

## **Ethics Opinion E-07-01: Contact with Current and Former Constituents of a Represented Organization**

*(Effective date: July 1, 2007)*

**Synopsis:** *When an organization is represented in a matter, SCR 20:4.2 prohibits a lawyer representing a client adverse to the organization in the matter from contacting constituents who direct, supervise or regularly consult with the organization's lawyer concerning the matter, who have the authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. All other constituents may be contacted without consent of the organization's lawyer. Consent of the organization's lawyer is not required for contact with a former constituent of the organization, regardless of the constituent's former position. When contacting a current or former constituent of a represented organization, a lawyer must state their role in the matter, must avoid inquiry into privileged matters and must not give the unrepresented constituent legal advice. The mere fact, however, that a current or former constituent may possess privileged information does not in itself prohibit a lawyer adverse to the organization from contacting the constituent. A lawyer representing an organization may not assert blanket representation of all constituents and may request, but not require, that current constituents refrain from giving information to a lawyer representing a client adverse to the organization. The mere fact that an organization has in-house counsel does not render the organization automatically represented with respect to all matters. Former Opinions E-82-10 and E-91-01 are withdrawn.*

This Opinion discusses the extent to which SCR 20:4.2 prohibits contact with current and former constituents of an organization when the organization is represented with respect to a matter.<sup>1</sup> The Opinion also discusses the obligations under the Rules of Professional Conduct of lawyers seeking to contact constituents of represented organizations and the obligations of lawyers representing organizations.

SCR 20:4.2 *Communication with Person Represented by Counsel* reads:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

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<sup>1</sup> This question most frequently arises with respect to current and former employees of represented corporations. The Committee uses the phrase "constituents of a represented organization" to track the language of the Comment to SCR 20:4.2, but emphasizes that this Opinion applies to represented organization of all types, including corporations. Special considerations apply however, with respect to constituents of represented governmental entities. See ABA Formal Ethics Opinion 97-408 and Wisconsin Ethics Opinion E-95-1.

lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by a court order.<sup>2</sup>

As is apparent, the language of the Rule itself does not provide explicit guidance with respect to constituents (e.g. employees, officers, agents) of a represented organization. Paragraph [7] of the Comment to the Rule, however, provides as follows:

*[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.*

The Comment to SCR 20:4.2 thus provides specific guidance with respect to the question at hand. Before discussing the parameters of allowable contact with current and former constituents of represented organizations, the Committee believes some background information regarding the history and purpose of SCR 20:4.2 is appropriate. Understanding the intent of the drafters of ABA Model Rule 4.2, which Wisconsin has adopted as SCR 20:4.2, and the Rule as interpreted by courts and ethics committees of other states will provide enhanced guidance for Wisconsin lawyers.

## ***I. History and Purpose of SCR 20:4.2***

Wisconsin's current SCR 20:4.2 and Comment are identical to ABA Model Rule 4.2 and Comment. The ABA Model Rule and its Comment were amended in 2002 as part of the ABA's Ethics 2000 revision of the Model Rules of Professional Conduct. Like the current Rule 4.2, the prior Model Rule (which was almost identical to Wisconsin's prior SCR 20:4.2) itself contained no reference to constituents of a represented organization but rather addressed the issue in the Comment.<sup>3</sup>

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<sup>2</sup> In addition to the language of the Rule and Comment, the Committee also looked to other states for guidance because of the lack of Wisconsin case law on this topic and the age of the previous Wisconsin Ethics Opinions, E-82-10 and E-91-01, which drew upon rules that no longer exist.

<sup>3</sup> The applicable language of both the ABA's and Wisconsin's Comment to former Rule 4.2 stated "In the case of an organization, the Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on behalf of the organization."

The 2002 amendments to the Comment were significant and reflected the ABA's intention to clarify the language and provide better guidance. In particular, the ABA removed language from the Comment prohibiting contact with constituents having "managerial responsibility," which had frequently been criticized as "vague and overly broad."<sup>4</sup> Language prohibiting contact with constituents "whose statements may constitute an admission on the part of the organization" was also removed. This is because this language was originally intended to protect those jurisdictions which still maintained the old evidentiary rule that statements by an agent bound the principal, in the sense that, when such statements of an agent are admitted into evidence, the principal may not introduce other evidence to contradict the statement.<sup>5</sup> Modern evidence rules, however, while permitting an employee's statement to be admitted as an exception to the hearsay rule, do not bind the employer, who is free to introduce evidence contradicting the employee's statement.<sup>6</sup> Accordingly, that language in the old Comment was often misinterpreted to prevent contact with any constituent whose statement may constitute a non-binding admission.<sup>7</sup> Finally, a sentence was added to the comment to clarify that Rule 4.2 does not prohibit contact with former constituents of an organization, regardless of the position the former constituent once occupied.<sup>8</sup>

Thus, the changes made by the ABA have narrowed the Rule's prohibition with respect to constituents of a represented organization. As will be discussed *infra*, this is in keeping with the pronounced trend in case law and ethics opinions.

Although often invoked in the context of litigation, SCR 20:4.2 is a *disciplinary* rule and prescribes conduct which can subject a lawyer to professional discipline. The purpose behind this disciplinary Rule is to "contribute to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation."<sup>9</sup> Put more succinctly, the "(p)urpose of the rule is to protect the attorney-client relationship from intrusion by opposing counsel."<sup>10</sup>

Applying this Rule to the representation of an individual is relatively simple. Defining the parameters of the attorney-client relationship with respect to a represented organization proves more difficult. It is clear that when a lawyer represents an organization, the client is the organization itself.<sup>11</sup> It is also clear that an organization acts only through its constituents, some of whom should be afforded the protections of SCR 20:4.2. In determining just which constituents should be protected by SCR 20:4.2,

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<sup>4</sup> See ABA Model Rule 4.2 -Reporter's Explanation of Changes.

<sup>5</sup> Such statements are often referred to as "judicial admissions."

<sup>6</sup> Wisconsin follows the modern rule – see sec. 908.01(b)4 Stats.

<sup>7</sup> See ABA Model Rule 4.2 -Reporter's Explanation of Changes.

<sup>8</sup> This recognized the long-standing position of the ABA. See *ABA Formal Opinion 91-359 (1991)*.

<sup>9</sup> See SCR 20:4.2, Comment [1].

<sup>10</sup> *Palmer v. Pioneer Inn Associates, LTD.*, 118 Nev. 943, 948, 59 P.3d 1237 (2002).

<sup>11</sup> See SCR 20:1.13.

courts have attempted to balance many competing interests. One court described the factors to be balanced as follows:<sup>12</sup>

*Many competing policies must be considered when deciding how to interpret the no-contact rule as applied to organizational clients: protecting the attorney-client relationship from interference; protecting represented parties from overreaching by opposing lawyers; protecting against the inadvertent disclosure of privileged information; balancing on one hand an organization's need to act through agents and employees, and protecting those employees from overreaching and the organization from the inadvertent disclosure of privileged information, and on the other hand the lack of any such protection afforded an individual, whose friends, relatives, acquaintances and co-workers may generally all be contacted freely; permitting more equitable and affordable access to information pertinent to a legal dispute; promoting the court system's efficiency by allowing investigation before litigation and informal information-gathering during litigation; permitting a plaintiff's attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with [Rule 11](#); and enhancing the court's truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely.*

In balancing these interests, courts have formulated a variety of tests. On one end of the spectrum is an outright ban on contact with any constituent of a represented organization.<sup>13</sup> The advantage of such a bright-line test is clarity and certainty, but this comes at a high cost; an opposing party might have to resort to filing suit to begin to gather information about the viability of a possible claim, or simply be without the means to informally gather information in transactional or certain administrative proceedings without formal discovery. This involves great expense when compared to informal interviews and clogs the courts with potentially baseless claims. It also gives organizations almost complete control over information in a matter and thus a great advantage over individuals, whose friends, colleagues and associates are not protected by SCR 20:4.2.

Many courts, therefore, have adopted various tests, such as the “party-opponent admission test,”<sup>14</sup> the “managing-speaking agent test,”<sup>15</sup> the “control group test,”<sup>16</sup> the “case-by-case balancing test,”<sup>17</sup> and the “alter-ego test,”<sup>18</sup> which seek to balance an

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<sup>12</sup> *Palmer v. Pioneer Inn Associates, LTD.*, 118 Nev. 943, 951, 59 P.3d 1237 (2002).

<sup>13</sup> See *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv., Ltd.*, 745 F.Supp 1037 (D.N.J. 1990).

<sup>14</sup> See *Cole v. Appalachian Power Co.*, 903 F.Supp. 975 (S.D.W.Va. 1995); *Brown v. St. Joseph County*, 148 F.R.D. 246 (N.D.Ind.1993); *University Patents, Inc. v. Kligman*, 737 F.Supp 325 (E.D.Pa. 1990).

<sup>15</sup> See *Chancellor v. Boeing Co.*, 678 F.Supp. 250 (D.Kan.1998); *Wright by Wright v. Group Health Hosp.*, 103 Wash.2d 192, 691 P.2d. 564 (1984).

<sup>16</sup> See *Fair Automotive v. Car-X Service Systems*, 128 Ill.App.3d 763, 471 N.E.2d 554 (1984).

<sup>17</sup> See *B.H. by Monahan v. Johnson*, 128 F.R.D. 659 (N.D. Ill.1989).

organization's right to counsel with an opposing party's right to gather information with respect to a matter. The decisions discussing various tests are not entirely consistent in the use of these names, but the fact that such a variety of different tests has developed illustrates the difficulty in reaching an appropriate balance. Because the Wisconsin Supreme Court has adopted the ABA Model Rule and Comment, which outlines its own test, the particulars of other such tests need not be discussed here. But it is worth noting that the test adopted in SCR 20:4.2 is very close to the "alter-ego test" and also very close to the test adopted by the *Restatement (Third) of the Law Governing Lawyers*, §100.

It is clear from a review of these cases and other sources that courts seek to interpret Rule 4.2 to protect those within an organization who act on behalf of an organization in connection with a matter i.e. those who direct and consult with the organization's lawyer or whose act or omission serves as a basis for the matter in question. These decisions also recognize that Rule 4.2 is not meant to protect an organization from the disclosure or discovery of potentially damaging facts.<sup>19</sup> As one court stated "(p)reventing the disclosure of unfavorable facts merely because they happen to have occurred in the workplace is not a legitimate organizational interest for purposes of applying rule 4.2."<sup>20</sup> Thus the Rule's protection extends to those constituents who may be said to personify the organization as a "client" in a matter, but ordinarily does not extend to constituents of an organization who simply possess relevant facts. With this background information, the Committee turns to the questions prompting this opinion.

## ***II. Current Constituents of an Organization***

Comment [7] to SCR 20:4.2 outlines two categories of protected constituents of a represented organization. Any constituents falling within these two categories may not be contacted by opposing counsel without the consent of the organization's lawyer. Conversely, any constituent falling outside these two categories may be contacted without consent of the organization's lawyer. The categories are as follows:

**1) Constituents who supervise, direct or regularly consult with the organization's lawyer concerning the matter or who have authority to obligate the organization with respect to the matter.** This category clearly applies to those constituents (typically upper-level management) to whom the organization's lawyer looks for decisions with respect to the matter. Thus a senior vice president of a corporation who is directing outside tax counsel about an IRS matter is clearly covered by the Rule. Note, however, that the category is specific to the *matter* in question. In large organizations, some management constituents may direct or control counsel for some matters, but not others. The vice president of human resources may direct the corporation's lawyer on an employment discrimination matter and thus be covered by SCR 20:4.2. However, if the chief financial officer was a witness to the alleged act of

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<sup>18</sup> See *Niesig v. Team I*, 76 N.Y.2d. 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990).

<sup>19</sup> See e.g. *Aiken v. The Business and Industry Health group, Inc.*, 885 F.Supp 1474 (D. Kan. 1995)

<sup>20</sup> *Messing v. President & Fellows of Harvard College*, 436 Mass. 347, 764 N.E.2d 825 (2002)

discrimination, but has no involvement in the direction or control of the organization's lawyer handling the defense of the discrimination claim, the officer would not be protected by SCR 20:4.2. The mere fact that a constituent holds a management position does not trigger the protections of the Rule.

This category also includes those constituents who "regularly consult" with the organization's lawyer concerning the matter. This need not be a constituent who also directs the organization's lawyer. So, for example, an engineer employed by a company who works closely with and provides expertise to the lawyer defending the company against a defective product claim, or an employee who is assigned the task of collecting documents and information for the organization's lawyer would both be covered by the Rule. However, a constituent who is simply interviewed or questioned by an organization's lawyer about a matter does not "regularly consult" with the organization's lawyer.

Finally, this category includes those constituents who have authority to settle or compromise a matter on behalf of the organization. Such a person obviously acts as an "alter-ego" of the organization and must be protected by the Rule. Typically this category would include members of an organization's upper-level management. Again, it is worth noting that simply the status of being a "manager" does not automatically invoke the protections of the Rule. Thus a department manager of an employee who is alleged to have committed a negligent act does not fall within this category if the department manager does not have the authority to settle or compromise the claim on behalf of the organization.

**2) Constituents whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.** This category includes those individuals whose actions or omissions have triggered the matter in question and would likely be a named party but for the fact of their membership in the organization. Typical examples of constituents in this category would include the truck driver for a company who is alleged to have caused injury while in the course of employment, the manager who is alleged to have sexually harassed an employee, or the machine operator who is alleged to have ignored safety protocols and injured another employee. It is important to note that this category includes constituents who are alleged to have committed acts or omissions that may impute liability to the organization even if the organization or constituent disputes or denies the allegations.<sup>21</sup> This category, however, does not include constituents who are simply witnesses to the alleged act or omission.

Finally, should a current constituent have their own counsel in a matter, or be *actually* represented by the organization's lawyer, then SCR 20:4.2 would prohibit contact with that constituent regardless of their position within the organization.

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<sup>21</sup> See *Restatement (Third) of the Law Governing Lawyers*, §100, comment (d).

### ***III. Former Constituents of an Organization***

By the plain language in Comment [7] to SCR 20:4.2, “(c)onsent of the organization’s lawyer is not required for communication with a former constituent.” This is consistent with the long-standing position of the ABA “that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer in the matter may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation’s lawyer.”<sup>22</sup> This is also the position of the *Restatement (Third) of the Law Governing Lawyers*, which states that “(c)ontact with a former employee or agent is ordinarily permitted, even if the person had formerly been within the category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary’s search for relevant facts without facilitating the employer’s relationship with its counsel.”<sup>23</sup>

The vast majority of reported decisions on the question hold that Rule 4.2 does not prohibit or restrict contact with former constituents. While some courts have held otherwise,<sup>24</sup> the great majority of courts considering this issue have followed the recent trend of embracing the position that Rule 4.2 does not prohibit contact with former constituents of an organization.<sup>25</sup> Recent ethics opinions from other states also adhere to this view.<sup>26</sup>

The conclusion that Rule 4.2 does not prohibit contact with former constituents of an organization flows logically from the purpose of the Rule: to protect the attorney-client relationship and not inhibit access to factual information. As expressed by Professors Rotunda and Dzienkowski in *The Lawyer’s Deskbook on Professional Responsibility (ABA 2006-2007)*, §4.2-6(c):

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<sup>22</sup> ABA Formal Opinion 91-359.

<sup>23</sup> *Restatement(Third) of the Law Governing Lawyers*, §100, Comment g. The *Restatement* notes however, that in certain unusual circumstances, such as a former employee consulting regularly with an organizations lawyer about the matter, a former employee may be covered by the no-contact rule.

<sup>24</sup> *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv., Ltd.*, 745 F.Supp 1037 (D.N.J. 1990); *Porter v. Arco Metals Co.*, 642 F.Supp. 1116 (D.Mont. 1986); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987). As noted in the *Restatement*, however, there appears to be no reported decisions since 1990 holding that Rule 4.2 covers former constituents on the basis of the former relationship alone.

<sup>25</sup> *Clark v. Beverly Health and Rehabilitation Services, Inc.*, 440 Mass 270, 797 N.E.2d 905 (2003); *Continental Ins. Co. v. Superior Court (Commercial Bldg. Maint. Co.)*, 32 Cal. App. 4<sup>th</sup> 94, 37 Cal. Rptr. 843 (1995); *Niesig v. Team I*, 76 N.Y.2d. 363, 559N.Y.S.2d. 493 (1990); *H.B.A. Mgmt. Inc. v. Estate of Schwartz*, 693 So.2d 541 (Fla. 1997); *Smith v. Kalamazoo Ophthalmology*, 322 F. Supp.2d 883 (W.D. Mich. 2004); *Terra Int’l. v. Mississippi Chem.*, 913 F. Supp. 1306 (N.D. Iowa 1996); *Orlowski v. Dominick’s*, 937 F.Supp. 723 (1996); *Humco Inc. v. Noble*, 31 S.W.3d 916 (Ky. 2000); *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1985); *Smith v. Kansas City Southern Railway Co.*, 87 S.W.3d 266 (Mo.App. 2002).

<sup>26</sup> *Ohio Ethics Opinion 2005-03* (2005); *Utah Ethics Advisory Opinion No. 04-04* (2004); *DC Ethics Opinion 287*(1998).

*Any other reading of Rule 4.2 is unnatural and strained. It is not the purpose of Rule 4.2 to prevent the disclosure of prejudicial testimony but to protect the client-lawyer relationship. The attorney for the employer does not have a client-lawyer relationship with a former employee. Moreover, to so interpret the Rule would make it more expensive for the lawyer to obtain information about her case, because she would have to proceed by way of deposition rather than interview if the opposing lawyer refused consent. Furthermore, Rule 4.2 protects a person from being damaged by a binding disclosure made without that person's lawyer being present. But former employees are not represented by the employer's lawyer.*

As put by one court<sup>27</sup> in holding that Rule 4.2 does not prohibit contact with former employees of a corporation:

*Indeed, exclusion of former employees furthers both the specific and the more general purposes of rule 4.2. It must be remembered that rule 4.2 is but one part of a comprehensive system of laws and regulations designed to hold counsel to the highest professional standards in our adversary system. Within that system, pretrial (including precomplaint) discovery plays an essential role. It is the phase in which material facts are discovered, issues are narrowed as theories of the case are tested, rejected, or refined, and the parties and their attorneys have the opportunity to assess the strengths and weaknesses of their case with an eye toward both trial and the negotiation of settlement. Courts have long recognized that informal interviews are an exceptionally efficient means for the meaningful gathering of facts. They are generally more conducive to full disclosure and far less costly than the more structured processes of formal discovery, or even informal investigation with opposing counsel present. See *Niesig v. Team I*, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990) ("Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information")...*

*Former employees may be a useful source of meaningful information, because they may feel less directly tied to the employer's interests and therefore more willing to discuss informally what they know. At the same time, these employees may still have economic and other ties to the organization that would make them reluctant to speak freely in the presence of the organization's attorneys, even in an informal setting. In effect, immunizing former employees from all ex parte interviews would permit the organization to monitor the flow of nonprivileged information to a potential adversary at the expense of uncovering material facts. Fairness in our established system of adversary representation would be the casualty.*

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<sup>27</sup> *Clark v. Beverly Health and Rehabilitation Services, Inc.*, 440 Mass. 270, 277, 797 N.E.2d 905 (2003).



Thus, by reference to the plain language of the Comment and by looking to the purposes of SCR 20:4.2, the inescapable conclusion is that SCR 20:4.2 does not prohibit contact with former constituents of an organization regardless of the former position held by the former constituent. Of course, if a former constituent is currently represented by their own counsel with respect to a matter, or is *actually* represented by the organization's lawyer in the matter (assuming the former constituent consents and such representation does not constitute a conflict of interest. See SCR 20:1.7), then SCR 20:4.2 applies.

#### ***IV. Obligations of a lawyer contacting a current or former constituent not covered by SCR 20:4.2.***

Although SCR 20:4.2 does not prohibit contact with some current and all former constituents of an organization, that does not mean that lawyers contacting such constituents are free from all constraint. Comment [7] to SCR 20:4.2 states "In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4."

SCR 20:4.4(a) provides as follows:

*In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*

Comment [1] to SCR 20:4.4 provides:

*Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.*

Comment [9] to SCR 20:4.2 states "In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3."

SCR 20:4.3 provides as follows:

*In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer's role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer*

*knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.*

These two Rules thus impose the obligation to inform an unrepresented person of the lawyer's role in the matter and to avoid seeking privileged information.<sup>28</sup> Reported decisions and ethics opinions have also cautioned lawyers seeking to informally contact current and former constituents of represented organizations to observe certain guidelines when making such contacts.<sup>29</sup> Some decisions go beyond these two Rule-based proscriptions and set forth other guidelines for lawyers in these circumstances.

One of the purposes of imposing such guidelines is to protect the organization's privileged information. In *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct 677, 66 L.Ed.2d 584 (1981), the Supreme Court held that attorney-client privilege may attach to communications with any employee of a corporation, not simply high-ranking management.<sup>30</sup> A lawyer is thus forbidden by SCR 20:4.4 from seeking to induce disclosure of information protected by the privilege when contacting any constituent of a represented organization.

The mere fact, however, that a constituent is in possession of information protected by the privilege does not mean that the constituent is covered by SCR 20:4.2. It is important to bear in mind that the privilege protects communications, not facts. As the Supreme Court noted in *Upjohn*, "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."<sup>31</sup>

In the wake of *Upjohn*, it was argued that the scope of Rule 4.2 should be extended to all constituents who may be in possession of privileged information, but courts and ethics opinions have rejected such an interpretation as overly broad and unnecessary to protect organizations.<sup>32</sup> As one court noted, if a lawyer violates an

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<sup>28</sup> The prohibition applies only to information protected by fundamental and general law such as the attorney-client privilege, physician-patient privilege and work-product immunity. It does not extend to duties of confidentiality based on contract, such as confidentiality agreements, which may be of indeterminate scope and of which opposing counsel is unlikely to be aware. Further, if the Rule encompassed such contract based duties, an organization could turn SCRs 20:4.2 and 4.4 into an impenetrable shield by simply requiring its constituents to sign agreements prohibiting them from ever speaking with a lawyer opposing the organization thus creating the very outcome that courts interpreting the Rule consistently reject. See *Restatement (Third) of the Law Governing Lawyers*, §102, comment b.  
<sup>29</sup> See e.g. *Smith v. Kalamazoo Ophthalmology*, 322 F. Supp.2d 883 (W.D. Mich. 2004); *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990); *Snider v. Superior Court*, 113 Cal.App. 4th 1187, 7 Cal.Rptr.3d 119 (2003); *Midwest Motor Sports Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp.2d 1147 (D.S.D. 2001); *McCallum v. CSX Transp. Inc.*, 149 F.R.D. 104 (M.D.N.C. 1993); *Ohio Ethics Opinion 2005-03* (2005); *Utah Ethics Advisory Opinion No. 04-04* (2004); *DC Ethics Opinion 287*(1998); *South Carolina Ethics Opinion 01-01* (2001); *Virginia Ethics Opinion 1749* (2001).

<sup>30</sup> Commonly referred to as the "litigation control group."

<sup>31</sup> 449 U.S. at 395.

<sup>32</sup> See *Snider v. Superior Court*, 113 Cal.App. 4th 1187, 7 Cal.Rptr.3d 119 (2003); *Clark v. Beverly Health and Rehabilitation Services, Inc.*, 440 Mass. 270, 797 N.E.2d 905 (2003); *Lang v. Superior Court*, 826 P.2d 1228 (Ariz.Ct.App. 1992); *Restatement (Third) of the Law Governing Lawyers*, §102, comment d.; *Virginia Legal Ethics Opinion 1749* (2001)

organization's attorney-client privilege "the court may disqualify him or her from further participation in the case...and, under certain circumstances, may exclude improperly obtained evidence or take other appropriate measures to achieve justice and ameliorate the effect of improper conduct."<sup>33</sup> Thus, protections such as protective orders, disqualification motions and motions for sanctions are available to organizations. Furthermore, lawyers who violate an organization's attorney-client privilege may be subject to disciplinary action for violations of SCR 20:4.3 and SCR 20:4.4.

Thus, if a constituent who witnessed an act that serves as a basis for a suit against an organization is interviewed about the matter by the organization's lawyer, and is not otherwise protected by SCR 20:4.2, opposing counsel may contact the constituent with respect to factual information about the matter. There are however, ethical duties placed upon lawyers who seek to contact such a constituent.

To summarize these duties, when contacting a constituent of a represented organization (or any unrepresented person), the applicable Rules mandate the following:

- 1. The lawyer must inform the unrepresented constituent of the lawyer's role in the matter (see SCR 20:4.3).<sup>34</sup>**
- 2. The lawyer must refrain from giving legal advice to an unrepresented constituent if there is a reasonable possibility that the interests of the client may conflict with those of the unrepresented constituent (see SCR 20:4.3).**
- 3. The lawyer must not ask any questions reasonably likely to elicit information that the lawyer knows or reasonably should know is privileged and, if necessary, should caution the unrepresented constituent not to reveal such information (see SCR 20:4.4).**
- 4. The lawyer must not make any false statements of material fact to or mislead an unrepresented constituent (see SCR 20:4.1 and SCR 20:8.4).**

These guidelines are derived from the language of the Rules themselves and are the failure to follow then could therefore result in disciplinary action. As noted above, however, some courts and ethics committees that have offered guidelines to lawyers beyond the language of the Rules which may be of valuable assistance to lawyers who seek to avoid civil sanction and disciplinary enforcement, and the Committee herein offers similar suggested guidelines:

- 1. The lawyer should clearly identify the client and the fact that the client is adverse to the organization.**

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<sup>33</sup> *Triple A Machine Shop, Inc. v. State of California*, 213 Cal.App.3d 131, 261 Cal.Rptr. 493 (1989)

<sup>34</sup> This normally means identifying the client. See SCR 20:4.3, Comment [2].

2. **The lawyer should inquire as to whether the constituent has counsel of their own in the matter.**
3. **The lawyer should explain the purpose of interview.**
4. **The lawyer should inform the constituent that they need not speak to the lawyer**

There is no Wisconsin authority mandating this second set of guidelines, but the Committee hopes that by following these guidelines, lawyers will avoid grievances and civil litigation concerning the lawyer's conduct.

## ***V. Obligations of a Lawyer Representing an Organization***

Lawyers representing organizations also have obligations relative to constituents who may be contacted by opposing counsel. These obligations reflect the lawyer's role of representing the organization itself, as opposed to the organization's constituents.

**1. A lawyer representing an organization may not assert blanket coverage of all current and former constituents of an organization by SCR 20:4.2 unless the lawyer *actually* represents each and every constituent of the organization.** Courts and ethics opinions have consistently rejected broad assertions of representation of all employees based upon nothing more than the fact of employment and this Committee agrees with these decisions.<sup>35</sup> As discussed *supra*, when a lawyer represents an organization, the client is the organization itself, not its constituents, and SCR 20:4.2 prohibits contact only with certain current constituents. Therefore, there is no basis for asserting such sweeping coverage and lawyers must be mindful of their obligations under SCR 20:4.1(a)(1), which prohibits a lawyer from making a false statement of fact or law to a third person, and SCR 20:3.4(a), which prohibits a lawyer from unlawfully obstructing another party's access to evidence.

Lawyers may, in certain circumstances, represent current or former constituents of an organization in the same matter in which the lawyer represents the organization [*see* SCR 20:1.13(g)], but in seeking to represent a constituent, the lawyer must be mindful of the prohibition on certain types of solicitation [*see* SCR 20:7.3(a)]. The lawyer must first obtain the constituent's consent to representation after determining whether a conflict of interest exists and, if so, determining whether the conflict is waivable (*see* SCR 20:1.7). If a waivable conflict exists, the lawyer must obtain the informed consent [*see* SCR 20:1.0(f)] in writing to the conflict of both the constituent and the organization in order to undertake the dual representation. If the lawyer does undertake such dual representation, the lawyer must inform both clients of the implications of dual representation, such as the lack of confidentiality between the clients, the lack of attorney-client privilege with

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<sup>35</sup> See *Harry A. v. Duncan*, 330 F.Supp.2d 1133 (D. Mont. 2004); *Michaels v. Woodland*, 988 F.Supp 468 (D. N.J. 1997); *Carter-Herman v. City of Philadelphia*, 897 F.Supp. 899 (E.D.Pa. 1995); *Brown v. St. Joseph County*, 148 F.R.D. 246 (N.D. Ind. 1993); ABA Formal Opinion 95-396 (1995); *Utah Ethics Opinion 04-06* (2004).

respect to disputes between the clients, and the likelihood that the lawyer may not continue to represent either client in the case of an unwaivable conflict or a conflict to which one client refuses to waive.

**2. Lawyers for organizations may appear on behalf of the organization when a constituent is deposed, but that does not mean that the lawyer represents that constituent as an individual.** This practice is common, but the mere fact that a lawyer accompanies a constituent to a deposition and consults with that constituent does not transform that constituent into a client. As stated in one recent ethics opinion:<sup>36</sup>

*While corporate counsel may certainly consult with the constituent called as a witness in a deposition, this consultation is part of counsel's representation of the corporation and does not render the attorney counsel to the witness as an individual. Nor does such corporate representation block opposing counsel's ability to attempt to interview such a fact witness separate and apart from formal discovery.*

The lawyer's client remains the organization and the lawyer is obligated to protect the interests of the organization first. In such a situation, the lawyer should take care to ensure that the constituent does not misunderstand the lawyer's role (*see* SCR 20:1.13(f) and SCR 20:4.3).

**3. SCR 20:3.4(f) permits a lawyer representing an organization in a matter to request that employees or agents of the client refrain from voluntarily giving relevant information to another party.** It is important to note that this Rule does not allow a lawyer to *forbid* constituents from speaking to the other side. That being said, this Rule would permit a lawyer for an organization to contact employees and ask that they not speak to the lawyer representing a client adverse to the organization. The lawyer should be careful to choose language that makes plain that such request is not an order. This Rule also applies only to current employees.

It is also worth noting that neither SCR 20:3.4 nor SCR 20:4.2 prohibit a lawyer for an organization from seeking a protective order from a court restricting access to certain current or former constituents if circumstances warrant. For example, if a vice president, who worked closely with the organization's lawyer on a particular matter but did not witness any of the events underlying the matter, leaves his or her job and becomes a former constituent and thus not covered by SCR 20:4.2, the organization's lawyer might appropriately seek a court order limiting another party's access to the former vice president. Such a former employee clearly has much privileged information and is highly unlikely to possess any relevant factual information. Thus there is little reason for the lawyer opposing the organization to contact such a former employee because the lawyer would be prohibited by SCR 20:4.4 from asking the former employee about anything that the employee would likely know.

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<sup>36</sup> *Utah Ethics Opinion 04-06 (2004)*. See also, *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D.1 (D.D.C. 2004).

## ***VI. In-house Counsel***

Finally, the Committee wishes to comment upon the status of organizations with permanent in-house counsel. The fact in itself that an organization has in-house counsel, or regularly retains outside counsel, does not render the organization represented with respect to a specific matter.<sup>37</sup> “Similarly, retaining counsel for all matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer.”<sup>38</sup>

A lawyer does not violate SCR 20:4.2 by contacting in-house counsel for an organization that is represented by outside counsel in a matter. The retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person.<sup>39</sup>

***Ethics Opinions E-82-10 and E-91-01 are hereby withdrawn.***

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<sup>37</sup> See *Miano v. AC&R Advertising, Inc.*, 148 F.R.D. 68 (S.D.N.Y. 1993).

<sup>38</sup> ABA Formal Opinion 95-396 (1995)

<sup>39</sup> See *Humco v. Noble*, 31 S.W.3d 916 (Ky. 2000); *Restatement (Third) of the Law Governing Lawyers*, §100, comment c., ABA Formal Opinion 06-443 (2006).