

320 EAST BUFFALO ST., SUITE 700 MILWAUKEE, WISCONSIN 53202 TELEPHONE 414 271 3400 FACSIMILE 414 271 3841 www.hallingcayo.com

CHANGES TO THE WISCONSIN SUPREME COURT RULES

HOW WILL THEY AFFECT THE BANKRUPTCY BAR?

Lou Jones Breakfast Club March 11, 2008 **Richard J. Cayo**

On January 5, 2007 the Supreme Court issued an order substantially revising the Rules of Professional Conduct for Attorneys, SCR Chapter 20, effective July 1, 2007. I have reproduced an outline I have been using for talks concerning the new rules but (at your request) will try to focus on those bearing most directly on client confidentiality, candor and duties to prospective clients.

Preamble: A Lawyer's Responsibilities

Change: The "Scope" section of the new Preamble liberalizes the use of the rules for purposes of civil liability. **Practice implication:** Violation of a rule will be more readily be admissible to show malpractice.

Change: The "Terminology" section is moved from the Preamble to the new Rule 1.0, with some definitions being altered, and some being added:

- Rule 1.0(h): The definition of "firm" now incorporates governmental entities.
- Rule 1.0(f): The change requires lawyers to obtain: "informed consent" under those circumstances in which a lawyer was formerly obligated to obtain "consent after consultation". In so doing, lawyers must discuss available options, alternatives, advantages and disadvantages of course of conduct when presenting matter to client for decision. The change opens the door to an instructive body of law (applicable to doctors) but also to damage claims against lawyers for failure to obtain.
- Rule 1.0 (h): "Misrepresentation" is defined to include false statements that are made with reckless disregard, not actual knowledge, as to the truthfulness of the statement(s). (Lends some support to certain *mens rea* arguments in connection with OLR charges.) Additionally, under the new definition, omissions may constitute misrepresentation.
- Rule 1.0 (p): The definition of "tribunal" now incorporates administrative law judges, arbitrators, administrative agencies, and any other body or individual that renders binding legal judgment after presentation of evidence or argument.
- Rule 1.0(q): "Confirmed in writing" now includes provisions relating to electronic and audio records.

Practice implication: Many of the revisions and additions to terminology found in the new Rule 1.0 effect substantive changes in the rules, particularly those governing conflict resolution.

Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer

Change: Renamed. Rule recognizes implied authority. New subsection (e) requires insurance defense lawyers to inform clients **in writing** of any limitations on the scope of representation imposed by the terms of the insurance policy & must do so within "a reasonable time" of being retained.

With the exception of (e), SCR 20:1.2 follows ABA Model Rule 1.2 and is similar to our current rule, which provides that client has final authority to determine the course of the representation. But the former concept was: client determines *objectives* of the representation / lawyer determines *means* of achieving objectives. Under the *new rule – client decides both*.

Practice implication: Involve client in *all* decisions having any strategic significance.

Practice implication: Engagement letters should state what the lawyer will do and will not do, what the client will do, what the client will pay, when the representation will end, and a forewarning regarding withdrawal.

Rule 1.4, Communication

Change: The new rule emphasizes promptness, and lists specific duties of communication, including:

- Duty to promptly notify the client of any decision or circumstance in which the client's informed consent is required;
- Duty to reasonably consult with the client about how the client's objectives are to be accomplished;
- Duty to keep the client reasonably informed about the status of the matter;
- Duty to promptly comply with the client's reasonable requests for information; and
- Duty to consult with the client about any relevant limitation on the lawyer's conduct resulting from a request for assistance that is not permitted by the Rules of Professional Conduct or other law.

Practice implication: A significant number of grievances filed against Wisconsin lawyers each year involve complaints for failure to communicate. Best practice: Promptly return client calls, answer questions thoroughly, and willingly provide information regarding the representation.

Rule 1.5, Fees

Change: For representations costing more than \$1,000, a lawyer must inform the client **in writing** as to the nature and scope of representation and basis or rate of fees and costs charged before or within a reasonable time after commencing the representation. Lawyers must also advise clients in writing when basis for fees or costs increases during the course of representation.

Exception: If a lawyer reasonably foresees that combined fees and costs charged to a client will be **less** than \$1,000, the lawyer must still advise the client of representation's nature and scope and basis of fees and costs, but may do so orally.

Exception: No written fee agreement is needed with respect to clients for whom legal services have previously been rendered upon the same terms.

Practice suggestion – unless you KNOW fees + costs = <\$1,000 routinely confirm all agreements in writing. Rule change also clarifies ethical duties of lawyers who share fees (not proportionate to services rendered) upon referral of matter to another attorney. Referring lawyer and lawyer to whom matter is referred have same responsibilities as if partners in a firm and client must be informed in writing of and consent in writing to terms of referral arrangement (including the % split).

Rule 1.6, Confidentiality

Under the existing Rule 1.6, Wisconsin lawyers **must** disclose confidential information to prevent a client from inflicting death or substantial harm to a person or to the financial interests of another; this provision remains the same under the new rules. **Change:** The new version of Rule 1.6 adds **permissive** disclosure of confidential information in the following situations:

- To prevent death or substantial bodily harm that is reasonably likely to occur, regardless of whether the client is involved in the conduct likely to cause such harm;
- To seek advice about compliance with the Rules of Professional Conduct;
- To comply with other law or court order.

Practice implication: What constitutes "substantial harm" to a person or to the financial interests of another? The rule doesn't say. When in doubt, take refuge in the provision that allows lawyers to seek advice about compliance with the Rules of Professional Conduct and contact the State Bar Ethics Hotline (Atty. Tim Pierce) hotline or a member of the firm's risk management team or a colleague.

Rule 1.7: Conflicts of Interest: Current Clients

The old Rule 1.7 provided that waivers of conflict must generally be in writing and signed by the affected client; this provision remains intact.

Change: The new version of Rule 1.7 discusses prospective waiver, and lists certain conflicts that may not be waived. Additionally, Rule 1.7 now distinguishes conflicts based on direct adversity

from conflicts based on material limitations. The former occurs when a current client's interests conflict with another current client's interests; the latter occurs when there is a significant risk that the representation of a current client may be materially limited by the lawyer's responsibilities to another current client or to a former client, or by the lawyer's own interests.

Rule 1.8, Conflicts of Interest: Prohibited Transactions

The current version of Rule 1.8 prohibits lawyers from making cash advancements to clients. Thankfully, that provision is retained. **Change:** The conflicts enumerated in the existing Rule 1.8 **are now imputed to other lawyers in the same firm.** Exception: The prohibition against sexual relations with clients is not imputed. The new version of Rule 1.8 expands a lawyer's obligations when entering into business transactions with a client. Specifically, the lawyer must obtain the client's informed consent to the transaction **in writing**. Additionally, before a client may waive a conflict that arises from a business transaction involving his or her lawyer, the client must be advised **in writing** to seek separate legal counsel. Interestingly, the new Rule 1.8 prohibits making an agreement with a client that would limit the client's right to report misconduct to the OLR, but advance waiver of malpractice is permitted if the client is independently represented.

Rule 1.9, Duties to Former Clients

Change: The Comment to Rule 1.9 has been revised to focus the analysis on the protection of confidential information. The new Comment references the "substantial relationship" test: A lawyer may be conflicted if information that would "normally" be imparted in a relationship with a former client would materially advance a subsequent client's position. Information that is obsolete or disclosed to the public is **not** disqualifying.

Practice implication: Watch for violations of Rule 1.6 relating to confidentiality when contemplating disclosure of "obsolete" or "public" information. That such information does not create conflict does **not** mean it is public.

Rule 1.10, Imputed Disqualification: General Rule

Under the existing rule, conflicts are generally imputed to other members of firm; this provision remains the same. **Change:** The revision to Rule 1.10 delineates the following exceptions to the imputation rule:

- Conflicts arising from a lawyer's personal interests (i.e., sex, family, financial interest in opposing entity) that do not pose a significant risk of materially limiting the representation will not be imputed;
- When conflicts arise from a lawyer's provision of minor and/or isolated services to a former client at the lawyer's previous firm, the lawyer with the conflict may be screened to defeat imputation of the conflict to other lawyers in the new firm. Notice of the screening arrangements must be given to the affected client.

Rule 1.13, Organization as Client

Change: Rule 1.13 now requires that when a lawyer deals with an organizational constituent, and the lawyer "knows or reasonably should know" that the organization's interests are adverse to those of the constituent, the lawyer must explain his or her role. Additionally, the revised version of Rule

1.13 provides that the **mandatory disclosure** requirements of Rule 1.6(b) apply when a lawyer represents an organization. Specifically, when representing an organization a lawyer **must** disclose confidential information to the extent necessary to prevent a client (or the corporate client's employee) from inflicting death or substantial harm to a person, or to the financial interests of another. **Additional change:** If a lawyer becomes aware that a corporate employee's illegal actions are likely to harm the organization, the lawyer **must** report the misconduct to a higher authority within the organization. If the higher authority fails to address the situation, the lawyer **may** reveal information otherwise protected by Rule 1.6 to the extent necessary to protect the organization. (Sarbanes-Oxley effect)

Rule 1.14, Client with Diminished Capacity

Under the existing rules, a lawyer who represents a client with diminished capacity must treat the client, insofar as possible, as the lawyer would treat any other client. **Change:** The revised rule still encourages a "normal" relationship. However, the revised rule approves "reasonably necessary protective action, including consulting with individuals and entities that have the ability to take action to protect the client." Note that the alternatives for protective action end with -- rather than begin with -- guardianship-type proceedings.

Practice implications: Even clients with diminished capacity get benefit of the doubt regarding decisions. Weigh options carefully before waiving confidentiality while taking protective action on behalf of a client with diminished capacity – no more disclosure than needed.

Rule 1.18, Duties to a Prospective Client

This new rule recognizes that a lawyer owes to a prospective client a duty of confidentiality and a duty to avoid conflicts of interest even though the lawyer or prospective client or both elect not to form a lawyer/client relationship. Describes duties that lawyer owes to prospective client who meets with or talks to lawyer seeking representation which does not ensue. Duty of confidentiality is owed to prospective client re information obtained and interviewing lawyer prohibited from adverse representation in matter. But conflict is not imputed to other members of firm if: (1) interviewing lawyer took no more information than necessary in declining case; (2) prospective client is given notice of adverse representation; and (3) interviewing lawyer is screened from adverse case and fee.

Practice implications: conduct initial interviews with care – obtain info in sequence likely to reveal *early* features of representation which will result in declining the work. Share contact information with colleagues but not the information that will also disqualify them.

Beware the cocktail party conversation that begins, "You're a lawyer? Let me ask you a question..." You may unwittingly find yourself with a conflict of interest.

Rule 2.2, Lawyer Serving as Intermediary

Rule 2.2 has been **eliminated**. Current rule addresses situations in which lawyer is retained to represent clients with divergent interests. Court eliminates SCR 20:2.2 because lawyer's responsibilities when representing clients simultaneously is addressed by other rules, i.e. SCR 20:1.7. Elimination of SCR 20:2.2, the "scrivener rule", does not prohibit lawyer from accepting work from parties for service as neutral scrivener without advocacy for either party. Lawyers must follow conflict rules. Conflict waivers that comply with requirements for obtaining informed

consent from each client may be used. With or without the rule change, this undertaking is *never* advisable in this writer's opinion, even if care exercised. Better practice: accept work as scrivener but clarify that work is on behalf of only one of the parties – others are unrepresented.

Rule 2.4, Lawyer Serving as Third Party Neutral

Rule 2.4 is new. Recognizing that lawyers often serve as mediators or arbitrators, Rule 2.4 imposes a duty towards unrepresented parties. The lawyer serving as mediator or arbitrator must explain the lawyer's role and inform unrepresented parties that she or he is not representing them.

Rule 3.3, Candor Toward the Tribunal

Change: New provisions in Rule 3.3 expand a lawyer's duties of candor towards a tribunal. Specifically, lawyers now have a duty to take remedial measures if they are representing a client in an adjudicative proceeding and discover that **any person** is engaging in, or intends to engage in, fraudulent conduct related to the proceeding.

Practice implication: Now, in addition to worrying about whether your client is lying, lawyers need to be mindful about the possibility that someone else involved in the proceeding is lying.

SCR 20:3.8, Special Responsibilities of Prosecutors

Rule provides guidance to prosecutors concerning statements made to individuals not represented by lawyer. Clarifies limitations on prosecutors to ensure they do not unduly influence unrepresented person considering tactical decisions, in proceedings in which a deprecation of rights may occur. Rule applies in some circumstances to municipal prosecutors. Care needed in communication with unrepresented persons to avoid misrepresentation regarding prosecutor's allegiances. The new version of Rule 3.8 prohibits prosecutors from giving legal advice to unrepresented persons and from assisting unrepresented persons in completing court forms. City Attorneys are exempt from this rule.

Rule 3.10, Threatening Criminal Prosecution

Rule 3.10 has been **eliminated**. Court deletes SCR 20:3.10, which (presently) makes it misconduct to threaten prosecution solely to gain advantage in civil matter. ABA rules contain no similar provision and current rule has been difficult to enforce – a trap only for the clumsy. To extent such conduct may constitute extortion, it would still be misconduct under SCR 20:8.4(b).

Rule 4.1, Truthfulness in Statements to Others

The current rule prohibits lawyers from making false statements of material fact or law to other persons. **Change:** The new rule retains these provisions, but allows lawyers to supervise or advise other persons about (but not participate in) investigative activities that may involve false statements as means of combating unlawful conduct. Lawyers may give advice to others in lawful investigative activities in order to ensure that investigation is conducted in accordance with law. (Hurley?)

Rule 4.2, Communication with Person Represented by Counsel

Change: Rule 4.2 now allows lawyers to contact represented persons directly when authorized by a court order. More significantly, the revised Comment to Rule 4.2 contains useful clarification regarding organizational opponents: Contact is expressly prohibited with a constituent of the organization who "supervises, directs or regularly consults with the organization's lawyer with respect to the matter, or whose act or omission in the matter may be imputed to the organization for

purposes of civil or criminal liability." Former constituents may be contacted, but the Comment warns that a lawyer should not solicit or assist in the breach of any duty of confidentiality by a former constituent. Note new Ethics Committee decision E-07-01. see *Wisconsin Lawyer* – June 2007

Practice implication: Lawyers may contact the former employee of an organizational opponent, but before engaging in substantive discussions make sure that there is no confidentiality agreement.

Rule 4.4, Respect for Rights of Third Persons

Rule 4.4 requires that prompt notification to the sender when a lawyer receives a document through inadvertence. By virtue of the revised definition of "writing" in the new Rule 1.1, this provision encompasses e-mail transmittals.

Practice implication: Rule 4.4 does not impose duties beyond prompt notification to the sender. Answers one question but begs many others – read? keep copy? disclose to client? use to client's advantage?

Rule 4.5, Guardians ad Litem

Pursuant to this new rule, guardians ad litem are bound by the Rules of Professional Conduct consistent with their role in representing the best interests of individuals rather than individuals personally.

Rule 6.1, Voluntary Pro Bono Publico Service

Rule 6.1 preserves the voluntariness of *pro bono* service, but suggests that lawyers should perform 50 hours *pro bono* service per year. Defines *pro bono* as geared towards financially needy.

Practice implication: Rule 6.1 is aspirational; disciplinary enforcement has been rejected as a means of forcing compliance.

Rule 6.5, Nonprofit and Court-Annexed Limited Legal Services Programs

Rule 6.5 allows lawyers to participate in walk-in legal clinics, legal advice hotlines, advice only pro se clinics, and similar programs without worrying so much about violating the rules. Where limited legal services are being provided, Rule 6.5 expressly limits conflicts and imputation of conflicts to matters in which the lawyer has knowledge of the conflict.

Practice implication: Lawyers looking for opportunity to fulfill the 50 hours of *pro bono* service that is recommended under Rule 6.1 will now have a wider variety of volunteer opportunities.

Rule 7.2, Advertising

Rule 7.2 allows lawyers to enter into referral agreements subject to certain limitations. Specifically, the referral agreement must be nonexclusive; the referred client must give informed consent; the feesharing provisions in Rules 1.5 and 5.4 must be observed; the referral agreement must not interfere with the lawyer's independent professional judgment; and the lawyer must keep information confidential as required by Rule 1.6.

Rule 7.6, Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

Under this new rule, "pay to play" is expressly prohibited. Lawyers may not accept government contracts or engagements if the lawyer or the lawyer's firm has made contributions for the purpose of obtaining such engagements.

Rule 8.3, Reporting Professional Misconduct

Roman of the Carlos of the Car

4.1

Under the current version of Rule 8.3, lawyers have a duty to report unprivileged information concerning serious misconduct of other attorneys; this provision is retained Changes: Rule 8.3, as revised, mandates that if a lawyer's duty to report requires revelation of information protected by Rule 1.6, then the lawyer *must consult with the affected client* and abide by the client's wishes.

Practice implication: This rule sometimes arises in the context of cases inherited from other lawyers. It often relates to misconduct of other firm members.

Rule 8.4, Misconduct

Changes: The new version of Rule 8.4 expressly provides that failure to cooperate with the OLR in the investigation of a grievance is misconduct. The new Rule 8.4 also provides that it is misconduct for a lawyer to harass a person "on the basis of sex, race, age creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities." Comment states that what constitutes harassment may be determined by legislation and case law. Extremely ominous and unnecessary duplication of civil remedies which portends OLR investigations concerning law firm personnel issues, case selection (may family lawyer limit practice to one gender?) and vendor selection.

CONCLUSION

The new Supreme Court Rules became effective on July 1, 2007. All warrant examination now to avoid problems. The Court has also made extensive changes to the trust account rules (SCR 20:1.15) which are not covered in this outline.

Richard Cayo