
Wisconsin Memorandum Ethics Opinion EM-18-01: Local Court Rule Requiring Withdrawal

March 16, 2018

Question: What are the ethical obligations of a defense lawyer when a local court rule requires the lawyer to file a motion to withdraw at the pretrial hearing if the lawyer has not been in communication with the client?

Answer: A Wisconsin county has a local court rule which governs pretrial procedure in criminal cases. The rule in question addresses the responsibilities of defense counsel at pretrial hearings, where normally a plea is taken or the matter will be set to proceed to trial on the scheduled trial date. The rule states: “When defense attorneys have no communication with client, file a motion to withdraw.” The public defender seeks clarification about defense counsel’s responsibilities under Wisconsin’s Rules of Professional Conduct for Attorneys (the “Rules”). In particular, the public defender inquires about the duty of the lawyer to inform the court about the lack of communication as a basis for withdrawal. Further the public defender asks how the lawyer’s duties of candor to the tribunal and confidentiality to the client affect the ability of a lawyer to respond if the court asks the lawyer directly if there has been communication with the client.

Rules of the Tribunal

Supreme Court Rule (“SCR”) 20:3.4(c) states:

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

This Rule thus requires lawyers to follow local court rules, such as the rule in question¹, and also court orders.² Lawyers appearing before a tribunal that had a local rule requiring withdrawal when there is no contact with the client would be obliged by SCR 20:3.4(c) to comply with such

¹ Consideration of whether this local court rule is a “valid obligation” is beyond the scope of the Committee’s authority; for purposes of this opinion the Committee will consider the local rule to be a valid obligation of the lawyers.

² See e.g. *Disciplinary Proceedings against Voss*, 2015 WI 104, 871 N.W.2d 859 (2015); *Disciplinary Proceedings against Lemanski*, 2017 WI 5, 892 N.W.2d 305 (2017).

a rule. With that primary obligation in mind, we consider how this mandatory withdrawal rule may impact a defense lawyer's obligations under other Rules.

Confidentiality

SCR 20:1.6 requires lawyers to hold in confidence all information that relates to the representation of a client.³ The duty applies not only to matters communicated in confidence by a client, but to all information that relates to the representation of a client, whatever its source.⁴ ABA Comment [3] to SCR 20:1.16 also makes plain that the duty of confidentiality applies when seeking permission of a court to withdraw from a matter:

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. *The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.*

(emphasis added)

ABA Comment [4] to SCR 20:1.6 further states that the Rule applies "to disclosures that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person."

The public defender states that if the court learns that there has been no contact between the lawyer and the client, the court will address the client's bond, which may result in the client's incarceration.

It is clear that if a lawyer were to comply with the requirements of the local rule and file a motion to withdraw when there has been no communication with the client, the lawyer's duty of confidentiality to the client would preclude disclosure of the reason for the withdrawal to the court. As suggested by ABA Comment [3] to SCR 20:1.16, the lawyer should provide no more than a statement that professional considerations require withdrawal. A statement by the lawyer that local rules require withdrawal is a statement that leads directly to disclosure of information protected by SCR 20:1.6.

³ For an extensive discussion of the duty of confidentiality, see Wisconsin Ethics Opinion EF-17-02.

⁴ See SCR 20:1.6, Comment [3].

The Committee is concerned that even the statement that professional considerations require withdrawal could be tantamount to a disclosure, given the court's awareness of the local rule. This is particularly problematic in the criminal defense context, where the result may be the incarceration of the client. The local rule thus jeopardizes the lawyer's duty of confidentiality to the client.⁵

Withdrawal

SCR 20:1.16 governs a lawyer's responsibilities when withdrawing from a matter and provides several grounds for mandatory and permissive withdrawal. It states in relevant part:

(a) Except as stated in par. (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

...

(b) Except as stated in par. (c), a lawyer may withdraw from representing a client if:

...

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

Lawyers have duties to communicate with clients (SCR 20:1.4) and to represent clients competently (SCR 20:1.1) and diligently (SCR 20:1.3). If a lawyer has had no contact with a client, it is possible that the lawyer may not be able to fulfill these duties and thus be required by SCR 20:1.16(a)(1) to seek a court's permission to withdraw from the matter. Thus, in some cases, the local court rule may simply duplicate an obligation that already exists under SCR 20:1.16(a)(1).

⁵ If the court asks the lawyer if the withdrawal motion was filed pursuant to the local rule, the lawyer would be bound to refuse to answer. If the court ordered the lawyer to answer, the lawyer would be permitted to answer under SCR 20:1.6(c)(5).

Criminal defendants, however, have constitutional rights to trial and to counsel, and a client who is not in communication with a lawyer may appear at the scheduled trial date, either voluntarily or through contact with law enforcement. Further, conducting a defense in a criminal trial may sometimes largely consist of challenging the prosecution's evidence, and sometimes a lawyer may be able to prepare for trial with little or no participation from the client. It is not necessarily the case that the Rules require withdrawal every time a client does not communicate with their lawyer.

It also may be the case that when a defendant fails to appear, the court will issue a bench warrant for the defendant's arrest and, if the non-appearance violates a condition of the defendant's bond, the prosecutor may issue bail jumping charges. Neither of these facts by themselves requires defense counsel to withdraw from the underlying matter. In cases where a bench warrant is issued for the client and the client is quickly apprehended, the lawyer's forced withdrawal may delay assistance of counsel when the client is likely to need such assistance.⁶

The Committee finds it troubling that the local rule creates a new ground for mandatory withdrawal in criminal matters where clients have constitutional right to counsel.

Conclusion

The Rules recognize that lawyers have lawful obligations that exist outside the Rules.⁷ The lawyer's obligation to obey law outside the Rules normally supercedes the lawyer's obligation under the Rules. For example, a lawyer may seek the permission of a court to withdraw from a matter because of a conflict of interest. If the court denies the lawyer's request, SCR 20:1.16(c) makes plain that the lawyer must continue the representation notwithstanding that the lawyer is now acting under a conflict of interest. In the situation addressed in this opinion, the lawyer faced with such a local rule must abide by the rule.

The Committee also understands a court's desire to control the proceedings before it.⁸ It is concerning, however, that such measures come at the expense of weakening one of the core duties that lawyers owe to clients. The duty of confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship."⁹ The local rule in question creates a new circumstance which forces defense counsel to implicitly disclose damaging information and erodes that trust. The Committee questions whether the local rule strikes the appropriate balance between seeking efficiency and respecting the core duties lawyers owe clients.

⁶ This may also create additional administrative burdens as the public defender's office will have to re-appoint counsel.

⁷ See Preamble and Scope, paragraph [15].

⁸ The Committee assumes one of the purposes of the local rule is to manage the court's calendar.

⁹ SCR 20:1.6, ABA Comment [3].

