
**E-87-2 Opposing expert's communications with
represented party**

Facts

An individual (respondent) is involuntarily detained pursuant to section 51.15 or 51.20, Wis. Stats., a public in-patient facility pending a probable cause hearing under section 51.20(7), Wis. Stats. An attorney is appointed (or retained) to represent the respondent in the commitment proceeding. The facility assigns a staff physician to examine the respondent for the purposes of testifying at the probable cause hearing and for treatment of the individual pending final disposition of the case. Treatment usually includes the administration of psychotropic medications. The facility resident staff physicians are county employees. The position on commitment taken by the county's attorney, either the district attorney or the corporation counsel under section 51.20(4), during the proceedings is, in virtually every case, identical with the views of the staff physicians.

After the appointment of counsel, but prior to the probable cause hearing (or final hearing) the physician negotiates an agreement with the respondent for an out-patient commitment, in return for a medical recommendation for the respondent's imminent release from the in-patient facility. This agreement is negotiated directly with the respondent, with the knowledge that the respondent is represented by counsel, but without notifying counsel of the negotiations. It is not clear whether the physician fully explains to the respondent his or her rights under chapter 51 or the potential alternatives to commitment during the course of the negotiations. The physician does advise respondent to waive the right to jury trial and advises respondent to submit to involuntary out-patient commitment. At times, clients have reported feeling intimidated or confused by the physician's comments regarding these aspects of the commitment proceeding.

Question

What are the ethical concerns based on these facts?

Opinion

SCR 20.04(2) prohibits circumvention of a disciplinary rule through the actions of another person. SCR 20.38(a) prohibits communicating or causing another to communicate on the subject of the representation with a represented party. *See also Disciplinary Proceedings Against Zapf*, 125 Wis. 2d 123, 375 N.W.2d 654 (1985); and *Disciplinary Proceedings Against Heilprin*, 123 Wis. 2d 394, 367 N.W.2d 217 (1985).

The committee concludes that, absent prior notification of respondent's counsel and counsel's consent, and negotiations with the respondent by the district attorney or other public employees on his or her behalf would be improper. However, the committee makes no finding on the facts as presented herein regarding whether or not a breach of SCR 20.38(1) has occurred. *See* State Bar Bylaws, article IV, section 5, precluding the committee from commenting upon the past or present conduct of an identifiable State Bar member.

Regarding the communications of the physician, non-lawyer, with the respondent, the committee is not authorized to issue opinions on what is or is not the practice of law but reminds all concerned of SCR 10.03(4), SCR 20.18(1) and Wisc. Stat. section 757.30.