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**Revised Wisconsin Ethics Opinion E-86-06: Duty of Lawyer to be  
Candid with Court  
in Connection with Prior Convictions<sup>1</sup>  
December 29, 2018**

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**SYNOPSIS**

*A lawyer is not required to proactively disclose facts to a court if the facts would be harmful to the lawyer's client. Nor is a lawyer required to correct inaccurate statements made by opposing counsel to the court unless the inaccurate statements were based upon false facts provided by the lawyer or the lawyer's client.*

**Scenario**

In Wisconsin, a first-offense operating while intoxicated ("OWI") charge is non-criminal. Subsequent offenses expose the defendant to escalating penalties and mandatory jail time. The existence of and number of prior OWI convictions must be proven by the state to subject the defendant to a greater penalty. A defendant with two prior OWI convictions is incorrectly charged with a second rather than third OWI offense. During a court hearing it becomes apparent the court and prosecutor are unaware of the correct number of prior offenses that would require charging a third offense, subjecting the defendant to a more serious penalty.

**Question**

Does a lawyer have an affirmative duty to disclose to the court the existence of prior OWI convictions that would expose the client to a more severe penalty when the court appears unaware of the correct number of prior convictions but has not asked the lawyer or client about the relevant facts?

**Analysis**

Wisconsin Supreme Court Rule ("SCR") 20:3.3 highlights the duty of the lawyer:

- (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;

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<sup>1</sup> This opinion was revised to reflect Wisconsin's current Rules of Professional Conduct for Attorneys.

(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.

ABA Comment [2] which follows SCR 20:3.3 identifies the role of the lawyer in protecting the integrity of the adjudicative process:

[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.

SCR 20:3.3 balances the lawyer's duty to the client with the duty to the tribunal. It places several responsibilities on the lawyer regarding the facts<sup>2</sup> relevant to the case:

(1) Counsel may not knowingly make a false statement of fact or law to the tribunal<sup>3</sup>,

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<sup>2</sup> The attorney has a proactive responsibility to inform the court of relevant legal authority even if adverse if it has not been disclosed by opposing counsel and it appears the court is unaware of the authority. SCR 20:3.3(a) (2). This duty – to correct misunderstandings about the controlling law – is not at issue in the scenario addressed in this opinion.

<sup>3</sup> SCR 20:3.3(a) (1).

- (2) Counsel may not knowingly present false evidence to a tribunal<sup>4</sup>,
- (3) Counsel must remedy criminal or fraudulent conduct by the client related to the proceeding<sup>5</sup>,
- (4) In an *ex parte* proceeding counsel must inform the tribunal of all material facts, even if adverse, to enable the tribunal to make an informed decision.<sup>6</sup>

These varied duties can arise in several situations:

- (1) the court may demonstrate an incorrect understanding of the facts to the advantage of the defendant;
- (2) opposing counsel may misstate the relevant facts to the advantage of the defendant;
- (3) the court may directly ask counsel about the relevant facts, or,
- (4) the court may directly ask the defendant about the relevant facts.

Although the scenario presented reflects only the first situation described this opinion will address the responsibility of counsel in each of them given they are closely related and can arise in the context of a single hearing.

In the first two situations the lawyer has no ethical duty to proactively correct the mistaken beliefs of the court or prosecutor.

In Wisconsin the number of prior OWI convictions controls the potential penalty for the most recent offense. Defense counsel has no obligation to assist the state in proving prior convictions, either by directly offering proof of prior convictions or correcting an inaccurate recitation of prior convictions by the prosecution.<sup>7</sup> Lawyers generally have no duty to assist opposing parties by making them aware of facts that may assist them but damage the lawyer's client.<sup>8</sup>

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<sup>4</sup> SCR 20:3.3(a) (3). In criminal cases the defendant's constitutional rights to testify and present a defense may require counsel to present testimony that might otherwise violate this rule. See ABA comments ¶¶ 7, 9 and *State v. McDowell*, 2004 WI 70, 681 N.W.2d. 500.

<sup>5</sup> SCR 20:3.3(b). Violations of SCR 20:3.3(a)(1) and (3) must also be corrected by counsel.

<sup>6</sup> SCR 20:3.3(d).

<sup>7</sup> See Restatement (Third) of the Law Governing Lawyers, §120 cmt. d "A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness."

<sup>8</sup> See Restatement (Third) of the Law Governing Lawyers, §120 cmt. b." The procedural rules concerning burden of proof allocate responsibility for bringing forward evidence. A lawyer might know of testimony or other evidence vital to the other party, but unknown to that party or their advocate. The advocate who knows of the evidence, and who has complied with applicable rules concerning pretrial discovery and other applicable disclosure requirements (see, e.g, § 118), has no legal obligation to reveal the evidence, even though the proceeding thereby may fail to ascertain the facts as the lawyer knows them."

In the third and fourth situations, where the court directly asks counsel or the defendant about the prior record, the lawyer's responsibilities would be different.

In the third situation, counsel may not knowingly report an incorrect number of prior OWI convictions. SCR 20:3.3(a)(1). This does not mean counsel must provide information adverse to the client.<sup>9</sup> Counsel may respectfully decline to answer, suggest that the court's inquiry is best directed to the prosecutor, or seek her client's permission to provide the information.<sup>10</sup>

The Committee's response to the fourth situation, where the court directly questions the client, is informed by the dual principles that the client should not answer falsely but also that the client is not obliged to provide information to assist the prosecution.

In all cases counsel should prepare the client in advance of a court hearing. Counsel should normally advise the client that counsel, and not the client, should respond to questions from the court or opponent. Thus, if the court directly engages the client, the client should defer to counsel to respond. If this is not possible, the client should be admonished to answer truthfully if any answer is given. SCR 20:1.2(d), 20:8.4(a). The Committee believes that a false statement by the client about the number of prior OWI convictions could require remedial action even if harmful to the client. SCR 20:3.3(b).<sup>11</sup>

In summary, in a criminal proceeding a defense lawyer is not obligated to correct an error made by the court or prosecuting attorney but has a duty not to provide false information to the court. Courts and prosecuting attorneys, in turn, should honor the obligations of defense attorneys to protect the client's confidential information and put the state to its proof.

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<sup>9</sup> Counsel's knowledge of the client's prior convictions is information that relates to the representation and is protected by SCR 20:1.6(a).

<sup>10</sup> It is the opinion of the Committee that it is inappropriate for the court or prosecutor to request that either defense counsel or the defendant assist the prosecution by providing information about the elements of the crime charged or sentencing factors that affect potential penalties. There may be strategic reasons for the defense to correct the mistake notwithstanding the absence of any ethical obligation to do so.

<sup>11</sup> SCR 20:3.3(b) requires action if the client's behavior is "criminal or fraudulent". Making a false statement to a tribunal is not criminal in Wisconsin if the person is not under oath, Wis. Stat. §§946.31, 946.32 nor acts for some form of consideration, Wis. Stat. §946.65. However, the Committee believes an unsworn false statement might be deemed to be fraudulent. If faced with a duty to remedy a client's false statement, counsel may seek permission from the client to correct the misstatement, explaining that it is likely to be discovered anyway sooner rather than later, or may unilaterally correct the statement without prior consultation with the client. *See also* ABA Formal Ethics Op. 87-353.