
**Wisconsin Informal Ethics Opinion EI-11-01:
Legal Information Seminars**

April 6, 2011

Question: What are the ethical implications of a lawyer presenting a seminar in which the basic state forms for power of attorney for health care and power of attorney for finances are reviewed and then executed by participants in the seminar with the assistance of law students?

The requestor asks the State Bar's Standing Committee on Professional Ethics (the "Committee") several questions regarding a proposed legal seminar, in which a general discussion of the medical power of attorney form and the financial power of attorney form by a lawyer would be followed by an opportunity for participants to complete those forms with the assistance of law students. The program would be offered under the auspices of a law school student organization. In the interests of clarity, the Committee has rephrased and reorganized the requestor's questions.

Question 1. Does the lawyer create a lawyer-client relationship with seminar attendees by presenting information about the purpose and effect of the state forms at the seminar?

The question of whether a lawyer-client relationship is created is not an "ethics" question, in that the Rules of Professional Conduct for Attorneys (the "Rules") intentionally do not define the standards for the establishment of such a relationship – a lawyer must look to other sources of law to determine whether a lawyer-client relationship exists. Normally, the Committee offers no opinions on questions that fall outside the Rules, but given the importance of the issue to lawyers' duties under the Rules, the Committee has opined in the past on formation of the lawyer-client relationship (see *Ethics Opinion E-95-5*) and in *Ethics Opinion EI-10-01*, the Committee discussed the formation of the lawyer client relationship as follows:

The lawyer-client relationship is one of agency based upon a contract and the law of contracts governs whether such a relationship has been created. Glazer v. Brookhouse, 2008 US. Dist. LEXIS 7249 (E.D. Wis. Jan. 17, 2008). The contract may be express, but formality is not essential. Security Bank v. Klicker, 142 Wis. 2d 289, 418 N.W.2d 27 (Wis. Ct. App. 1987). The relationship may be implied from the words and actions of the parties. Ibid. Whether a lawyer-client relationship exists rests on the intent of the parties and presents a question of fact for the fact finder. Marten Transport Ltd. Hartford Specialty Co., 194 Wis. 2d 1, 533 N. W.2d 452 (1995).

Section 14 of the Restatement (Third) of the Law Governing Lawyers states that a lawyer client relationship arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services;
or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

Thus, the lawyer-client relationship is a contractual relationship that arises when a person seeks legal services from a lawyer and the lawyer agrees to provide those services or fails to decline to provide those services in the face of the person's reasonable reliance. This test is fact-specific, and the final determination of whether a lawyer client relationship exists depends on the particulars of each matter.

The question of whether a lawyer-client relationship is formed in large part depends on whether the lawyer presenting the seminar is providing or offering to provide *legal services* and the attendees are seeking such services. In determining whether legal services are being provided or offered, the distinction between "legal advice" and "legal information" becomes important because it is generally accepted that providing legal information does not constitute the practice of law, whereas the provision of legal advice normally is the practice of law.

There is no definition of "legal advice" or "legal information" in the Rules, or in any Wisconsin statute or case of which the Committee is aware. It is generally agreed, however, that legal advice is the application of legal knowledge and skill to the circumstances of a specific individual or entity in order to evaluate or recommend certain courses of action or opinions. Legal information is the provision of general information about legal processes or procedures without application to the particular circumstances of a specific individual or entity. Often, legal information is information about what *may* be done, whereas legal advice is recommendations about what *should* be done.

In a publication intended to provide guidance to court personnel in dealing with unrepresented litigants, the Arizona Judicial Council discussed the distinction between legal advice and legal information.¹ While intended for court personnel, the Committee believes the following is useful in considering the question presented:

Legal information is communication of facts about court procedures, timing and resources. It includes information contained in court records, examples of forms or pleadings, informational pamphlets, copies of statutes and court rules, procedures, practices and due dates.

Legal information involves identifying available procedural options (within the scope of the personnel's knowledge) and helping customers understand and comply with court procedures.

Legal information is generally about court process (how the court and its judges function), court rules, court records and forms.

Legal advice is a written or oral statement that:

- *Interprets some aspect of the law, court rules, or court procedures, or recommends a specific course of conduct a person should take in an actual or potential legal proceeding*
- *Applies the law to the individual person's specific factual circumstances, or*
- *Requires the person giving advice to have knowledge of the law and legal principles beyond familiarity with court requirements and procedures.*

Court customers are asking for legal advice when they ask whether or not they should proceed in a certain fashion. Telling a court customer "what to do" rather than "how to do it" may constitute giving legal advice.

¹ *GUIDE TO COURT CUSTOMER ASSISTANCE: Legal Advice - Legal Information Guidelines for Arizona Court Personnel* (March 2007)

It is also generally accepted that lawyers who make presentations are not providing legal advice to their audiences because the presentation is not tailored to the needs of a specific individual. Thus, if the lawyer/presenter provides general legal information about the purpose and effect of the forms and the information required to complete them, without addressing the particular circumstances of specific individuals, the lawyer/presenter would not be providing legal services and there would be no lawyer-client relationship.

On July 27, 2010, the Wisconsin Supreme Court issued Order No. 07-09 (2010 WI 101) adopting a definition of the practice of law in Wisconsin. This order warrants discussion in this opinion because it defines the practice of law in Wisconsin. The order promulgates Supreme Court Rules ("SCR") Chapter 23, which took effect on January 1, 2011. SCR 23.01 (2) defines the practice of law, in relevant part, as follows:

The practice of law in Wisconsin is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

(2) Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).

Thus, as of January 1, 2011, it is plain that the completion of legal documents on behalf of another in circumstances of a client relationship would be the practice of law. This, however, does not alter the conclusion reached above, in that if the lawyer/presenter limits the presentation to legal information, then no lawyer-client relationship is formed with attendees and there is no "client relationship of trust or reliance."

Question 2: Would the law students be practicing law without a license by assisting attendees in filling out the forms and serving as the notary and witness in this context?

With respect to assistance in completing the forms, the discussion above regarding the distinction between legal advice and legal information applies: if the law students refrain from advising attendees what they should do and limit themselves to providing information about what information is required in the form, the law student would not be engaged in the practice of law.

If, however, the intention is that the law students do provide legal advice to attendees, it would be permissible provided that the program complies with the requirements of SCR Chapter 50. This chapter allows law students to engage in activities otherwise considered the practice of law when acting under the supervision of a licensed attorney supervisor in an approved law school program. There are other requirements, such as certification of participating students by the law school dean, and the Committee will not address all such requirements in this opinion. If, however, the proposed program meets and fulfills all the requirements of SCR Chapter 50, the law students would be able to provide legal services to attendees with appropriate supervision.

The Committee notes that SCR 50.05(3) imposes personal professional responsibility on the supervising lawyer for the activities of the law students taken under the supervision of the lawyer. Thus, if the program is organized under SCR Chapter 50 to allow the law students to provide legal advice to attendees, and the lawyer/presenter supervises the law students in providing such advice, the lawyer/presenter assumes professional responsibility for advice, even if the lawyer/presenter limited the presentation itself to legal information. Thus if the program is organized under SCR Chapter 50, the lawyer/presenter supervising the students would have a lawyer-client relationship with attendees.

As noted above, the newly adopted SCR 23.02 will mandate that a person must have a law license to engage in the practice of law in Wisconsin, but contains numerous exceptions. SCR 23.02(2)(i) in particular provides as follows:

(2) EXCEPTIONS AND EXCLUSIONS. A license to practice law and active membership in the State Bar of Wisconsin are not required for a person engaged in any of the following activities in Wisconsin, regardless of whether these activities constitute the practice of law

(i): Selection or completion of a legal document, including a legal document created pursuant to statute, administrative rule, or Supreme Court Order, where the document may contain various blanks and provisions to be filled in or completed and selection or completion of the legal document requires only common or transaction specific knowledge regarding the required information and general knowledge of the legal consequences.

The Committee notes that power of attorney forms for health care and finances are sometimes completed without the assistance of a lawyer and, as of January 1, 2011, SCR 23.02(2)(i) allows non-lawyers to assist individuals in filling out such forms under circumstances where completion of the document requires only common or transaction specific knowledge about the matter. Because the Committee lacks knowledge of the specifics of the requirements of the forms to be used in the proposed seminar, and questions outside of professional responsibility law are generally beyond the scope of the Committee's authority, the Committee takes no position as to whether completion of the forms at the proposed seminar "requires only common or transaction specific knowledge regarding the required information and general knowledge of the legal consequences."

If the lawyer/presenter reasonably believes that the level of knowledge required fits within the exception, SCR 23.02(2)(i), would allow law students to assist individuals in completing health care and financial POAs without engaging in the unauthorized practice of law.

However, if the seminar is held out to attendees in a manner which either expressly or impliedly states that the forms will be filled out under the supervision of the lawyer/presenter, then the conditions set forth in §14 of the *Restatement*, as discussed above, would likely be met and seminar attendees would have a reasonable expectation of receiving legal services under the direction of a lawyer. The lawyer/presenter would then be responsible for the activities of the students. See SCR 20:5.3.

Question 3: Would requiring all attendees to sign a disclaimer, acknowledging that the lawyer/presenter will provide legal information only, assist in preventing the unintentional formation of a lawyer-client relationship?

The use of a disclaimer, in appropriate circumstances, can be a useful risk management tool for lawyers. As is always the case, however, the conduct of the lawyer/presenter, rather than the language of any disclaimer, would determine whether or not a lawyer-client relationship would arise. Put another way, disclaimers are effective provided that the language of the disclaimer accurately reflects the circumstances. If the intent is to avoid the creation of a lawyer-client relationship, then the lawyer/presenter must act accordingly.

Such a disclaimer may be effective if the lawyer/presenter provided legal information only and did not supervise or assist the law students in providing legal advice to the attendees. Thus, if the lawyer/presenter were to make the presentation and leave, without providing supervision to the law students, a disclaimer may explain the following:

- No lawyer-client relationship is intended
- The seminar is provided for informational purposes only
- The lawyer is not providing supervision or direction to the law students in assisting attendees

Such a disclaimer would be effective as a risk management tool to limit the possibility that the lawyer/presenter should be found to have unintentionally formed a lawyer client relationship with an attendee.

Question 4: Would the lawyer/presenter be able to subsequently represent an audience member against another audience member in a matter related to the documents prepared at the seminar at some future date?

The answer to this question depends on the specific facts.

If the lawyer/presenter and the law students are careful to avoid providing legal advice to the attendees, then there is no lawyer-client relationship and no conflicts arising from the seminar. In this case the lawyer presenter would be free to represent attendees in future disputes, provided that no other circumstances give rise to conflicts.

If the intent of the program is to provide legal advice to the attendees, the program is sponsored by the law school and there is no contemplation of further legal assistance beyond the seminar, the provisions of SCR 20:6.5 would apply.

SCR 20:6.5 – Nonprofit and court-annexed limited legal service programs.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to SCR 20:1.7 and SCR 20:1.9 (a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to SCR 20:1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by SCR 20:1.7 or SCR 20: 1.9 (a) with respect to the matter.

(b) Except as provided in par. (a) (2), SCR 20:1.10 is inapplicable to a representation governed by this rule.

This Rule, adopted in 2007, allows lawyers to more freely participate in clinical or other limited legal services programs by limiting conflicts and imputation of conflicts. The Rule exempts lawyers providing brief, one time only, limited scope legal services from the restrictions of SCR 20:1.7 (concurrent conflicts of interest), SCR 20:1.9(a) (former client conflicts) and SCR 20:1.10 (imputed conflicts), unless the lawyer is actually aware of the conflict. This means that lawyers can participate in most walk-in, advice-only clinics without worrying about screening for conflicts.

Because the SCR 20:6.5 exempts a lawyer from conflict checking in the in program itself, the lawyer/presenter would face a subsequent conflict under SCR 20:1.9(a) only if the lawyer presenter were *actually* aware of the conflict. Further, the lawyer/presenter participating in such a program would not be required to maintain a list of attendees for conflict checking purposes. Comment [4] to SCR 20:6.5 states as follows:

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's

firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

Thus, because there is no imputation of any conflict arising from a representation conducted under SCR 20:6.5, to other members of the Lawyer's firm, there is no need to enter the names of limited scope clients into the firm's conflict checking data base.

Therefore, if the intent is to provide legal services to attendees, and the program otherwise meets the requirements of SCR 20:6.5, the lawyer/presenter would have lawyer/client relationships but would not face subsequent conflicts unless the lawyer/presenter was actually aware of the conflict.