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## Wisconsin Ethics Opinion E-09-02: Obligations of a Prosecutor Dealing with Unrepresented Persons

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### Question

What are the ethical obligations of a prosecutor when dealing with an unrepresented person?<sup>1</sup>

### Opinion

This opinion discusses a prosecutor's responsibilities under Wisconsin's Rules of Professional Conduct for Attorneys (the "Rules") when contacting unrepresented persons. The first step in analyzing a prosecutor's obligations under the Rules is defining what is meant by the term "prosecutor." The former version of the Rules contained no definition of the term and, traditionally, the term "prosecutor" was assumed to refer to a government attorney handling a criminal case. "Prosecutor," however, is now specifically defined by SCR 20:1.0(j) as

*. . . a government attorney or special prosecutor (i) in a criminal case, delinquency action, or proceeding that could result in a deprivation of liberty or (ii) acting in connection with the protection of a child or a termination of parental rights proceeding or (iii) acting as a municipal prosecutor.*

It is noteworthy that this new definition of prosecutor is expanded to include both government lawyers handling certain non-criminal matters and municipal prosecutors, who do not prosecute criminal cases in Wisconsin.

With that definition in mind, we turn now to SCR 20:3.8, entitled "Special Responsibilities of a Prosecutor," which imposes duties particular to prosecutors.<sup>2</sup> SCR 20:3.8, like many other Rules, was significantly amended by the Wisconsin Supreme Court effective July 1, 2007. The former Rule imposed two obligations upon prosecutors when dealing with unrepresented persons; first, prosecutors were prohibited from seeking a waiver of "important pretrial rights" from an unrepresented person and second, prosecutors were required to afford unrepresented accused the opportunity to retain counsel. The current SCR 20:3.8 contains three subsections that expand a prosecutor's duties with respect to unrepresented persons in important ways. Each subsection is discussed in turn.

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<sup>1</sup> This opinion replaces E-92-6 entitled "Prosecutor Contact with Unrepresented Criminal Defendant." That opinion is no longer current because it was based on former rules, significantly changed by the Wisconsin Supreme Court's amendment, effective July 1, 2007, of Wisconsin's Rules of Professional Conduct for Attorneys, found in Chapter 20 of the Supreme Court Rules.

<sup>2</sup> Wisconsin's SCR 20:3.8 differs substantially from ABA Model Rule 3.8. Therefore, the ABA Comment to the Rule provides only limited guidance and cases and ethics opinions from other states are similarly limited in relevance. Thus, the Committee's interpretation of the Rule is based solely upon the language of the Rule itself.

**SCR 20:3.8(b)**

SCR 20:3.8(b) reads as follows:

*When communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor's role and interest in the matter.*

This obligation to identify the prosecutor's role and interest in a matter applies to a prosecutor's contacts with any unrepresented person, and is not limited to contacts with a target of an investigation or an already indicted individual. This duty therefore applies to fact witnesses or any other unrepresented individual, irrespective of whether or not that person may face criminal charges. This duty applies only when contacts with an unrepresented individual are made "in the context of an investigation or proceeding," but this encompasses most contacts that a prosecutor would have with unrepresented persons in the course of his or her official duties.

Neither SCR 20:3.8(b) nor its Comment defines what it means for a prosecutor to "inform the person of the prosecutor's "role and interest in the matter." The Committee believes, however, that this normally requires the prosecutor to identify herself as a prosecutor, to identify the entity (local, state or federal) by which the prosecutor is employed and to disclose the prosecutor is engaged in the investigation or prosecution of a matter.<sup>3</sup> The Committee does not believe that this Rule requires a prosecutor to identify the specific individual or entity that is the subject of the investigation or prosecution. Such a requirement could potentially jeopardize certain investigations by forcing prosecutors to prematurely reveal the targets of investigation.

**SCR 20:3.8(c)**

SCR 20:3.8(c) imposes additional responsibilities upon prosecutors when dealing with unrepresented persons. It reads as follows:

*When dealing with an unrepresented person who has a statutory or constitutional right to counsel, the prosecutor shall inform the person of the right to counsel and the procedures to obtain counsel and shall give that person a reasonable opportunity to obtain counsel.*

In considering Rule 3.8(c), it is important to note that its requirements only apply to unrepresented persons who have a constitutional or statutory right to counsel. Whether such a right exists depends upon the nature of the proceeding and its procedural posture and it is beyond the scope of the Committee's role to attempt to describe all such situations. The Committee does note however, that the phrase "an unrepresented person who has a statutory or constitutional right to counsel" replaces the phrase "the accused," which appeared in the former version of the Rule. This change emphasizes that the prosecutor's responsibilities under subsection (c) may

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<sup>3</sup> This obligation is similar to the obligation found in SCR 20:4.3, which requires all lawyers dealing with an unrepresented person to inform the person of the lawyer's role in the matter and to make reasonable efforts to correct any misunderstanding that the person has about the lawyer's role.

arise before the filing of formal charges.<sup>4</sup> Further, the Committee notes that in Wisconsin, persons who are the subject of certain non-criminal proceedings, such mental commitment proceedings under Chapter 51 of the Wisconsin Statutes, or termination of parental rights (“TPR”) proceedings, have a right to counsel.

**SCR 20:3.8(d)**

SCR 20:3.8(d) provides, in part, as follows:

*When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights....*

This language, when compared with the language of the former SCR 20:3.8, substantially expands a prosecutor’s ability to negotiate with an unrepresented person and settle cases. The former SCR 20:3.8 prohibited prosecutors from seeking “to obtain from an unrepresented accused waiver of important pretrial rights.” That language was reasonably interpreted by many prosecutors in Wisconsin as foreclosing plea negotiations with unrepresented defendants since plea agreements necessarily involve the waiver of rights, most notably the right to trial. The problem was regarded as a significant one because a substantial percentage of defendants, especially in misdemeanor cases, appear *pro se*.

SCR 20:3.8(d) now plainly allows prosecutors to negotiate resolutions of criminal cases with unrepresented defendants. However, SCR 20:3.8(d) further provides that:

*a prosecutor, other than a municipal prosecutor, may not:*

- (1) Otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject the 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) a guilty plea forms (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial.*

This prohibition on providing legal advice is similar to the prohibition, found in SCR 20:4.3, against a lawyer giving legal advice to an unrepresented person whose interests are likely in conflict with the interests of the lawyer’s client.

SCR 20:3.8(d) thus allows discussion of resolutions available to an unrepresented person but prohibits advice as to which resolution should be. The line between discussion and advice

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<sup>4</sup> See United States v. Acosta, 111 F. Supp. 2d 1082, 1094 (E.D. Wis. 2000), holding that a prosecutor’s obligations to inform the accused of the right to counsel and the procedures for obtaining counsel and to provide the accused with a reasonable opportunity to do so arise even before a suspect is formally indicted.

may not always be bright, but the Rule forbids a prosecutor from crossing that line by moving from a discussion of what the person's choices are to advice on which choice to take.

A few examples help illustrate the distinction. The prosecutor must disclose the right to counsel and procedures to obtain counsel but may not advise the person on whether counsel should be obtained or which particular counsel should be retained. The prosecutor may explain the legal consequences of a particular plea agreement but may not advise the person on whether to accept it. The prosecutor may explain what happens at a preliminary examination but may not advise a defendant to waive the examination. SCR 20: 3.8(d)(1) flatly prohibits advice on how the tribunal is likely to rule in the case.

It is also important to note that a prosecutor discussing settlement with an unrepresented individual must also adhere to SCR 20:4.1(a)(1) which forbids lawyers from making false statements of material fact or law to third persons. Accordingly, in any communication with an unrepresented person, the prosecutor must take care to be accurate in the describing the facts and the law of the case.

### **Municipal Prosecutors**

SCR 20:3.8(d) explicitly exempts municipal prosecutors from the prohibitions contained in SCR 20:3.8(d)(1) and (2).<sup>5</sup> Furthermore, the Wisconsin Comment to SCR 20:4.3 states that a municipal prosecutor's obligations under SCR 20:4.3 should be read in conjunction with SCR 20:3.8 (d) and (f), clearly implying that the requirements of SCR 20:4.3 do not apply to municipal prosecutors to the extent that those requirements would conflict with SCR 20:3.8(d).

This appears to lead to the conclusion that municipal prosecutors, unlike all other Wisconsin lawyers, are free to give legal advice, to whatever extent they choose, to unrepresented adversaries. The Committee, however, does not believe, despite the language of SCR 20:3.8, that municipal prosecutors are unfettered with respect to providing legal advice to unrepresented adversaries. The Committee, rather, believes that the exception for municipal prosecutors contained in SCR 20:3.8(d) is narrowed by the requirements of other Rules, as explained below.

None of the Rules, other than SCR 20:4.3, contain any indication that they are to give way to the exception for municipal prosecutors in SCR 20:3.8(d). Accordingly, municipal prosecutors continue to be subject to the other ethical obligations that apply to all lawyers. For example, if a municipal prosecutor provided legal advice to an unrepresented adverse party, this likely would present an unwaivable conflict of interest under SCR 20:1.7, which provides as follows:

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<sup>5</sup> The Committee interprets this exception as applying only to lawyers acting as municipal prosecutors in a municipal court. The Committee does not believe that this exception would apply, for example, if a municipal prosecutor is for some reason prosecuting a termination of parental rights ("TPR") or Child in Need of Protective Services ("CHIPS") matter.

(a) *Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*

- (1) *the representation of one client will be directly adverse to another client;*  
*or*
- (2) *there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*

(b) *Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:*

- (1) *the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*
- (2) *the representation is not prohibited by law;*
- (3) *the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and*
- (4) *each affected client gives informed consent, confirmed in a writing signed by the client.*

An unrepresented adversary who receives legal advice from a municipal prosecutor, is entitled to rely on that advice.<sup>6</sup> This imposes a significant limitation on the types of advice that a municipal prosecutor may render to an unrepresented adversary because advice detrimental to the interests of the prosecutor's municipal client would create a conflict between the prosecutor's duty to provide reliable advice to the unrepresented adversary and competent and loyal representation to the municipal client, thus creating a material limitation conflict under SCR 20:1.7(a)(2).<sup>7</sup>

Also, a municipal prosecutor who provides legal advice or assistance to an unrepresented adversary runs the risk of unintentionally establishing a lawyer-client relationship with the adversary. Generally, a lawyer-client relationship is established when a person seeks legal services from a lawyer, the lawyer either affirmatively agrees to provide the services or fails to manifest lack of consent to do so and the person reasonably relies on the lawyer to provide the services.<sup>8</sup> While perhaps unlikely to be commonplace, it is not difficult to imagine a scenario in which an unrepresented person in municipal court relies to their detriment on advice from a municipal prosecutor who was careless in providing assistance to the unrepresented person. It

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<sup>6</sup> Lawyers have a duty of competence with respect to advice rendered even in the absence of a formal lawyer-client relationship, such as with respect to prospective clients. See e.g. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) and *Restatement (Third) of the Law Governing Lawyers*, §15(1)(c) (2001).

<sup>7</sup> In E-92-6, this Committee opined that the rendition of legal advice by a prosecutor to an unrepresented defendant was prohibited in part because "a clear conflict of interest exists."

<sup>8</sup> See e.g. *Restatement (Third) of the Law Governing Lawyers*, §14.

would not necessarily be unreasonable for a person who receives assistance from a municipal prosecutor to be legitimately confused as to the prosecutor's role. In such circumstances the test for formation of the lawyer-client relationship may be met. Representing one's adversary in a matter pending before a tribunal is an unwaivable conflict of interest [*see* SCR 20:1.7(b)(3)].

It is worth noting here that, while municipal prosecutors are seemingly exempted from the prohibition found in SCR 20:4.3 against providing legal advice to persons whose interests are adverse to the interests of the lawyer's client, municipal prosecutors are not exempt from that Rule's requirement that lawyers inform such persons of the lawyer's role in the matter. Thus, municipal prosecutors are obligated to inform unrepresented persons that the municipal prosecutor's function is to act as advocate for the municipal client, and therefore is not neutral. This duty takes on particular importance in busy municipal courts, where unrepresented persons may view a municipal prosecutor as a government lawyer whose job it is to "help out." Lawyers must understand, however, that this duty applies whenever a lawyer deals with an unrepresented person, and is not limited to circumstances in which the unrepresented person appears confused about the lawyer's role. By scrupulously fulfilling this obligation to inform unrepresented persons of their role in the matter, municipal prosecutors will do much to avoid the dangers of an unintended lawyer-client relationship.

If, in fact, the exemption for municipal prosecutors in SCR 20:3.8(d) does not trump all other Rules, the question arises as to exactly what type of assistance is permitted and what is not. In the opinion of the Committee, providing assistance to an unrepresented person that tends to be more general in nature, such as assistance with forms, explanation of procedures and explanation of typical outcomes with respect to certain types of cases, likely would avoid the conflict of interest issues discussed above. On the other hand, providing legal advice to an unrepresented adversary with respect to the viability of potential defenses or the benefits of retaining counsel, or attempting to dissuade the person from contesting a matter, run the risk of violating the conflict of interest Rules. It is not possible to list and categorize every possible situation a municipal prosecutor may face, but by limiting the assistance to areas which generally address how the process in municipal court works as opposed to specific advice about the legal merits of a particular matter, are likely to avoid potential problems.<sup>9</sup>

The Committee offers two other suggestions, not specifically required by the Rules, that might be wise to consider in this context. The first is to simply ask the apparently pro se individual if he or she has an attorney in the matter. If the person says no, the situation is made clearer. If the answer is yes, the prosecutor knows to work through the person's counsel. This will minimize allegations that the prosecutor communicated with the person without the

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<sup>9</sup> During the hearings that the Wisconsin Supreme Court conducted in connection with the adoption of SCR 20:3.8, much concern was expressed that if municipal prosecutors were prohibited from assisting unrepresented individuals, particularly with forms, the processing of cases in larger municipal courts would be significantly impaired. In subsequent administrative conferences concerning SCR 20:3.8, concerns over the administrative efficiency of municipal courts appeared to weigh heavily in the adoption of the municipal prosecutor exception. While these observations are by no means determinative in attempting to interpret the Rule, it is worth noting that the Court appeared to be concerned that municipal prosecutors not be prohibited from providing administrative assistance to unrepresented persons.

knowledge and consent of that person's counsel in violation of the standards of the Sixth Amendment and Rule 4.2, which limit communication with persons represented by counsel.

Second, a prosecutor meeting with an unrepresented person should consider having a third person present at the meeting. This has obvious benefits in the event the unrepresented person subsequently alleges unethical conduct by the prosecutor. It may also be helpful in insulating the prosecutor from possible disqualification under Rule 3.7, the advocate-witness rule.

***E-92-6 is hereby withdrawn***