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**WISCONSIN FORMAL ETHICS OPINION EF-21-03**  
**Responsibilities of a Lawyer with a Fugitive Client<sup>1</sup>**

***October 21, 2021***

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**Synopsis**

*Information regarding a fugitive client's location is information that relates to the representation of the client and is protected by the lawyer's duty of confidentiality. The information may also be privileged if the client contacts the lawyer for general information regarding his legal status or to seek assistance in surrendering to authorities. If the client seeks assistance to evade apprehension, information regarding their location is protected by the duty of confidentiality but may not be privileged. The lawyer in such a situation has a duty to consult with the client, explain the client's available options and the likely consequences of each, but the lawyer may not advise, encourage, or assist the client to engage in conduct that is criminal or fraudulent. If continued representation would violate the disciplinary rules or other law the lawyer must withdraw. If the client persists in a course of action that is repugnant to the lawyer or otherwise provides permissible grounds for withdrawal, the lawyer may withdraw even if continued representation would be permissible. Should the lawyer be asked to disclose the client's location or other client information, the lawyer should assert the attorney-client privilege if applicable and not reveal the information unless ordered to do so by a court. Memorandum Opinion 8/76B is withdrawn.*

**Scenario**

A lawyer represents a client charged with several robberies. The client missed a mandatory court appearance resulting in issuance of a warrant and additional charges of bail jumping.<sup>2</sup> The client calls the lawyer and provides contact information and their current location. The client asks the lawyer what exposure they face, their options, and the likely consequences of each. The client is afraid to surrender, worried that a significant sentence might be imposed. The lawyer is concerned about what information and advice can be provided to the client, whether the client's contact information and location are protected information, and whether the lawyer must or should withdraw from the representation if the client does not agree to surrender.

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<sup>1</sup> This opinion is an expanded version of Memorandum Opinion 8/76B.

<sup>2</sup> Wis. Stat. §§969.09(1), 946.49(1)(b). Similar issues would exist if the client had escaped from custody or absconded from supervision.

## **1. The duty to consult with the client.**

Three rules address the lawyer's responsibility to consult with and advise the client – SCR 20:1.4, 20:1.2, and SCR 20:2.1.<sup>3</sup>

First, SCR 20:1.4 outlines the lawyer's communication responsibilities:

### **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.

SCR 20:1.2(d) describes the limits on what advice the lawyer may provide:

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

... (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.

SCR 20:2.1 addresses the the breadth of considerations the lawyer may include when advising the client:

### **SCR 20:2.1 Advisor**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other

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<sup>3</sup> In addition, the lawyer must be competent to address questions posed by the client, which may require factual and legal investigation. SCR 20:1.1.

considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

In the scenario presented the client has contacted the lawyer, seeking information, expressing worry, and appearing reluctant to surrender. The lawyer has several obligations. First, the client should be informed of their total exposure to criminal penalties.<sup>4</sup> Second, the lawyer should review all the client's options, both lawful and unlawful, and the likely consequences of the choice made.<sup>5</sup>

In advising the client, the lawyer may go beyond discussion of the immediate situation and discuss the impact of the client's decision in the long term, the impact upon others, and other relevant details in the particular case.<sup>6</sup>

While the lawyer may not recommend a course of action that is "criminal or fraudulent", such an option may be discussed with the client.<sup>7</sup> It will often be prudent to accompany a discussion of such an option with a strong remonstrance against it, including the likely negative outcomes for the client.<sup>8</sup> While not required by the text of the applicable rules, there is some support for the notion that the lawyer should encourage the client in such a situation to choose a lawful course of action, in this situation, a surrender to authorities.<sup>9</sup> It is important to note, however, that under Wisconsin's rules there is no affirmative obligation on the lawyer to urge the client to surrender.

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<sup>4</sup> This would include the maximum penalties for the underlying robberies and any new bail jumping charges that may arise from the client's failure to appear, as well as the fact that any sentences imposed could be consecutive to each other. In the case of absconding from supervision, this would include what length of confinement might follow revocation as well as the sentences for any new crimes committed while on supervision. Competence in such situations includes knowledge of the applicable statutes, administrative rules, and local practices.

<sup>5</sup> SCR 20:1.2(d).

<sup>6</sup> SCR 20:2.1.

<sup>7</sup> While the now repealed Code of Professional Responsibility prohibited assisting the client in conduct that was "fraudulent" or "illegal" both the ABA and the identical Wisconsin version of Rule 1.2(d) only prohibit assistance for behavior that is either "fraudulent" or "criminal", suggesting that assistance for conduct that is illegal but not fraudulent or criminal may be permitted. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 Fla. L. Rev. 251 (2018). This would not be an issue in most fugitive cases given that escape or bail jumping both involve criminal conduct. Absconding from supervision, if not a criminal violation in the particular jurisdiction, may raise the issue of what the lawyer may do in representing the client.

<sup>8</sup> In such situations, the lawyer should document in the file precisely what information and advice was provided to the client.

<sup>9</sup> Michigan Informal Ethics Op. RI-160 (1993).

## 2. The lawyer's responsibilities if the client refuses to surrender.

If, following consultation, the client intends to surrender, the lawyer should work with the client and authorities to manage the client's safe transfer to custody and explore means of assisting the client with the unresolved matters and the client's custodial situation. However, if the client is unwilling to surrender, the lawyer is faced with several other considerations.

### A. Prohibition against assisting the client with criminal or fraudulent conduct.

First, the lawyer may not assist the client in evading apprehension, at least when the underlying behavior constitutes a continuing criminal offense.<sup>10</sup> This invites consideration of what the lawyer may and may not do while representing a fugitive.

Meeting with, speaking to, or having knowledge of the client's plans absent some type of active encouragement or help does not constitute prohibited assistance.<sup>11</sup> Other actions, however, have been found improper, including directly assisting the client's flight from the jurisdiction<sup>12</sup> or helping the client remain in a secret location when knowing they were subject to active warrants.<sup>13</sup>

Courts and disciplinary bodies have disagreed whether the lawyer has a duty to divulge knowledge of the fugitive client's location and whether the failure to do so constitutes improper assistance. Differences in the opinions reflect distinctions in both the facts of the reported cases

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<sup>10</sup> For the most part, a lawyer has no responsibility to disclose information about or take other action regarding crimes previously committed by the client where the lawyer's services were not involved. SCR 20:1.6(c)(2); Wis. Stat. §905.03(4)(a). However, if the behavior constitutes a continuing crime, lawyer assistance may be viewed as facilitating the commission of a crime. In Wisconsin, escape is a continuing crime, *See* Wis. Stat. §946.42 (escape), *Parent v. State*, 31 Wis. 2d 106, 141 N.W. 2d 878 (1966); WJI Crim. 1770, n.7. Although bail jumping would seem similar, Wisconsin law is unsettled whether it also is a continuing offense. *See* Wis. Stat. §946.49(1)(b) (bail jumping); WJI Crim. 1765. Absconding from supervision is not a criminal offense in Wisconsin; however, encouraging one to abscond is – Wis. Stat. §946.46. Thus, although assisting a client with absconding may not violate SCR 20:1.2(d) it would appear to violate SCR 20:8.4(b).

<sup>11</sup> The comment to SCR 20:1.2(d) provides:

[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.

<sup>12</sup> *See Attorney Grievance Comm'n of Md. v. Sheinbein*, 812 A.2d 981 (Md. 2002) (attorney disciplined for violating Maryland Rules 8.4(b) and (d) for aiding fugitive to flee jurisdiction).

<sup>13</sup> *See* Wis. Stat. §946.47(1)(a); SCR 20:8.4(b); *cf. State v. Acciardo*, 748 A.2d 811 (R.I. 2000).

and the applicable disciplinary rules.<sup>14</sup> For reasons more fully developed in the section on privilege and confidentiality, the State Bar’s Standing Committee on Professional Ethics (the “Committee”) believes that under Wisconsin’s disciplinary rules, the lawyer does not have a duty to report the client’s location or contact information to authorities and that the failure to do so alone does not constitute improper assistance to the client.<sup>15</sup>

Finally, there are different views about whether the lawyer may continue representation of the fugitive client and if so, what type of litigation-related assistance may be provided.<sup>16</sup> As discussed below, the Committee does not believe that Wisconsin’s rules require withdrawal under such circumstances.

## **B. Confidentiality and privilege.**

While representing a client who has escaped from custody, failed to appear in court, or absconded from supervision, the lawyer will often possess knowledge that would help authorities apprehend and prosecute the client. This raises the question about whether this information may or must be disclosed to authorities.

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<sup>14</sup> See Michigan Informal Ethics Op. RI-160 (1993) (under Michigan rules lawyer should disclose location of fugitive client when necessary to prevent commission of crime); Ohio Ethics Op. 95-4 (1995) (lawyer may not reveal that fugitive client will be visiting lawyer’s office); Philadelphia Ethics Op. 2004-13 (2005) (lawyer may not reveal client’s whereabouts unless an exception to Rule 1.6 applies such as if lawyer’s service were used to commit a crime or fraud); Utah Ethics Op. 97-02 (1997) (lawyer does not assist client in commission of a crime or fraud by refusing to disclose contact information for client); Neb. Ethics Adv. Op. 90-2 (lawyer may disclose location of client if the lawyer believes the client intends to commit a future crime).

<sup>15</sup> SCR 20:3.3(b) imposes additional requirements on the lawyer. The rule provides:

(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.

This subsection concerns conduct that compromises the integrity of the adjudicative process, such as bribing, intimidating, or engaging in other improper contact with a witness, juror or court official, unlawfully concealing or destroying evidence, or failing to disclose information to the opponent or tribunal when required by law. SCR 20:3.3 cmt. ¶12. Given its focus it would not appear to apply to the situation discussed in this opinion.

<sup>16</sup> See Connecticut Informal Ethics Op. 93-2 (1993) (lawyer may continue representation of fugitive client to settle personal injury suit and arrange for transfer of funds to client); New York City Bar Association Op. 1999-02 (attorney may continue representation of client who becomes fugitive during pendency of civil action and manage funds for client; delivering funds to client does not constitute assisting client in criminal conduct); *but see* Michigan Informal Ethics Op. RI-160 (1993) (lawyer may not continue representation of fugitive client in the recovery of funds related to civil claims of the client). If the lawyer facilitated the transfer of funds to the fugitive client knowing that the client intended to use the funds to remain at large and the client’s behavior constituted a continuing crime, the lawyer’s involvement as counsel could be viewed as improperly assisting in the commission of a crime in violation of SCR 20:1.2(d) and 20:8.4(b). See also sec. 3, *supra*.

SCR 20:1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably likely death or substantial bodily harm;
- (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (3) to secure legal advice about the lawyer's conduct under these rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law or a court order; or
- (6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Wisconsin's disciplinary rules impose a mandatory disclosure obligation only when necessary to prevent a "criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another." SCR 20:1.6(b).<sup>17</sup> The failure to appear in court, comply with conditions of bail, or report to one's probation or parole officer is not the type of conduct which creates a risk of the type of harm necessary to trigger the obligations of the rule.

SCR 20:1.6(c) also provides for discretionary disclosure of protected information in six different situations. Only SCR 20:1.6(c)(5) – compliance with "other law or a court order" –

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<sup>17</sup> A lawyer is also obligated to disclose protected information when necessary to correct the presentation of false evidence. SCR 20:3.3(a)(3).

might apply to the fugitive client situation. Subsection (c)(1) concerns disclosure “to prevent reasonably likely death or substantial bodily harm”<sup>18</sup>, subsection (c)(2) addresses mitigation of financial harm involving the lawyer’s services, (c)(3) permits disclosure to seek ethics advice, (c)(4) involves disputes between the lawyer and client, and (c)(6) allows disclosures to resolve conflict of interest issues.

Consequently, the Committee believes that SCR 20:1.6 neither requires nor permits a Wisconsin lawyer to disclose the location of or contact information for a fugitive client absent client consent or a court order.

A related question may arise when the client fails to appear for a scheduled court appearance<sup>19</sup> and the presiding judge asks the lawyer why the client is not present. While the lawyer may not make a false statement in response to the court’s inquiry<sup>20</sup>, the lawyer is under no obligation to inform the court where the client is, if known, how the client may be contacted, or whether the client knew about the appearance and SCR 20:1.6 generally prohibits the lawyer from providing such information to the court.<sup>21</sup>

If the lawyer is called as a witness or directly ordered by the court to provide information regarding the fugitive client, the attorney-client evidentiary privilege becomes relevant, and the issue may arise whether information about the client fits within the crime fraud exception to the rule.<sup>22</sup>

While the Committee generally does not address questions arising under the rules of evidence, the Committee believes a brief discussion is merited here. Wis. Stat. §905.03(4)(a) provides the privilege does not apply, “[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud ...”

If the client simply asked the lawyer what might happen if they did not appear or, after failing to appear, asked about their options and likely consequences, the client’s purpose in contacting the lawyer would not appear to be seeking help in the commission of a crime. If

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<sup>18</sup> Previously, the ABA Code of Professional Responsibility permitted disclosure of “[t]he intention of his client to commit a crime and the information necessary to prevent the crime”, CPR DR 4-101(C)(3), an approach followed in some jurisdictions. In contrast, both the ABA and Wisconsin versions of Rule 1.6 require the risk of substantial harm to person or property to allow for disclosure of protected information.

<sup>19</sup> See Wis. Stat. §971.04 (outline of court hearings that require the presence of the defendant).

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

<sup>21</sup> Often the response, “I don’t know” may be appropriate when the lawyer does not have actual knowledge of the whereabouts of the client and does not wish to appear evasive or disrespectful to the court.

<sup>22</sup> See Wisconsin Formal Ethics Opinion EF-17-02 for a discussion of the distinction between the disciplinary rule of confidentiality and the evidentiary rule of privilege.

so, the exception would not apply, and the communications would be privileged. If, on the other hand, the client asked for lawyer's assistance in evading apprehension, a closer case is presented given the exception looks to the intent of the client rather than that of the lawyer. Even if the lawyer refused assistance, if it is shown that the client sought help in the perpetuation of a crime the privilege would appear to not apply. In either case, given the uncertainty of application of the exception, the lawyer should assert the privilege and require the court to make a ruling.<sup>23</sup>

### **3. Withdrawal from representation.**

If the client expresses an unwillingness to surrender and fails to appear in court the lawyer may consider whether withdrawal from representation is appropriate.<sup>24</sup>

Under SCR 20:1.16(a)(1) mandatory withdrawal is required if continued representation would "result in a violation of the Rules of Professional Conduct or other law ...". Even if the lawyer has not provided improper assistance to the client, if the lawyer has lost contact with the client, it may not be possible to satisfy the responsibility to consult with the client and assist them in making necessary decisions. The lack of contact could be viewed as violating SCR 20:1.1, 20:1.2 and 20:1.4 – adequate representation being impossible when the client cannot be reached. Should the lawyer conclude that continued representation is not viable, withdrawal may be required.<sup>25</sup>

When the lawyer has the means to communicate with the client, the rules grant discretion to the lawyer in deciding whether to seek to withdraw. SCR 20:1.16(b). Assuming the lawyer's services are not facilitating the client's fugitive status<sup>26</sup> and were not involved in the client becoming a fugitive, subsections (b)(4) and (b)(5) would provide a basis to seek termination of representation if the lawyer believed the client's conduct was "repugnant" or if in violation of conditions for representation previously agreed upon by the lawyer and client.<sup>27</sup> Further,

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<sup>23</sup> Courts have split on whether the attorney client privilege protects information about the location of a fugitive client just as in their analysis of the confidentiality rules. See *In re Nackson*, 555 A.2d 1101 (N.J. 1989) (disclosure not required concerning the whereabouts of a client wanted on a fugitive warrant); *Commonwealth v. Maguigan*, 511 A.2d 1327 (Pa. 1986) (lawyer ordered to reveal whereabouts of fugitive client); *Bersani v. Bersani*, 565 A.2d 1368 (Conn. Super. Ct. 1989) (in custody dispute wife's lawyer required to reveal location of wife and children or face a contempt finding); *In re Doe*, 456 N.Y.S.2d 312 (N.Y. Cnty. Ct. 1982) (rejection of lawyer's assertion of attorney-client privilege regarding location of client in testimony before grand jury); *In re Grand Jury Investigation*, 669 N.Y.S.2d 179 (N.Y. Cnty. Ct. 1998) (location of client privileged and disclosure not required before grand jury). See also *Restatement (Third) of the Law Governing Lawyers* §§68, 82 (2000).

<sup>24</sup> Withdrawal in a pending matter will typically require permission of the court. The lawyer should consult local rules as well as the applicable ethics rules.

<sup>25</sup> See Wisconsin Ethics Opinion E-96-2 (withdrawal may be required if lawyer has lost contact with client).

<sup>26</sup> See n. 16, *infra*.

<sup>27</sup> Note if retainer agreement imposes responsibilities on client.

the client's absence may have rendered the representation unreasonably difficult under SCR 20:1.16(b)(6).

In most cases seeking withdrawal is within the discretion of the lawyer. Should a motion be filed, the lawyer must first attempt to provide notice to the client, and when seeking permission of the court, the lawyer must balance the need to provide an adequate basis for withdrawal with the duty to protect the client against the disclosure of information that could cause future harm to the client.<sup>28</sup>

If withdrawal is granted, the lawyer should make reasonable efforts to inform the client.

Memorandum Opinion 8/76B is withdrawn.

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<sup>28</sup> See SCR 20:1.16, ABA Comment [3].