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WSSFC 2023

QOL/Ethics Track – Session 2

Ethics Jeopardy

Presented By:
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About the Presenters...

Aviva Meridian Kaiser is Ethics Counsel at the State Bar of Wisconsin. Prior to joining the State Bar in 2013, she taught at the University of Wisconsin Law School for 25 years. She taught Professional Responsibilities, Ethical and Professional Considerations in Writing, Problem Solving, and Risk Management. From 1992 until 2002, she was the Director of the Legal Research and Writing Program. Aviva received her B.A. in Chinese from the University of Pittsburgh and her J.D. from the State University of New York at Buffalo Law School. She clerked for the Honorable Louis B. Garippo in People v. John Wayne Gacy and clerked for the Honorable Maurice Perlin in the Illinois Appellate Court. She practiced law in Chicago before beginning her full-time teaching career at IIT Chicago/Kent College of Law. Aviva is a member of the State Bar of Wisconsin, a Wisconsin Law Fellow, an American Bar Foundation Fellow, and a frequent speaker on matters of professional ethics.

Timothy J. Pierce has been Ethics Counsel for the State Bar of Wisconsin since 2004. He received his undergraduate degree from the University of Wisconsin–Madison and his law degree, *cum laude*, from the University of Wisconsin Law School. Mr. Pierce was previously a Deputy Director at the Office of Lawyer Regulation in Milwaukee and Madison. He has also been employed as the Ethics Administrator for Milbank, Hadley, Tweed & McCloy, in New York, and as an Assistant State Public Defender in Racine. He is a member of the State Bar of Wisconsin. He is a frequent speaker on matters of professional ethics and has given hundreds of CLE presentations to a wide variety of groups on professional responsibility law. He serves as reporter for the State Bar's Committee on Professional Ethics and writes the monthly "Ethical Dilemmas" column for the State Bar of Wisconsin. He has also taught Professional Responsibilities at the University of Wisconsin Law School since 2011 and currently serves as a Volunteer Subject Matter Expert for the MPRE.

Are You in Jeopardy? Legal Ethics Edition
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Trust Accounts 10

- Attorney Reed received a check for $10,000 from a client for advanced fees in a litigation matter.
- Using his cell phone, Attorney Reed made a mobile deposit into his trust account.
- Did Attorney Reed violate SCR 20:1.15?

A. Yes
B. No

Analysis

SCR 20:1.15 (a)(2) "Electronic transaction" means a paperless transfer of funds to or from a trust or fiduciary account. Electronic transactions do not include transfers initiated by voice or automated teller or cash dispensing machines. Note: Electronic transactions do not include wire transfers.

SCR 20:1.15(f)(3), which prohibited electronic transaction into and out of a traditional trust account, was repealed.

Under **SCR 20:1.15(f)(1)**, electronic transfers to and from the trust account are permitted if such transfers are authorized in advance by the lawyer or a person under the lawyer's direct supervision. Any chargeback, surcharge, or ACH reversal must be replaced by the lawyer within three business days of the notice of the chargeback, surcharge, or ACH reversal. The lawyer must reimburse the account before making any additional withdrawals.

Trust Accounts 20

- Attorney Carlson received a credit card payment from the client. The payment consisted of $3,000 for an advanced fee and $500 for advanced costs.
- Attorney Carlson uses the alternative protection provisions of SCR 20:1.5(g), which permits him to deposit advanced fees into the business/operating account. However, advanced costs must always be held in trust pursuant to SCR 20:1.5(f).
- Attorney Carlson deposited both the advanced fees and advanced costs into the business/operating account.
- Did he violate SCR 20:1.15?

A. Yes
B. No

Analysis

SCR 20:1.15(b)(6)
(6) Advanced legal fees and costs. A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, except as follows:
a. The lawyer complies with the requirements of SCR 20:1.5(g).
b. The lawyer may accept credit card payments or electronic funds transfer payments of advanced legal fees and expenses as temporary deposits in a non-trust account, so long as such funds are transferred promptly, and no later than two business days following receipt, into a client trust account. However, except as provided by SCR 20:1.5(g), a lawyer shall not accept any advance payment into a non-trust account if the lawyer has any reason to suspect that the funds will not be successfully transferred into the client trust account within two business days of receipt.

Wisconsin Comment
SCR 20:1.15 (b) (6) Advanced legal fees and costs.
While the general rule is that a lawyer must hold trust property separate from the lawyer's own property, SCR 20:1.15(b)(6) allows very limited short-term temporary commingling when accepting an electronic payment for advanced fees or costs. Considering the expense of electronic payment processing providers, this allows a lawyer to maintain only one electronic payment processing provider service and to have it connected to just one bank account, e.g. the law firm's operating account. The lawyer may accept electronic payments for advanced fees or costs to that account without violating SCR 20:1.15(a), so long as any payments for advanced fees or costs are promptly transferred to the lawyer's trust account within two business days.

Trust Accounts 30

- Attorney Alexander accepts credit card payments for advanced fees as well as costs into the trust account.
- Unfortunately, the credit card processing charges have become quite costly.
- Attorney Alexander has decided to deduct the credit charges from the advanced fees.
- Does doing so violate SCR 20:1.15?

A. Yes
B. No

Analysis

Wisconsin Comment SCR 20:1.15 (f) (1) Security of transactions
Costs associated with electronic payments
Electronic payment systems, such as credit cards, routinely impose charges on vendors when a customer pays for goods or services. That charge may be deducted directly from the customer's payment. Vendors who accept credit cards routinely credit the customer with the full amount of the payment and absorb the charges. Before holding a client responsible for these charges, a lawyer

should disclose this practice to the client in advance, and assure that the client understands and consents to the charges. This disclosure should be in writing if necessary to comply with SCR 20:1.5(b). In addition, the lawyer should ensure that holding the client responsible for transaction costs does not violate the terms of service of the payment system provider or other law.

Note: Under the previous version of the Rule, which was repealed, if funds were deposited into the E-Banking Trust Account, the Rule required the gross amount to be deposited. Consequently, the lawyer could not deduct the credit card processing fees from those funds. The new trust account rule, which became effective on July 1, 2023, repealed SCR 20:1.15(f)(3)b, the E-Banking Trust Account, and SCR 20:1.15(f)(3)c., the Alternative to E-Banking Trust Account.

Confidentiality 10

- Attorney Love represented Client in an employment discrimination case. Client was not the easiest client to work with and was not always the most truthful.
- Despite Client's lack of complete truthfulness, Attorney Love secured a rather successful settlement offer. It was the final offer.
- Client was not happy with the offer and accused Attorney Love of not pursuing certain aspects of the case, which Attorney Love believed were frivolous.
- Client terminated Attorney Love's representation and posted a Google Review, which accused Attorney Love of charging Client an exorbitant initial fee and sending Client bills.
- Attorney Love did not bill Client. In fact, the fee agreement was a contingent fee agreement.
- Attorney Love responded that the comments were not accurate because no initial fee was charged, and no bills were sent.

A. Attorney Love violated SCR 20:1.6 by disclosing information relating to the representation of Client.
B. Attorney Love did not violate SCR 20:1.6 because the response only negated what Client said.

Analysis

Wisconsin Formal Ethics Opinion EF-23-01 Responding to Online Criticism

"A lawyer may not reveal information relating to the representation of a client in response to online criticism of the lawyer without the affected current, prospective or former client's informed consent. A response to online criticism which reveals protected information is not permitted by the self-defense exception outlined in SCR 20:1.6(c)(4). In most instances, the committee believes that no response best serves both the interests of the client and the lawyer. However, should the lawyer decide to respond, they may not reveal protected information and should be restrained and proportional in their response."

Suggested permissible response:
"If the lawyer believes a response is necessary, the committee suggests the following: I do not believe the [post/comments] are fair or accurate. Professional obligations prevent me from commenting further."

Examples of information that is protected by the rule but not privileged include the identity of the client, Wisconsin Formal Ethics Op. EF-17-02 (2017), or litigation details even if publicly available, Rhode Island Ethics Op. 99-02 (1999).

In addition to protecting publicly available information and information not covered by the attorney client privilege, SCR 20:1.6 also protects information previously disclosed to others, information learned from third parties and disclosures that would not be harmful to the client. Wisconsin Formal Ethics Op. EF-17-02 (2017).

Confidentiality 20

- Attorney GAL represented the best interest of the 10-year-old boy in a divorce proceeding. The divorce was acrimonious, and both parents contributed to the acrimony.
- About a year and a half after the divorce proceeding ended, a colleague in Attorney GAL's firm was appointed GAL in a CHIPS case.
- The single mother in the CHIPS case had been spending time with a man who is not liked by her 11-year-old daughter.
- The daughter has often been left alone at night. One night when she was alone, she was frightened by a strange noise and called a neighbor.
- Colleague GAL was discussing the CHIPS case with Attorney GAL when they discovered that the man referred to in the CHIPs was the male parent in Attorney GAL's divorce case.
- Attorney GAL shared some of the male parent's antics with Colleague GAL.
- Did Attorney GAL violate the duty of confidentiality?

    A. Yes
    B. No

Analysis

Wisconsin Formal Ethics Opinion EF-23-02 Guardian ad Litem Conflicts and Informed Consent, Confidentiality and other Obligations under the Rules of Professional Conduct

GALs represent the best interests of their wards, and therefore possess "information relating to the representation" of both current and former clients, which is protected by SCRs 20:1.6 and 20:1.9(c), and the committee believes these rules apply to GALs.

GALs, like most lawyers, come into possession of much sensitive and important information, and like other lawyers, GALs are not free to use or disclose such information as they wish.

While it is appropriate and indeed required that GALs make disclosures that advance the best interests of the ward, sometimes even over the objections of the ward, they may not make disclosures not required by their responsibilities that are adverse to the interests of the ward or that solely further the interests of the GAL or a third party**.** So for example, a GAL may not disclose information about the ward to assist a colleague in cross examining the former ward should they be an adverse witness in a matter.

Confidentiality 30

- Lawyer represents Client who is charged with three robberies.
- Client missed a mandatory court appearance resulting in issuance of a warrant and additional charges of bail jumping.
- Client calls Lawyer and provides Lawyer with contact information and current location. Client asks 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.

    A. 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.
    B. Lawyer has a duty to divulge knowledge of the fugitive client's location and the failure to do so constitutes improper assistance.

WISCONSIN FORMAL ETHICS OPINION EF-21-03 Responsibilities of a Lawyer with a Fugitive 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).

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" – might apply to the fugitive client situation. Subsection (c)(1) concerns disclosure "to prevent reasonably likely death or substantial bodily harm" 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.

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 so, the crime exception to the attorney client privilege would not apply, and the communications would be privilege.

Conflicts of Interest 10

- Attorney Van Ness represents Plaintiff in a contract dispute with Defendant Company.
- Attorney Savage represents Defendant Company and has been Defendant Company's in-house counsel for six years. Attorney Savage's name appears on the correspondence with Plaintiff prior to Plaintiff retaining Attorney Van Ness.
- Attorney Van Ness and Attorney Savage play on the same flag football team and have done so for several years.
- They see each other at practice and games, team social events, and sometimes at special occasions such as the weddings of teammates.
- When Attorney Savage learned that Plaintiff was represented by Attorney Van Ness, he informed Defendant Company that opposing counsel was a teammate and the extent of their relationship.
- Defendant Company has strongly encouraged Attorney Savage to file a motion to disqualify Attorney Van Ness.

A. Attorney Van Ness has a conflict of interest.
B. Attorney Van Ness does not have a conflict of interest.

Analysis

SCR 20:1.7(a)(2) provides that in the absence of informed consent confirmed in writing a lawyer may not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

ABA Comment [11] explains that when opposing counsel are related by blood or marriage "there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment."

ABA Formal Opinion 494 (July 29, 2020) Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel

The opinion concludes that these risks also arise when there are close personal or intimate relationships between lawyers who represent opposing clients.

The opinion considers three categories of relationships: intimate relationships, friendships, and acquaintances.

Intimate relationships
Lawyers who cohabit in an intimate relationship, couples who are engaged to be married, or in exclusive intimate relationships should be treated similarly to married couples for conflicts purposes. These lawyers must disclose the relationship to their respective clients and ordinarily may not represent the clients in the matter, unless each client gives informed consent confirmed in writing, assuming the lawyers reasonably believe that they will be able to provide competent and diligent representation to each client.

Opposing counsel who are in some type of intimate relationship, but are not exclusive, engaged to be married or cohabiting, must carefully consider whether the relationship creates a significant risk that the representation of either client will be materially limited by the lawyers' personal relationships. The prudent course would be to disclose to the affected clients and obtain their informed consent.

Friendships

Friendships may be the most difficult category to navigate. On the one hand, an adversary may be a dear and longtime friend or someone with whom the lawyer regularly socializes. On the other hand, an adversary may be considered a "friend" even though contact is occasional, brief, or superficial. Opposing lawyers who are friends are not *for that reason* alone prohibited from representing adverse clients.

Close friendships with opposing counsel should be disclosed to each affected client and, when circumstances require as described further below, their informed consent obtained.

The following are indicia of friendships that would require disclosure and, ordinarily, informed consent: Lawyers who exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues or share confidences and intimate details of their lives.

By contrast, friendships that might require disclosure to the affected clients but will not ordinarily require consent from clients include lawyers who "once practiced law together [and] may periodically meet for a meal when their busy schedules permit or, if they live in different cities, try to meet when one is in the other's hometown." Similarly, adversaries who "were law school classmates or were colleagues years before [and] may stay in touch through occasional calls or correspondence, but not regularly see one another" will typically not require the consent of affected clients and may not even require disclosure.

Whether either consent or disclosure is required depends on the lawyer's considered judgment as to whether Rule 1.7(a)(2) applies and, if so, whether the lawyer reasonably believes the lawyer can competently and diligently carry out the representation notwithstanding the conflict.

Acquaintances

Acquaintances are relationships that do not carry the familiarity, affinity or attachment of friendships. Lawyers, like judges, "should be considered acquaintances when their interactions . . . are coincidental or relatively superficial, such as being members of the same place of worship, professional or civil organizations, or the like."

Lawyers who are "acquaintances" may see each other at such gatherings, even frequently, without feeling a close personal bond. They might regularly meet at bar association or other business events, present continuing education programs together, or serve on bar association committees or boards together where their relationships may be collegial but not necessarily fall into the category of a "friend" that could materially limit the lawyer's independent professional judgment on behalf of a client.

Similarly, lawyers who regularly see each other at civic or social events but do not make any particular effort to seek each other's company do not have the type of close personal friendship requiring disclosure and informed consent.

Lawyers might both attend bar association or other professional meetings; they may have represented co-parties in litigation. . .; they may meet each other at school or other events involving their children or spouses; they may see each other when socializing with mutual friends; they may belong to the same country club or gym; they may patronize the same businesses and periodically encounter one another there; they may live in the same area or neighborhood and run into one another at neighborhood or area events, or at homeowners' meetings; or they might attend the same religious services. . . . Generally, neither . . . seeks contact with the other, but they greet each other amicably and are cordial when their lives intersect.

Lawyers who are acquaintances of opposing counsel need not disclose the relationship to clients, although the lawyer may choose to do so. Disclosure may be advisable to maintain good client relations. It may be helpful to inform a client that the lawyer has a professional connection with opposing counsel and then explain how that will not materially limit the lawyer's objectivity but may, in fact, assist in the representation because the lawyers can work collegially.

Conflicts of Interest 20

- Solo Practitioner agreed to serve as co-counsel for plaintiff in a personal injury case.
- The law firm that had asked Solo Practitioner to serve as co-counsel was forced to withdraw after discovering that it had represented the defendant in numerous personal and business matters for over 3 years.
- The defendant has filed a disqualification motion alleging that Solo Practitioner has a conflict of interest.

    A. Solo Practitioner has a conflict of interest.
    B. Solo Practitioner does not have a conflict of interest.

Analysis

SCR 20:1.10(a) states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 . . ."

Kelly v. Paulsen, 2016 BL 433631, N.Y. App. Div., 3d Dep't, No. 522669, 12/29/16). 33 Law. Man. Prof. Conduct 10.

The conflict of interest that forced a law firm to withdraw from a personal injury case against a former client did not taint a solo practitioner who agreed to serve as co-counsel in the matter.

The appeal required the court to decide whether co-counsel who work in different law firms are "associated" with each other within the meaning of New York Rule of Professional Conduct 1.10(a), which governs the imputation of conflicts of interest.

Although the rule doesn't define the phrase “associated in a firm,” the court said it was “well established” that the meaning “extends beyond partners and associates who are employed by the same firm and includes attorneys with ‘of counsel’ relationships.”

A number of other courts that have held that a tainted lawyer's conflict generally isn't imputable to his or her co-counsel, absent evidence that the conflicted lawyer shared confidential information with the co-counsel. See, e.g., *Commonwealth v. Maricle*, 10 S.W.3d 117 (Ky. 1999); *Brown v. Eighth Judicial Dist. Court*, 14 P.3d 1266 (Nev. 2000).

Conflicts of Interest 30

- Attorney Jenkins represented Client five years ago in securing a zoning variance to build a multi-use building.
- Due to the pandemic, construction was delayed for three years, and the cost of construction increased substantially. The size of the building was reduced by approximately 15%.
- The building, now completed, has been a success in terms of occupancy rates.
- Unfortunately, the success has caused parking problems. Homeowners near the building have complained about the lack of street parking for them and their guests.
- A group of homeowners have asked Attorney Jenkins to advise them what options, if any, they may have.

A. Attorney Jenkins has a conflict of interest.
B. Attorney Jenkins does not have a conflict of interest.

Analysis

SCR 20:1.9 (a)
A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a **substantially related matter** in which that person's interests are **materially adverse** to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

ABA Comment [3]
[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or **if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.** For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

ABA Formal Ethics Opinion 497 Conflicts Involving Materially Adverse Interests

"Material adverseness is present when a current client and former client are directly adverse, material adverseness also can be present where direct adverseness is not."

"However, 'material adverseness' does not reach situations in which the representation of a current client is simply harmful to a former client's economic or financial interests, without some specific tangible direct harm. In *Gillette Co. v. Provost*, the court concluded that '[w]ith respect to the material adverse prong of Rule 1.9, representation of one client is not adverse to the interests of another client, for the purposes of lawyers' ethical obligations, merely because the two clients compete economically.'"

The following are types of situations where "material adverseness" may be found:

- "Suing a former client or defending a new client against a claim by a former client (*i.e*., being on the opposite side of the "v" from former client) on the same or on a substantially related matter."
- "Another type of "material adverseness" exists when a lawyer attempts to attack her own prior work."
- Rule 1.9(c)(1) prohibits using information from a former client "to the disadvantage of the former client." If a lawyer must use information relating to the former representation to the disadvantage of a former client to competently examine the former client, the lawyer has a conflict, unless that information has become "generally known.

In ***Zerger & Mauer***, the City of Greenwood prosecuted and settled a nuisance claim against Martin Marietta involving the latter's truck traffic to a local quarry. As part of the settlement, the City could designate the specific route that Martin Marietta's trucks took on the way to the quarry.

The law firm of Zerger & Mauer represented the City in this litigation.
Thereafter, Zerger & Mauer brought a private nuisance action against Martin Marietta on behalf of various individuals with property interests along the route designated by the City for Martin Marietta's traffic to the quarry.

The City was not a part of the private nuisance action but sought to disqualify Zerger & Mauer from representing the private plaintiffs in that case. The court disqualified the firm, finding that it was "advocate[ing] a position that contradicts a term in [the City's] settlement."

The court also found that Zerger & Mauer's current clients "have an interest in . . . disrupting Martin's use of the [City's] designated route" and "there is a very real possibility that other routes will come into play." The City also "may demand that its former counsel not advocate positions that pose the serious threat of once again embroiling [it] in protracted litigation." The court upheld the lower court's finding that the interests of the City and the private plaintiffs "remain[ed] materially adverse."

Fees 10

- Attorney Wicks entered into a "Fee Agreement" with Client. The scope of representation was described as "1400 Wisconsin Avenue."

- The fee was described as a “Nonrefundable retainer of $ 2,000 due at the signing of the agreement.”
- For two months, there was no activity on the matter. Client asked Attorney Wicks to refund the $ 2,000 because no services were provided.
- Attorney Wicks refused to refund the $ 2,000, claiming that the retainer was earned by being available during the two months, and that this was fully discussed with Client prior to Client signing the agreement.
- Did Attorney Wicks violate the Rules of Professional Conduct?

A. Yes.
B. No.

Analysis

SCR 20:1.0(mm) "Retainer" denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. **This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point.** A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d). [Emphasis added.]

SCR 20:1.5(b)(1) and (2)

(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be $1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.
(2) If the total cost of representation to the client, including attorney's fees, is more than $1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

Revised Wisconsin Ethics Opinion E-93-4: Nonrefundable Retainers and Advanced Fees

Lawyers may charge clients advanced fees, which SCR 20:1.0(ag) defines as an amount paid to a lawyer in contemplation of future services. SCR 20:1.0(ag) subjects advanced fees to the requirements of SCR 20:1.5 and SCR 20:1.16(d). Lawyers may also charge availability retainers to clients. SCR 20:1.5(b)(2) requires that the purpose and effect of any retainer be communicated to the client in writing when the total cost to the client of the representation is more than $1000. SCR 20:1.0(mm) prohibits lawyers from billing against retainers for fees or costs at any time, and subjects retainers to the requirements of SCR 20:1.5 and SCR 20:1.16(d). Because both advanced fees and retainers must be earned as required by SCR 20:1.16(d), and unforeseen circumstances may prevent such fees from being earned, a lawyer may not describe such fees as “nonrefundable” in communications with clients, including fee agreements.

Fees 20

- After a free initial consultation with Client, Attorney Alexander entered into an agreement for a flat fee of $ 750 with Client for a municipal violation. The agreement was not in writing.
- Prior to engaging Attorney Alexander, Client had talked with one of the City's Assistant Corporation Counsel, who had extended an offer to Client.
- Client did not tell Attorney Alexander the offer.
- Attorney Alexander was quite familiar with the municipal ordinance, and the facts from the free initial consultation. Attorney Alexander told Client that the City Corporation Counsel was a good friend.
- Attorney Alexander called the City Corporation Counsel and was made an offer which was quite good in Attorney Alexander's opinion given the new information learned about Client in the conversation with the City Corporation Counsel.
- Attorney Alexander conveyed the offer to Client. Client was extremely angry and demanded a refund of his fee, especially because an Assistant Corporation Counsel had made the same offer before Client had engaged the services of Attorney Alexander.

A. Attorney Alexander is entitled to keep the flat fee because the fee was earned.
B. Attorney Alexander violated SCR 20:8.4(d) and SCR 20:1.5(a).

Analysis

SCR 20:8.4 Misconduct
It is professional misconduct for a lawyer to:
(a) (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
. . .
(d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(dm) "Flat fee" denotes a fixed amount paid to a lawyer for specific, agreed-upon services, or for a fixed, agreed-upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed-upon stage in the representation. A flat fee, sometimes referred to as "unit billing," is not an advance against the lawyer's hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), and SCR 20:1.16(d). Notwithstanding that lawyers have a property interest upon receipt of flat fees, such fees can be earned only by the provision of legal services.

SCR 20:1.5 Fees
(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

Fees 30

- Attorney Doubs entered into a limited scope representation agreement with Client to review documents for an asset purchase that another lawyer had prepared for Client.
- Attorney Doubs agreed to an hourly rate of $300, capped at $900. Attorney Doubs is quite proficient in asset purchase agreements and does not think it will take 3 hours.
- Because the total cost of representation to the client, including attorney's fees, is $1000 or less, the agreement was only oral.

A. Attorney Doubs did not violate the Rules because the total cost of representation was $1000 or less.
B. Attorney Doubs violated the Rules because the representation was limited in scope.

Analysis

SCR 20:1.5(b)(1)
The scope of the representation and **the basis or rate of the fee and expenses for which the client will be responsible** shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past**. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be $1000 or less, the communication may be oral** or in writing.

SCR 20:1.2(c)
A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. **The client's informed consent must be in writing** except as set forth in sub. (1).

a. the representation of the client consists solely of telephone consultation;
b. the representation is provided by a lawyer employed by or participating in a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms;
c. the court appoints the lawyer for a limited purpose that is set forth in the appointment order;
d. the representation is provided by the state public defender pursuant to Ch. 977, stats., including representation provided by a private attorney pursuant to an appointment by the state public defender; or
e. the representation is provided to an existing client pursuant to an existing lawyer-client relationship.