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Quality of Life/Ethics Track – Session 7

Lawyers in the Community: Ethical Considerations of Being a Lawyer and a Community Member

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About the Presenters...

Matthew (Matt) M. Beier, is the Senior Vice President and Director of Business Development Wisconsin Lawyers Mutual Insurance Company (WILMIC). Prior to joining WILMIC in November 2016, Matt was a civil litigation attorney in Madison with experience before state and federal courts as well as Wisconsin administrative agencies. He has broad experience in diverse areas of the law, including personal injury, employment law, contract law, business law, commercial law, and debtor/creditor law. Matt is a 1996 graduate of South Dakota State University, with a degree in Political Science, and graduated from the University of Wisconsin Law School in 2000. He is a member of the State Bar of Wisconsin, Wisconsin Defense Counsel, Milwaukee County Bar Association and the Dane County Bar Association. He also serves as a board member on the State Bar of Wisconsin's Solo/Small Firm and General Practice Section.

Stacie H. Rosenzweig is a shareholder at Halling & Cayo, S.C. in Milwaukee. Her practice emphasizes representation of regulated professionals, including lawyers and health care professionals who face possible disciplinary action by licensing authorities, as well as ethics and compliance counseling.

Lawyers in the Community: Ethical Considerations of Being a Lawyer and Community Member

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I. Introduction

- Importance of professional identity beyond client representation
- Lawyers as community members, mentors, and leaders
- Goal of session:
  - Apply Wisconsin Supreme Court Rules of Professional Conduct in nontraditional roles
  - Spot and resolve ethical pitfalls before they become problems

II. 24/7 Rules

- **What is a "24/7" Rule?**

- Some Supreme Court Rules (SCR Chapter 20) apply only in situations where lawyers are representing a client, or are otherwise at work. But some apply all the time, and are sometimes referred to as "24/7" rules.
- **SCR 20:8.4(b):** Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
  - Not all criminal acts constitute professional misconduct.
    - ABA Model Rules Comment 2 draws a distinction between acts of purely personal morality, such as adultery (which have no specific connection to fitness for the practice of law) and acts that do implicate law practice. *But see Disciplinary Proc. Against Ritland*, 2021 WI 36, in which a lawyer was convicted of, and disciplined for, "attempted adultery" (though in this case the "attempted adultery" was also connected with work).
  - Many cases leading to discipline concern operating while under the influence (OWI).
    - One case, *Disciplinary Proc. Against Johns*, 2014 WI 32, an attorney who was convicted of homicide by intoxicated use of a motor vehicle after he drove while drunk and killed his brother was *not* disciplined because, as stated by the referee, "The evidence in this case clearly shows that the crime committed by [the attorney] was a once in a lifetime aberration in his otherwise fine behavior. Except for this one

specific and tragic event, [the attorney] has led an exemplary personal and professional life. There is no evidence that points to even a hint of any other kind of personal or professional misconduct."

        - *But see Disciplinary Proc. Against Maras*, 2020 WI 78 (reciprocal discipline applied in case where attorney was suspended in Illinois for homicide by intoxicated use of a motor vehicle).

- **SCR 20:8.4(c)** states that it is misconduct to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."
    - Most SCR 20:8.4(c) cases involve conduct concerning representation of a client.
        - Some, however, involve lying to employers or law partners (*Disciplinary Proc. Against Bant*, 2019 WI 107, 389 Wis. 2d 446, 936 N.W.2d 152).
        - Some involve fraud or other acts that also violate SCR 20:8.4(b) (*Public Reprimand of Rajek*, No. 2006-4).
        - One case involved a lawyer lying to a magazine reporter covering the disciplinary case, about his past drug use (*Disciplinary Proc. Against Calhoun*, 196 Wis. 2d 665, 538 N.W.2d 797 (1995)).
- Lawyers, when they take the Attorney's Oath, they agree, among other things, to abstain from all offensive personality." **SCR 40.15. SCR 20:8.4(g)** allows attorneys to be disciplined for violating the attorney's oath.
    - Most "offensive personality" cases do have a direct connection to the practice of law, and the Supreme Court has found that, like the criminal acts at issue in SCR 20:8.4(b), the acts constituting offensive personality do need to reflect poorly on a lawyer's character or fitness as a lawyer. *Disciplinary Proc. Against Beaver*, 181 Wis. 2d 12, 22, 510 N.W.2d 129 (1994).
    - Criminal conduct giving rise to SCR 20:8.4(b) violations also constitutes offensive personality. *See, e.g*, *Public Reprimand of Ford* (2014-OLR-3); *Disciplinary Proc. Against Evenson*, 2015 WI 38.
        - Sometimes, the acts are offensive independent of any other rule. *See, e.g.*, *Disciplinary Proc. Against Johann* (six-month suspension for, among other things, distributing a handout with a picture of the lawyer's child's father and the caption "Accused Serial Rapist" and urging a boycott of the law firm of the man's wife).
        - *Disciplinary Proc. Against Beaver*, 181 Wis.2d 12 (90-day suspension for "verbally threatening to kill a man who was an adversary party in pending litigation and [for] striking and pushing that man's vehicle with his own").
        -

III. Serving on Boards

A. Defining Your Role

- **SCR 20:1.13 – Organization as Client**
  - Client is the *organization*, not the board or individual directors.
  - Risks arise when the line between *board member* and *legal counsel* is blurred.
- Clarify at the outset: Are you joining as a director, as counsel, or both?

B. Conflicts of Interest

- **Duty of Loyalty (SCR 20:1.7)**
  - Conflict exists if director duties materially limit lawyer's ability to provide competent/diligent representation.
  - Judgment must remain independent, not swayed by personal/business interests.
- **Advising on Director Actions**
  - Conflict if asked to advise on actions taken by the board—including your own actions as a director.
- **Adverse Positions**
  - Cannot represent another client in a matter directly adverse to the organization without *informed written consent*
- **Resolving Conflicts**
  - Recusal from board votes or from legal representation.
  - Some conflicts are *not consentable*—must decline role or withdraw.
    - **State Bar Ethics Hotline: To informally and confidentially discuss an ethics question, contact the State Bar's ethics hotline at (608) 229-2017 or (800) 254-9154, Monday through Friday, 9 a.m. to 5 p.m.**

Related Article: Dietrich, "Untangling Third-person Conflicts of Interest," *Wisconsin Lawyer, Vol.87(3)*, March 2014.

C. Confidentiality & Attorney-Client Privilege

- **SCR 20:1.6 – Confidentiality of Information**
  - Director's fiduciary duty + lawyer's confidentiality duty can complicate privilege.
- **Risks**
  - Business advice ≠ legal advice → not privileged.

    - Dual role makes it unclear whether a discussion is protected.
- **Privilege Waiver**
    - Courts may find privilege waived due to dual role, making sensitive info discoverable.
- **Preventive Measures**
    - Disclaimers clarifying "I am acting as a director, not as legal counsel."
    - Agree in advance with board on how privilege issues will be handled.

D. Lawyer as a Witness

- **SCR 20:3.7 – Advocate-Witness Rule**
    - Lawyer generally cannot serve as trial advocate if also a necessary witness.
    - Protects against jury confusion and preserves confidence.
- **Testimony Adverse to Client**
    - Creates severe conflict; lawyer and possibly firm disqualified.
- **Imputation of Conflict**
    - Rule doesn't automatically disqualify firm, but conflict rules (SCR 20:1.7, 20:1.9) may extend prohibition to colleagues.

E. Potential Liability

- **Malpractice Coverage Gaps**
    - Legal malpractice policies may not cover director-related actions.
    - D&O (Directors & Officers) insurance recommended.
- **Fiduciary Duties as Director**
    - Duty of loyalty and duty of care → risk of breach claims.
- **Shareholder Lawsuits**
    - Minority shareholders may sue if dual role creates appearance of unfair advantage or conflict.

F. Key Preventive Measures

- Obtain informed, written consent before joining client's board.
- Clearly delineate lawyer role vs. director role.
- Decline or withdraw when conflicts are unavoidable.
- Ensure adequate malpractice and D&O insurance.
- Educate the board about privilege risks when lawyer-director is present.

G. Practical Guidance

- Document role clearly at the outset (board member only, not general counsel unless formally retained)
- Use engagement letters or disclaimers if shifting into legal role
- Be alert to confidentiality issues: information obtained as board member may trigger duties as lawyer
- Recusal strategies when conflicts arise

IV. Mentoring

Mentorship might be the most impactful form of networking. It offers structure, continuity, and a trusted source of insight, which is much more effective than a hallway chat. Programs like the Dane County Bar Association's mentorship initiative, led by the tireless Pines Bach Attorney Josh Kindkeppel, offer newer lawyers access to the wisdom of experienced practitioners who've been there, done that, and likely have a brief or two to prove it. As Atty. Kindkeppel describes it,

> "The DCBA's mentorship program was created in large part to provide newer attorneys an opportunity to connect with seasoned attorneys on a monthly basis to discuss tricky legal and ethical issues, professional development, and civility. We wanted newer attorneys to feel supported, that is, that they weren't alone as they embarked on what is often times a stressful profession. Since we launched the program in 2007, hundreds of mentor-mentee pairs have participated in the program, attended the program's top notch CLE presentations, and have found it to be rewarding on a personal and professional level. At the end of the day, the more people we know the smaller the community feels."

These relationships are a two-way street: mentors gain fresh perspectives, while mentees get practical advice, encouragement, and the reassurance that they're not alone. It's hard to overstate the impact of being able to call a mentor and say, "Have you ever dealt with this situation before?" and not only receive insight—but avoid a potential costly mistake.

A. Mentoring Inside Your Firm/Department

- **SCR 20:5.1 – Responsibilities of Partners, Managers, and Supervisory Lawyers**
  - "(a) A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm,

shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."

    - ABA Comment [2] - [2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. **Such policies and procedures include those designed to** detect and resolve conflicts of interest, **identify dates by which actions must be taken in pending matters**, account for client funds and property **and ensure that inexperienced lawyers are properly supervised**.
  - Duty to make reasonable efforts to ensure firm policies and systems comply with ethics rules
  - Supervisors must provide guidance and oversight to prevent misconduct
- **SCR 20:5.2 – Responsibilities of Subordinate Lawyers**
  - Subordinate lawyers remain responsible for their own conduct
  - Limited defense if acting in accordance with a supervisor's "reasonable resolution" of an arguable question
- **Key Point:** Mentoring is not just coaching—it creates ethical duties of supervision

B. Mentoring Outside the Firm

- **SCR 20:1.1 Competence –** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
  - Comment 2: [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar … Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
- **SCR 20:1.6 – Confidentiality of Information**
  - Risk of mentees sharing client details in mentoring conversations
  - Importance of reminding mentees to preserve confidentiality when discussing cases
- Avoid "accidental attorney-client relationships" when mentoring newer lawyers outside your firm
- Boundary setting: sharing strategies, not legal opinions on active cases

C. Practical Guidance

- Encourage mentoring that emphasizes professional development, not case-specific advice
- Establish clear expectations at the start of mentoring relationships
- Use hypotheticals when discussing sensitive practice situations
- Maintain confidentiality in both directions (don’t share your clients’ details with mentees either)

V. Developing Business Relationships

A. Ordinary business relationships are not generally governed by the SCRs

- The 27/4 rules, such as SCR 20:8.4(c), still apply

- **SCR 20:1.8(a) governs business relationships with clients**

  - The rule reads:

  (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

  > (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  >
  > (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  >
  > (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

  - This Rule also applies to situations that aren’t traditional “business relationships.” Lawyers have been disciplined for:
    - Borrowing money from a client *Disciplinary Proceedings Against* Phillips, 2006 WI 43)

- Obtaining a promissory note from a client (*Disciplinary Proceedings Against Stern,* 2021 WI 84)
- Providing living quarters to a client (*Disciplinary Proceedings Against Smith,* 179 Wis. 2d 508)

- **SCR 20:1.8(c) governs gifts from clients (including complimentary products or services from a business client)**

  - The rule reads:
    A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, nor prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, except where (1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.
  - ABA Comment 6 distinguishes between simple tokens of appreciation, and more substantial gifts that may be the product of undue influence. Ordinary social hospitality should be acceptable.
  - Gifts of corporate stock in lieu of payment may require compliance with SCR 20:1.8(a). *See* ABA Formal Opinion 418.
  - Government lawyers may have additional ethical requirements and/or prohibitions on receiving certain gifts, even from non-clients.

- **Insurance considerations**

Another important consideration is the coverage provided and excluded in a legal malpractice policy. Most lawyers professional liability policies contain an exclusion for claims brought by any client in which an insured lawyer owns a 10% or greater interest. This exclusion exists to prevent situations where a lawyer could, in effect, bring a claim against himself by asserting malpractice in matters involving a business or entity in which he holds a significant ownership stake. Allowing such claims would create an inherent conflict, place the insurer in an untenable position, and undermine the fairness of coverage provided to other policyholders. In a mutual insurance company, where policyholders collectively share in the risks and benefits of the insurance pool, this safeguard ensures equitable treatment and protects the integrity of the coverage for all members.

VI. Existing in Public

A. Avoiding creating an Attorney-Client Relationship or an Imputed Conflict from Casual Conversation

- **SCR 20:1.10** governs imputed conflicts; generally, if one lawyer is disqualified from representation, other lawyers in the firm are also disqualified absent an exception or consent (waiver)
- **SCR 20:1.18** governs duties to prospective clients (including, potentially, people with whom a lawyer has a conversation even in a casual setting) and the same imputation applies
  - Lawyers can avoid generating a firmwide conflict from a conversation at a reception or bar by taking reasonable measures to avoid exposure to more information than necessary
- See ABA Formal Opinion 510[1]

B. Dealing with Press

- **SCR 20:1.6** (confidentiality): This rule applies to media contacts. Lawyers may not discuss any information related to a client without the client's informed consent. This includes positive information, such as a victory—many clients don't want the public know the matter arose in the first place.
- **SCR 20:3.6** (trial publicity): This rule forbids lawyers from making public statements outside of court that will have a substantial likelihood of materially prejudicing a proceeding (including civil matters triable to a jury, criminal matters of any kind, and any other case involving a potential deprivation of liberty).
- **SCR 20:8.4(c)** (honesty): This 24/7 rule applies to press contacts; lawyers can be disciplined for making false statements to a journalist.
- **SCR 20:8.2(a)** (attacking qualifications or integrity of judges, adjudicatory officer, or public legal officer, or candidate from same): Lawyers should refrain from making any such statements as a best practice, and
- Please see enclosed Sample Media Policy

[1] https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-510.pdf

LAWYERS IN THE COMMUNITY

ETHICAL CONSIDERATIONS OF BEING A LAWYER AND A COMMUNITY MEMBER

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INTRODUCTION

- Meet the presenters
- Professional identity beyond client representation
- Lawyers as community members, mentors, and leaders
- Goals of session
  - Apply Wisconsin Supreme Court Rules in nontraditional roles
  - Spot and resolve ethical pitfalls before they become problesm

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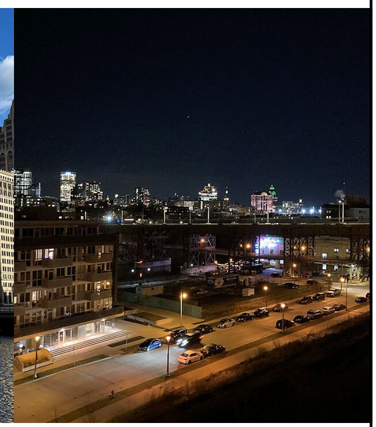
24/7 RULES

- SCR 20:8.4(c) (honesty)
- SCR 40.15, as enforced by SCR 20:8.4(g) (attorney's oath)

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SERVING ON BOARDS

- Defining your role (SCR 20:1.13)
- Conflicts of interest (SCR 20:1.1, 20:1.7)
- Confidentiality and Privilege (SCR 20:1.6)
- Lawyer as witness (SCR 20:3.7)
- Potential liability (coverage gaps, D&O insurance, shareholder suits)


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MENTORING AND MENTORSHIP

- In your own firm or department (SCR 20:5.1 and 20:5.2)
- Outside of your firm or department (SCR 20:1.1 and 20:1.6)

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DEVELOPING BUSINESS RELATIONSHIPS

SCR 20:1.8

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

- This Rule applies to non-traditional “business relationships,” such as borrowing money, providing living quarters, obtaining a promissory note
- Be careful about gifts (SCR 20:1.8(c))
- Be careful about writing books about your clients (SCR 20:1.8(d); SCR 20:1.6)
- Be careful about insurance coverage

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EXISTING IN PUBLIC

- Avoid inadvertently creating an imputed conflict at a cocktail party (SCR 20:1.10; 20:1.18; ABA Formal Opinion 510)
- Dealing with press (SCR 20:1.6; 20:3.6; 20:8.4(c); 20:8.2(a))

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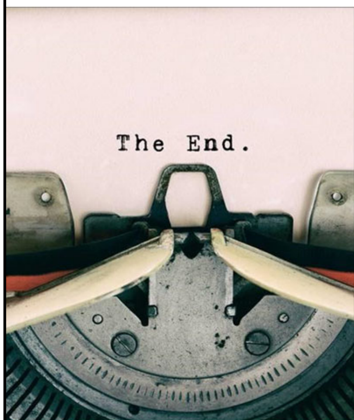

THANK YOU

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