parties]. In my opinion, based on my [research or investigation] there is a strong likelihood that no enforceable legal basis exists for maintaining an action against [party or parties]. [Even though my opinion is based on my preliminary research, I have found [several] cases that support my conclusion.]

I urge you to consult another lawyer if you would like a second opinion. Because time limitations may affect your right to pursue a claim, you should act promptly in consulting another lawyer. If you wish another lawyer to review this matter, and you do not have another attorney in mind, I suggest you call the State Bar of Wisconsin's Lawyer Referral Service, which maintains a list of lawyers who may be able to handle your case. The phone number for the Lawyer Referral and Information Service is (800) 362-9082 or (608) 257-4666 (in Dane County and outside of Wisconsin).

Because I am not representing you in this matter, I am returning your original documents to you. I have retained photocopies for my records.

Thank you for your interest in my firm. If you have the need for legal assistance in the future, I hope you will consider me.

Sincerely,

Lawyer

Enclosures:
[List of Documents]

Note: Send certified mail, return receipt requested.

Sample Termination Letter 5: Waiting Further Instructions

Date

Prospective Client
Prospective Client's Address Line 1
Prospective Client's Address Line 2

Re: [Identify Matter]

Dear Prospective Client:

This letter confirms our discussion on [date] regarding [identify matter]. During our discussion, I advised you [advice given].

At this time, you have not decided whether you wish to proceed further with this claim. I cannot represent you until:

- you advise me that you wish to proceed with this claim;
- you send me the [identify] documents; and
- you make satisfactory arrangements for the payment of the expenses and my legal fees.

Please keep in mind that time limits may apply to your claim. If you wish to proceed, it is important to act promptly so that you will not be barred by time limits from pursuing your claim.

If I do not hear from you within 30 days, I will assume that you do not want to proceed, and I will close the file.

Sincerely,

Lawyer

Note: Send certified mail, return receipt requested.

Sample Termination Letter 6: Lost Client

Date

Client
Client's Address Line 1
Client's Address Line 2

Re: [Identify Matter]

Dear Client:

We have not received any communication from you, however, for the past [time period]. We have attempted to contact you by telephone and by mail, but have been unsuccessful. Our letters and telephone calls have been unanswered. Because we have unable to communicate with you, we must assume that you no longer want us to represent you in this matter.

Because your case is pending before a court, we may withdraw only with the court's permission. Enclosed is a copy of the motion we intend to file within [number] of days from the date of this letter. We believe the court will grant our request for leave to withdraw. While you have time within which to obtain new counsel without jeopardizing your case, you should begin to look for new counsel immediately so that the transition may be as smooth as possible.

Of course, we will cooperate with your new counsel. Your new counsel may wish to discuss this case with us. We are willing to do so as long as satisfactory arrangements are made to compensate us for the time that will be involved. We will transfer our file to your new counsel, but will need a letter from you authorizing us to do so.

If you would like us to continue to represent you, we will do so if you contact us immediately upon receipt of this letter. If you do not contact us within [number-same as above], we will file the motion to withdraw.

We look forward to hearing from you.

Sincerely,
Lawyer

Note: Send certified mail, return receipt requested.

Sample Termination Letter 7: Inactivity

Date

Client
Client's Address Line 1
Client's Address Line 2

Re: [Identify Matter]

Dear Client:

A periodic review of our files indicate that we have performed minimal or no services for you for a substantial period of time [or since date]. This letter confirms that, pursuant to our firm's policy, our representation of you has terminated, and we no longer have a lawyer-client relationship.

We wish you every success in your endeavors and would be pleased to assist you in the future if the need arises.

Sincerely,
Lawyer

Disclaimer

All of the samples included in this outline are guides only and are intended for lawyers who are admitted to practice in Wisconsin. As samples, their content is generic and cannot reflect the needs or the circumstances of any particular client or matter. Consequently, the State Bar of Wisconsin makes no warranties that these samples are adequate for a particular client or matter.

Please use your independent legal judgment when evaluating these samples for their use in particular matters.

APPENDIX B

Selected Wisconsin Rules of Professional Conduct for Attorneys

SCR 20:1.2 Scope of representation and allocation of authority between lawyer and client

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

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

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

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

WISCONSIN COMMENT

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

WISCONSIN COMMITTEE COMMENT

The Committee has retained in paragraph (a) the application of the duties stated to "any proceeding that could result in deprivation of liberty." The Model Rule does not include this language.

ABA COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional

obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.

Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

SCR 20:1.3 Diligence

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

ABA COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable 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.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Model Rules for Lawyer Disciplinary Enforcement R. 28 (2002) (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

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.

WISCONSIN COMMITTEE COMMENT

Paragraph (a)(4) differs from the Model Rule in that the words "by the client" are added for the sake of clarity.

ABA COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[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. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

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

SCR 20:1.8 Conflict of interest: prohibited transactions

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

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

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

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

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

....

ABA COMMENT

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1, and 8.3.

SCR 20:1.16 Declining or terminating representation

(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; or
(3) the lawyer is discharged.

(b) Except as stated in par. (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Wisconsin Committee Comment

With respect to the last sentence of paragraph (d), it should be noted that a state bar ethics opinion suggests that lawyers in Wisconsin do not have a retaining lien with respect to client papers. See State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-95-4 (1995).

ABA COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal
[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The

lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

SCR 20:3.1 Meritorious claims and contentions

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

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

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

(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.

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

WISCONSIN COMMITTEE COMMENT

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

ABA COMMENT

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

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

SCR 20:3.2 Expediting litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

ABA COMMENT

[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 20:3.3 Candor toward the tribunal

(a) A lawyer shall not knowingly:

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

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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

WISCONSIN COMMITTEE COMMENT

Unlike its Model Rule counterpart, paragraph (c) does not specify when the duties expire. For this reason, ABA Comment [13] is inapplicable.

ABA COMMENT

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

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are

circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently

come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

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

Duration of Obligation

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

Ex Parte Proceedings

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

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

SCR 20:4.4 Respect for rights of 3rd persons

(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.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

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.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

SCR 20:8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

WISCONSIN COMMENT

In addition to the obligations in this rule, Wisconsin Attorneys should note the obligations concerning notification set forth in SCR 21.15(5) and SCR 22.22(1).

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers;

(g) violate the attorney's oath;

(h) fail to cooperate in the investigation of a grievance filed with the office of lawyer regulation as required by SCR 21.15(4), SCR 22.001(9)(b), SCR 22.03(2), SCR 22.03(6), or SCR 22.04(1); or

(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).

WISCONSIN COMMENT

Intentional violation of tax laws, including failure to file tax returns or failure to pay taxes may violate SCR 20:8.4(f), absent a showing of inability to pay. In re Disciplinary Proceedings Against Cassidy, 172 Wis. 2d 600, 493 N.W.2d 362 (1992).

WISCONSIN COMMITTEE COMMENT

Failure to cooperate, paragraph (h), was previously enforced as a violation of paragraph (f). Paragraph (h) was added to the rule to provide better notice to lawyers of the obligation to cooperate. Other statutes, rules, orders, and decisions continue to be included within the definition of misconduct and are enforceable under paragraph (f).

Paragraphs (f) through (i) do not have counterparts in the Model Rule. What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Because of differences in content and numbering, care should be used when consulting the ABA Comment.

ABA COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.