

**STATE BAR OF WISCONSIN
STATEMENT IN RESPONSE TO
PETITION 04-07**

Over the course of several months, the State Bar Board of Governors considered the proposed revisions to the Rules of Professional Conduct (“Rules”) of SCR Chapter 20. In May, a presentation was made to the Board of Governors by the Chair of the Supreme Court Ethics 2000 Committee (“Committee”). In September the State Bar brought in a consultant to assist the Board of Governors in using a knowledge-based decisionmaking process to identify those proposed rule changes on which the Board wanted to comment.

The State Bar posted information regarding this petition on its website and provided a member feedback link. Additionally, officers and senior State Bar staff made numerous visits to local bar associations to discuss this issue and solicit member feedback. Although there are a myriad of proposed changes in the petition, the following items are the proposed changes on which the State Bar Board of Governors has taken a position. The State Bar’s silence on a proposed change should not be taken as either support for or opposition to the proposed change, but rather a decision simply to take no position.

Preamble – There were two issues in the preamble. The first issue involves an addition to the preamble to clarify the applicability of the rules to practice in tribal courts of sovereign nations. The second issue involves a change to the preamble language proposed by the Committee.

1. The Board believes that the rules do not adequately acknowledge the court rules of sovereign nations and the lawyers practicing before tribal courts. The Board suggests adding language to the preamble to acknowledge the potential conflicts between the Rules and the rules of the tribal courts.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intergovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority. *Similarly, there are federally recognized Indian Tribes with Tribal governments in the State of Wisconsin and these Tribes have rights of self-government and self-determination. It is not the intent of*

these Rules to abrogate any such authority of Tribal governments. For example, a lawyer for a Tribal government may have authority under tribal law to assist a person who is not a member of the bar in the representation of persons before a Tribal judicial forum.

Reasons for Actions:

- Coordinating these Rules with rules applicable in tribal courts is important. These rules should respect the sovereignty of the tribal courts.

2. The last sentence of preamble was altered (although not highlighted in proposed Rules accompanying the petition) and the Board does not support the changed language.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. ~~*Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.*~~ *Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.*

Reasons for Actions:

- The new language proposed by the Committee suggests that a violation of the Rules is per se malpractice. However, the standard of proof for a violation of the Rules is different than the standard of proof for a civil malpractice action. Hence, suggesting that violation of the Rules is per se malpractice changes the standard of proof in such a civil action.

1.0-Terminology

(f)-Informed consent. The Board supports the definition of informed consent.

(j)-Prosecutor. The Board opposes the definition of a prosecutor [see SCR 20:3.8].

1.2-Scope of Representation and allocation of authority between lawyer and client.
The Board supports some of the proposed changes to this rule, but recommends a new subparagraph (d).

(a) ~~A Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and, as required by Rule 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 ~~accept an offer of settlement of~~ 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 ~~objectives~~ scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation gives informed consent.

(d) A lawyer who appears in court on a limited basis for a client who is otherwise unrepresented must give notice in writing or on the record to the court and all other parties of the tasks for which the lawyer is engaged and must promptly notify the court and all other parties in writing or on the record of the termination of the lawyer's appearance in the case upon the completion of such tasks.

~~(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.~~

~~(d)~~ **(e)** 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.

Reasons for Actions:

- The Board believes that unbundled legal services will provide one part of the solution to the unmet legal needs. However, whenever a lawyer limits his or her

representation, it is important that both the client and the court are aware of the limitations. The Board believes that notifying courts is important to managing limited representation arrangements.

1.5- Written fee communication. The Board supports the proposed changes through subparagraph (a)(8), rejects subparagraphs (b)-(e) of the proposed revisions, and recommends retaining the language in subsection (b) of the current rule. The remaining changes are supported.

(a) A lawyer's fee lawyer shall be reasonable not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

~~*(b) When the lawyer has not regularly represented the client, (1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.*~~

~~**(2) If the total cost of representation to the client, including attorney's fees, is more than \$1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.**~~

~~**(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.**~~

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon 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.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is ~~in proportion to~~ based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) ~~by written agreement with the client pursuant to the referral of a matter between the lawyers, each lawyer assumes joint the same ethical responsibility for the representation as if the lawyers were partners in the same firm;~~ the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client. ~~advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as result of their involvement; and (3) the total fee is reasonable.~~

Reasons for Actions:

- The proposed rule sets forth a best practice which the Board believes to be a good practice, but the existence or absence of a writing should not be the basis for discipline.
- There are various instances in which the urgency of the representation does not lend itself to committing the scope of the representation and the fee agreements to writing. The lawyer may not know the scope of the representation or the representation may be of a short but intense duration.

1.6(c)-Confidentiality. The Board supports the proposed changes.

1.8-Conflicts of interest: prohibited transactions. The Board opposes the removal of the insurance defense exception. The Board proposes to restore the exception language for defense provided under insurance contracts.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

~~*(1) the client consents after consultation gives informed consent, provided that no further consent or consultation need be given if the client has given consent pursuant to the terms of an agreement or policy requiring an organization or insurer to retain counsel on the client's behalf;*~~

(1) the client consents after consultation gives informed consent, provided that no further informed consent ~~or consultation~~ need be given if the client has given consent pursuant to the terms of an agreement or policy requiring an organization or insurer to retain counsel on the client's behalf;

Reasons for Actions:

- The Board does not support the deletion of the insurance exception. There is no evidence that conflicts of interest are not properly handled by the insurance companies.

3.3-Candor toward a tribunal. The Board opposes the proposed language and recommends the language included below.

~~(b)~~ (c) The duties stated in ~~paragraph~~ paragraphs (a) and (b) *continue to the conclusion of the proceedings, and* apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

~~(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

(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.

Reasons for Actions:

- The proposed language in 3.3 (a)(1) includes a duty on the part of a lawyer to correct a false statement of material fact or law. The proposed language of 3.3 (a)(3) includes the duty to take reasonable remedial measures when a lawyer has offered material evidence he or she comes to know is false. The proposed language in 3.3 (a)(b) includes the duty to take reasonable remedial measures when a lawyer knows that a person has engaged in criminal or fraudulent conduct related to the proceeding. Each of the proposed parts of this rule add a duty to go back to the tribunal and either correct a false statement, or take reasonable remedial measures, including, if necessary, disclosure to the tribunal. Nowhere in the proposed language is a time set for how long this duty continues. The ABA Model Rule includes a time limitation for these duties. The Board recommends adding a time limitation so that a lawyer's duty is clearly outlined. A practical time limit on the obligation to rectify false evidence or false statements of law and fact needs to be established. The conclusion of the proceeding is a reasonable point for termination of the obligation.
- The comment to the ABA Model Rule indicates that a proceeding will be concluded when a final judgment has been affirmed on appeal or when the time for review has passed.
- The addition of a time limit will give courts and lawyers a better framework for the application of this rule.

3.8-Special responsibilities of a prosecutor [also includes 1.0-Terminology (definition of prosecutor); and 4.1-Truthfulness in statements to others]. The Board considered these three rules together.

1.0-Terminology (definition of prosecutor). The Board opposes the definition of a prosecutor and would delete it from the definition section.

~~SCR 20:1.0 Terminology (definition of prosecutor).~~

~~(j) A “prosecutor” includes a government attorney or special prosecutor (i) in a criminal case or delinquency action or (ii) acting in connection with the protection of a child or (iii) acting as a municipal prosecutor;~~

3.8-Special responsibilities of a prosecutor. The Board rejects the proposed language in 3.8 and proposes retaining the current 3.8 language.

The prosecutor in a criminal case shall:

~~(a) A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall refrain from prosecuting not prosecute a charge that the prosecutor knows is not supported by probable cause;~~

~~(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;~~

~~(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;~~

~~(b) When communicating with an unrepresented person, a prosecutor shall inform the person of his or her role and interest in the matter.~~

~~(c) When communicating after the commencement of litigation with an unrepresented person who has a constitutional or statutory right to counsel, the prosecutor shall inform the person of the right to counsel and the procedures to obtain counsel and shall ensure that the person has been given a reasonable opportunity to obtain counsel.~~

~~(d) When communicating with an unrepresented person after the commencement of litigation, a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor shall not:~~

~~(1) otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights or how the tribunal is likely to rule in the case, or~~

~~(2) assist the person in the completion of (i) guilty plea forms (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial.~~

~~(e) A prosecutor shall not subpoena a lawyer in a grand jury or other proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:~~

~~(1) the information sought is not protected from disclosure by any applicable privilege;~~

~~(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and~~

~~(3) there is no other feasible alternative to obtain the information.;~~

~~(f) A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall:~~

~~(d)(1) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and~~

~~(e)(2) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.~~

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

4.1-Truthfulness in statements to others. The Board opposes the proposed change to this rule.

~~(b) Notwithstanding paragraph (a) and Rules 5.3(c)(1) and 8.4, a prosecutor may advise or supervise others with respect to lawful investigative activities involving deception.~~

Reasons for Actions:

The Board analyzed 1.0, 3.8, and 4.1 together and below are the reasons for action taken on these rules.

- Local government lawyers serve a special role representing the government entity and are expected to exercise special care when dealing with unrepresented parties. The inclusion of this definition and the requirements contained in the amendments to SCR 20:3.8 severely hamper the ability of local government lawyers to provide efficient representation for their clients.
- Limiting a government attorney's (especially a municipal attorney's) ability to instruct people regarding the process will unduly delay the process and adversely affect the court system.
- The Board understands that prosecutors may be asked to advise law enforcement personnel regarding "sting" operations. However, such advice will be based upon the case law that permits such activities and the lawyer's truthfulness is not in question.
- The standard for truthfulness should not vary based upon the type of law practiced.
- There is no evidence that prosecutors are being disciplined for advising law enforcement personnel.

3.10-Threatening criminal prosecution. The Board opposes the deletion of this rule and recommends that the current language remain.

SCR 20:3.10 Threatening criminal prosecution

A lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.

SCR 20:3.10 Threatening criminal prosecution

A lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Reasons for Actions:

- Removing this rule may suggest to the public as well as lawyers that this type of conduct is permissible when in fact it is not.

4.1-Truthfulness in statements to others. [see SCR 20:3.8]

4.5-Guardians ad litem. The Board recognizes the special role of a guardian ad litem. The Rules do not neatly apply to a person serving as a guardian ad litem because the person for whom they are appointed is not a client. However, the proposed change does not adequately assess the applicability of the entire set of Rules and by only excepting the two rules noted, implies that all other Rules do apply to a guardian ad litem. Further review and study is needed.

A lawyer appointed to act as a guardian ad litem or as an attorney for the best interests of an individual represents, and shall act in, the individual's best interests, even if doing so is contrary to the individual's wishes. A lawyer so appointed shall comply with the Rules of Professional Conduct, except with respect to requirements concerning client consent or direction.

Reasons for Actions:

- The rule as proposed begins to recognize the unique role of a lawyer serving as a guardian ad litem. However, by identifying the two rules from which a guardian ad

litem is exempt, all other rules would apply. The Board believes that there are other rules that may not be applicable. The Board recommends further review and revision of this proposed rule so that guardians ad litem are not inadvertently required to do things that are only applicable in a traditional attorney-client relationship.

5.4(a)(4)-Professional independence of a lawyer. The Board does not support the proposed change which would permit the sharing of legal fees with nonprofit organizations that hire or recommend the employment of the lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; ~~and~~

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

~~**(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.**~~

Reasons for Actions:

- Court awarded legal fees belong to the client and hence, are not the lawyers to share (or not share).
- The Board believes that caution should be applied whenever a fee sharing relationship is permitted so that the lawyer's independence is not threatened.

6.1-Pro bono publico service. The Board opposes the proposed change to this rule and recommends adoption of the ABA model rule rather than the language suggested by the Committee.

(ABA MODEL RULE)

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

~~[11]~~ [12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

Reasons for Actions:

- The Board recommends the language of the ABA Model Rule because the ABA Model Rule provides a better definition of pro bono. That definition acknowledges the variety of pro bono legal services that are needed and capable

of being provided by lawyers. The Board rejects the mandatory reporting because the information required by the mandatory reporting is the same information that the Bar will be seeking as part of its study of unmet legal needs to be undertaken in response to the WisTAF petition. Yet a mandatory reporting requirement is likely to alienate lawyers and affect their willingness to actually provide the pro bono services which are so important.

- Furthermore, the yes/no nature of the responses will not likely produce information that can truly shed light on the underlying issues or be used productively to craft solutions to the unmet legal needs.
- The ABA Model Rule provides more clarity to what is considered pro bono and acknowledges the myriad of ways in which lawyers can fulfill the need for pro bono services.

6.5-Nonprofit and court-annexed limited legal services programs. The Board supports the proposed changes, with the addition of the phrase “an accredited law school” in subsection (a).

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization, a bar association, *an accredited law school*, or a court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Reasons for Actions:

- Law school programs often provide “clinics” which provide limited services. These programs are supervised by lawyers/clinical faculty.

7.2 Advertising. After the Board meeting, the issues involved in the changes to this rule were raised by the Group and Prepaid Legal Services Committee. This committee asks for more time to review changes and make recommendations.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may

(1) pay the reasonable cost of advertisements or communications advertising or written communication permitted by this rule;

(2) and may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service or other legal service organization, and pay for a law practice in accordance with SCR 20:1.17. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person or refer clients or customers to the lawyer, if

(i) the reciprocal referral arrangement is not exclusive;

(ii) the client gives informed consent;

(iii) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(iv) information relating to representation of a client is protected as required by Rule 1.6.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Reasons for Actions:

- Questions have arisen regarding the breath and scope of the rule change as it relates to “legal service plans” and the sharing of fees with such plans. The

Group and Prepaid Legal Services Committee requests more study and input before modifying the rule as proposed.

8.3-Reporting professional misconduct. The Board recommends reinstating the exception for reporting misconduct discovered by an arbitrator in a law firm breakup situation.

(a) A lawyer ~~having knowledge~~ who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer ~~having knowledge~~ who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

~~(c) If the information revealing misconduct under subsections (a) or (b) is confidential under Rule 1.6, the lawyer shall consult with the client about the matter and abide by the client's wishes to the extent required by Rule 1.6.~~

~~(c) this rule does not require disclosure of information protected by SCR 1.6.~~

(d) This rule does not require disclosure of any of the following:

(1) Information gained by a lawyer or judge while participating in an approved lawyers assistance program. otherwise protected by Rule 1.6.

(2) Information acquired by one of the following:

~~(i) A member of any committee or organization approved by any bar association to assist ill or disabled lawyers where such information is acquired in the course of assisting an ill or disabled lawyer.~~

~~(ii) Any any person selected by a court or any bar association to mediate or arbitrate or arbitrate disputes between lawyers arising out of a professional or economic dispute involving law firm dissolutions, termination or departure of one or more lawyers from a law firm where such information is acquired in the course of mediating or arbitrating or arbitrating the dispute between lawyers.~~

Reasons for Actions:

- The Lawyer Dispute Resolution program was created in order to provide faster resolution of law firm break up disputes.

- Mediation and arbitration are useful tools in speeding up the dispute resolution process. Requiring reporting of misconduct by arbitrators will discourage the use of arbitrator and hence, extend the dispute.

8.4(i)-Misconduct. The Board does not support the addition of harassment to this section. The opposition is not because of a lack of opposition to harassment, but a belief that this behavior is already prohibited, independent of whether a person is a lawyer and hence a separate rule is unnecessary.

~~**(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.**~~

Reasons for Actions:

- The ABA Model Rules do not include the same anti-harassment language. Under the model rules, it is professional misconduct to “engage in conduct that is prejudicial to the administration of justice.” See ABA Model Rule 8.4(d). The Comments have interpreted this clause to prohibit prejudice based on race, sex, religion, etc., among other things. Wisconsin’s existing version of 8.4 excluded this language. According to the Committee Comment for the current version, “This provision is vague and should not, in the committee’s view, provide an independent basis for a finding of misconduct.” Governors were concerned that the proposed 8.4(i) is completely inconsistent with the ABA model and that it does not provide any more certainty or clarity.
- The Wisconsin Rules of Ethics already include language that prohibits harassment, and there is concern that the proposed 8.4(i) will create an unnecessary (and perhaps confusing) redundancy in the rules. Preamble paragraphs 5 and 9 address broad forms of harassing behavior. Rule 20:3.1(a)(3) prohibits harassing behavior in connection with client representation. The Civility Rules (while not part of the ethics code) sets the attorney’s responsibilities higher than the proposed 8.4(i). SCR 60.04(f), part of the Code of Judicial Conduct, requires lawyers appearing before judges to refraining from manifesting bias or prejudice based on race, gender, relation, etc.
- By limiting proposed 8.4(i) to race, gender, religion, etc., the proposed rules may implicitly suggest that other forms of harassment are permissible. Governors believe that the wrong message may be sent.

Mandatory Malpractice Insurance-The Board reviewed the proposed mandatory malpractice insurance disclosure rule that was adopted by the ABA. Although not a part

of Chapter 20, the Board wanted to express concern over the ABA Model Rule on Mandatory Malpractice Insurance Disclosure. The Board does not support inclusion of such a rule in the Wisconsin Rules because such information will not provide clients with a clear understanding of malpractice insurance coverage because of its claims-made basis and thus may in fact mislead a client. Furthermore, other professions are not required to make this disclosure.

Trust Account Rules-While not formally a part of the Ethics 2000 review, the most recent changes to the trust account rules have created compliance issues for a wide spectrum of practitioners from solo attorneys to large law firms. The issues have hit the family law, criminal law and bankruptcy law areas hardest, but all practice groups have experienced issues with some portion of the rule. The State Bar formed a work group, including the Director of OLR, Keith Sellen. That State Bar anticipates bringing forth a joint work product to address these identified issues.

Conclusion-The State Bar urges the Court to consider Ethics 2000 as a package. There are many rules that are inter-related and a change to one will affect the impact of a different rule. The State Bar would be happy to assist the Court in further consideration by answering additional questions, obtaining information on what other states are doing or how rules impact specific segments.