# Revised Wisconsin Ethics Opinion E-84-7: Duty of Lawyer to Inform Court of Error

## *Revised February 2, 2021*

**SYNOPSIS**

*A lawyer who becomes aware of a mistake by the court, opposing counsel, or a third party, which benefits the client and which the lawyer had no role in causing is not required to take action to correct the mistake. Nonetheless, the lawyer should consult with the client about the potential risks and benefits of not correcting the mistake.*

**Scenario One – Error by Court**

A lawyer represents a criminal defendant charged with two misdemeanors. The defendant has agreed to enter pleas of no contest to both charges, after which the state will recommend two consecutive terms of six months, for a total of twelve months in jail. Although the court indicated acceptance of the agreement, it imposed two concurrent sentences, for a total of six months. The prosecutor, who was reviewing their file, does not appear to notice the court's error. Does the lawyer have an obligation to inform the court of this error?

**Scenario Two – Error by Opposing Counsel**

A lawyer represents a criminal defendant charged with two misdemeanors. At a plea hearing, the prosecutor advised the court that the defendant will enter pleas of no contest to both charges and the state will recommend the defendant be sentenced to two consecutive terms of six months, for a total of one year in jail. However, at the subsequent sentencing hearing, a different prosecutor appears and recommends concurrent sentences, which the court imposes. The lawyer knows that the actual terms of the plea agreement, as agreed to by the defendant, called for two consecutive six month terms, for a total of twelve months in jail. Does the lawyer have an obligation to inform the prosecutor and the court of this error?

**Scenario Three – Error by a Third Party**

A lawyer represents a criminal defendant charged with two misdemeanors. At a court appearance, the prosecutor advises the court that the state will dismiss one of the charges but wishes to proceed on the other. The matter is set for a jury trial. A week before trial, the lawyer checked with clerk of court and was informed the court file indicated both cases against the defendant were dismissed, suggesting a clerical error by court personnel. Does the lawyer have an obligation to inform the court of this error?

**Opinion**

**1. Duty of Candor to the Tribunal**

A lawyer's responsibilities to her client often conflict with those owed to the tribunal. Wisconsin Supreme Court Rule ("SCR") 20:3.3 provides guidance on resolving these conflicts:

> **SCR 20:3.3**
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> (a) A lawyer shall not knowingly:
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> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
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> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
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> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.
>
> (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.

(c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.

SCR 20:3.3 imposes several duties upon the lawyer:

(1) False statements – A lawyer may not knowingly make a false statement of fact or law to a tribunal or fail to correct a previously made false statement of material fact or law.[1]

(2) False evidence – A lawyer may not knowingly present false evidence to a tribunal.[2]

(3) Remedial duties – A lawyer who subsequently learns the lawyer, the lawyer's client or a witness called by the lawyer has offered material false evidence, or that the client has, is or intends to engage in criminal or fraudulent conduct related to the proceeding must take remedial action.[3]

## 2. Omissions as Misrepresentations

The prohibitions in SCR 20:3.3 concern knowing affirmative deception. This makes sense given that disciplinary sanctions should generally not be imposed in areas of ambiguity, conflicting interests, and unclear culpability. However, comment [3] to SCR 20:3.3 states, "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Neither the rule nor commentary provide clarification of what these "circumstances" might be.

[1] SCR 20:3.3(a) (1). See also SCR 20:1.0(g), which provides, "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

[2] SCR 20:3.3(a) (3). In criminal cases the defendant's constitutional rights to testify and present a defense may require counsel to present testimony that might otherwise violate this rule. *See* ABA comments ¶¶ 7, 9.

[3] SCR 20:3.3(a)(1), (3), (b).

### 3. The failure to correct the mistakes of others[4]

The Committee does not believe any of the scenarios presented are the type of "circumstance where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Model Rule 3.3 cmt. ¶3. Consequently, the Committee believes that the lawyer is not obligated to take action to correct the errors and that not doing so does not violate SCR 20:3.3(a)(1). In each scenario all relevant facts are available in public records. Neither the defense lawyer nor the client played any role in the creation or concealment of the mistakes. The lawyer's knowledge of the mistakes is information relating to the representation and is protected by SCR 20:1.6. Disclosure is not mandatory under SCR 20:1.6 and if made could operate to the detriment of the client.

Although there are a handful of cases finding omissions to be misrepresentation, they involve distinct fact situations such as the death of the client[5], the client's use of a false identity[6] and the attorney's direct involvement in providing incomplete or misleading information.[7]

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[4] Duties to the tribunal arise primarily in contested case situations – otherwise a tribunal would not be involved. In such situations there will also be one or more adverse parties. As a result, cases often raise both the question of what duty the lawyer has to the tribunal and what duty is owed to the opponent or other third parties. *See* SCR 20:4.1(a). While the duty to the opponent and third parties parallels that owed a tribunal there are two basic differences – SCR 20:4.1(a) only prohibits false material statements and remedial duties do not apply if the information is confidential. Much has been written about the lawyer's duty of candor to the opponent, most often in the context of negotiations. *See for example*, Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?, 18 Geo. J. Legal Ethics 179* (2004), Wetlaufer, *The Ethics of Lying in Negotiation, 75 Ia. L. Rev. 1219* (1990), Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations, 87 Ky. L. Rev. 1055* (1999), Rubin, *The Ethics of Negotiations: Are There Any?, 56 La. L. Rev.* (1995). The committee agrees with the conclusion of the original version of this opinion that the lawyer had no duty to the opponent, and would not under the current rules. However, the focus of this opinion is on the duty to the tribunal.

[5] *See for example*, *Virzi v. Grand Trunk Warehouse & Cold Storage Co.,* 571 F. Supp. 507 (E.D. Mich. 1983) (failure to inform tribunal and opponent that plaintiff had died basis to set aside settlement); *Kentucky Bar Ass'n v. Geisler*, 938 S.W. 2d 578 (Ky. 1997) (failure to disclose death of client violation of duty of candor to the opponent); rather than to the tribunal. *See also* ABA Formal Opinion 95-397.

[6] *See In re Sieg*, 183 Wis. 2d 704, 515 N.W.2d 694 (1994) (attorney's failure to inform court that his client has used his sibling's identity violated SCR 20:3.3); *District of Columbia Ethics Op.* 336 (2006) (a lawyer serving as guardian who learns the ward has used a false name must inform the tribunal; *People v. Casey*, 948 P.2d 1014 (Colo. 1997) (lawyer appearing for client with knowledge that the client was using another's identity must advise the court).

[7] *See In re Alia,* 2006 WI 12 ("whiting out" adverse information from expert report and suggesting the report as submitted was an accurate reflection of the expert's opinion); *In re Wilka*, 638 N.W.2d 245 (S.D. 2001) (lawyer violated duty of candor by presenting an altered report about his client's drug use which deleted unfavorable information); *In re Gorokhovsky,* 2013 WI 100 (requesting a continuance while providing incomplete and misleading information to the tribunal); *In re Morrisy*, 172 Wis. 2d 58, 492 N.W. 2d 616 (1992) (lawyer violated duty of candor in submitting fee statement to court that left out separate fee arrangement with personal representative); *In re Hedrick*, 822 P.2d 1187 (Or. 1991) (lawyer in probate matter suspended for presenting only one will to the court while knowing second, subsequent will existed); s*ee also Florida Bar v. Dove*, 985 So. 2d 1001 (Fla. 2008) (lawyer

Opinions from other jurisdictions, with a single exception, are consistent with the committee's conclusion. For example, in *Mich. Ethics Op. RI-165* (1993), defense counsel was found to have no responsibility to remind the prosecutor that the plea agreement contemplated filing an additional charge which the prosecutor neglected to do. In *Va. Bar Ass'n Standing Comm. on Legal Ethics Op. 1400* (1991), the committee concluded the lawyer was not required to notify the court that the clerk erroneously entered the client's conviction as a misdemeanor rather than a felony. A similar conclusion was reached in *Va. Bar Ass'n Standing Comm. on Legal Ethics Op. 1186* (1986), where the court erroneously overlooked one of the two charges. In contrast, in *Ohio Ethics Op. 99-8*, the committee considered two questions – whether defense counsel was responsible to notify the court of a drafting error in the judgment of conviction by the prosecutor and a mistake in the calculation of the client's sentence by the Department of Corrections. The court concluded counsel was required to bring the first mistake to the court's attention but not the second.

A distinct, but related situation also provides support for the committee's conclusion – the situation in which neither the opponent nor tribunal were aware of pre-existing material facts at the time of trial or case disposition. The committee recently addressed this situation in Wisconsin and concluded the lawyer had no duty to provide information about the client's prior criminal record that was unknown to the court and prosecutor and which would help the opponent prove their case. *Wis. Ethics Op. E-86-06*. *See also New Mexico Ethics Adv. Op*. 1990-2 (counsel has no duty to provide information about client's prior criminal record or that client was not sentenced in a separate case); *Md. Ethics Op. 1999-26* (lawyer has no obligation to inform court of client's criminal history); *Texas Ethics Op. 504* (defense counsel has no duty to correct mistaken statements to the court by the prosecutor about the client's criminal record).[8]

**4. Communication with the Client**

That a lawyer may take, or not take, certain actions without fear of professional discipline does not always mean there are no other consequences for the choices made, consequences which the lawyer should consider and discuss with her client. Thus, although the Committee believes there is no ethical duty to notify others of an error that

violated duty of candor to tribunal in adoption proceeding by failing to disclose information about the paternity of the child and the existence of grandparents with interests in the action under state law).

[8] As discussed in Wis. Ethics Op. E-86-06, the lawyer's responsibility will differ if the tribunal asks the lawyer or his client about the information at issue. While the lawyer may not provide a false answer, she may decline to answer given that she has no duty to assist the prosecution in proving its case. So to, if the client is questioned, the client should be advised to allow the attorney to respond. *See* Wis. Ethics Op. E-86-06 at 3-4.

benefits the client in the scenarios presented it also believes that the lawyer has a duty to consult with the client to explain the potential risks and benefits of standing silent or correcting the error.[9]

First, the benefit to the client may be fleeting. Given how case data is entered, accessed, and managed in most communities, discovery of the mistake in all of the scenarios may be likely or even inevitable. This is particularly true if the client has or may have other active cases in the same jurisdiction where access to their court records by a variety of system actors can be expected.

If the lawyer does nothing and the mistake is discovered, others in the local legal community may view the client and the lawyer as less than honest, and may be less inclined to give them the benefit of the doubt in other matters, even if no ethics rules was violated. For both the client, the lawyer, and the lawyer's future clients the risks, and costs, of their inaction may be real and substantial.

There is also a possibility that the mistake will remain undiscovered and benefit the client, or that following discovery the defendant might successfully retain the unintended benefit.[10] This possibility could lead the client to instruct his lawyer to remain silent, which could present a conflict for the lawyer who may wish to not risk harm to her reputation and other current and future clients. SCR 20:1.7(a)(2). The Committee believes issues involved require a thorough and candid discussion. The options should be discussed in detail and the final decision of the client is documented in the file.[11]

**Conclusion**

A lawyer who comes to learn of an error by the court, the opponent, or court personnel which benefits the client that the client had no role in causing is not required to take action to correct the mistake. Nonetheless, the lawyer must consult with the client about the potential risks and benefits taking no action.

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[9] See SCRs 20:1.4(b); 20:2.1.

[10] Whether, as a matter of substantive law, the errors in the scenarios would permit amendment of the two sentences or reinstatement of a dismissed charge, or whether the benefit to the defendant may be unchallengeable, is beyond the scope of this opinion. However, the complexity and consequences of the mistakes only serve to underscore the importance of consultation with the client.

[11] Offering unrequested adverse information to the court will most often conflict with the lawyer's responsibility to protect "information related to the representation", SCR 20:1.6(a), and arguably with the duty to competently and diligently advance the client's objectives. SCRs 20:1.1; 20:1.3. *See also* SCRs 20:2.1; 20:1.4(b).