**2017: A Technology Odyssey**

An Overview of the Upcoming Changes to Ethics Rules

to Account for Changes in Technology

December 13, 2016

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1. **INTRODUCTION**
   1. New Wisconsin Supreme Court Rules will become effective January 1, 2017.
   2. Follow changes made to ABA Model Rules to account for the rise in the use of technology as part of legal representation.
   3. Most changes were made to the comments, although some modifications were made to the black letter rules.
2. **SCR 20:1.0 – TERMINOLOGY**
   1. Recognition of electronic communication and the expansion of methods of communication between an attorney and a client.
   2. 20:1.0(q) – “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and ~~e-mail~~ electronic communications.
   3. Comment [9] to SCR 20:1.0 is amended as follows:
      1. “The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. … To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.”
      2. The new comment recognizes the importance of accounting for access to electronic documents.
3. **SCR 20:1.1 – COMPETENCE**
   1. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
   2. Comment now acknowledges a lawyer’s duty to keep abreast of technology changes.
   3. Comment [6] to SCR 20:1.1 was renumbered to Comment [8] and reads:
      1. “**Maintaining Competence [8]** – To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”
   4. New Comments add language identifying the requirements for a lawyer contracting with another lawyer or joint representation.
      1. See Comments [6] and [7] to SCR 20:1.1.
4. **SCR 20:1.4 – CLIENT COMMUNICATION**
   1. Comment [4] to SCR 20:1.4 is amended as follows:
      1. “A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged.~~ A lawyer should promptly respond to or acknowledge client communications.”
5. **SCR 20:1.6 – CONFIDENTIALITY**
   1. Changes were made to the black letter rule that allow a lawyer to reveal limited information to detect and resolve conflicts of interest.
   2. SCR 20:1.6(c) allows a lawyer to reveal information relating to the representation of a client to the extent that the lawyer reasonable believes is necessary (1) to prevent death or bodily injury; (2) to prevent financial injury; (3) to secure ethics legal advice; (4) to establish a claim or defense in a lawyer-client controversy; and (5) to comply with other law/court order.
   3. SCR 20:1.6(c) was amended to add:

“(6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

* 1. Wisconsin Committee Comment provides background for why the SCR language differs from the Model Rules.
     1. “Paragraph (c)(6) differs from its counterpart, Model Rule 1.6(b)(7). Unlike its counterpart, paragraph (c)(6) is not limited to detecting and resolving conflicts arising from the lawyer's change in employment or from changes in the composition or ownership of a firm. Paragraph (c)(6), like its counterpart, recognizes that in certain circumstances, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest. ABA Comment [13] provides examples of those circumstances. Paragraph (c)(6), unlike its counterpart, also recognizes that in certain circumstances, lawyers may need to disclose limited information to clients and former clients to detect and resolve conflict of interests. Under those circumstances, any such disclosure should ordinarily include no more than the identity of the clients or former clients. The disclosure of any information, to either lawyers in different firms or to other clients or former clients, is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client. ABA Comment [13] provides examples of when the disclosure of any information would prejudice the client. Lawyers should err on the side of protecting confidentiality.”
  2. Comment [13] to SCR 20:1.6 was added and read as follows:
     1. “Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.”

* 1. Comment [14] to SCR 20:1.6 was added and reads as follows:
     1. “Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.”
  2. SCR 20:1.6(d) was added and reads as follows:
     1. “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”
  3. ABA Comment 18 was added and reads as follows:
     1. “Acting Competently to Preserve Confidentiality. [18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].”

1. **SCR 20:1.8 – PROHIBITED TRANSACTIONS**
   1. A Wisconsin Committee Comment was added to SCR 20:1.8 and reads as follows:
      1. “ABA Comment [8] states that Model Rule 1.8 "does not prohibit a lawyer from seeking to have the lawyer or partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position." This language is inconsistent with SCR 20:7.3(e), which prohibits a lawyer, at his or her instance, from drafting legal documents, such as wills or trust instruments, which require or imply that the lawyer's services be used in relation to that document. For this reason, ABA Comment [8] is inapplicable.”
2. **SCR 20:1.18 – DUTIES TO PROSPECTIVE CLIENT**
   1. SCR 20:1.18(a) was amended as follows:
      1. “A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”
   2. SCR 20:1.18(b) was amended as follows:
      1. “Even when no client-lawyer relationship ensues, a lawyer who ~~has had discussions with~~ learned information from a prospective client shall not use or reveal that information learned in the consultation, except as SCR 20:1.9 would permit with respect to information of a former client.”
   3. Comment [2] to SCR 20:1.18 is amended as follows:
      1. “~~Not all persons who communicate information to a lawyer are entitled to protection under this rule.~~ A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. ~~A person who communicates~~ Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."”
3. **SCR 20:4.4 – RESPECT FOR RIGHTS OF 3RD PERSONS**
   1. SCR 20:4.4(b) was amended as follows:
      1. “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”
   2. SCR 20:4.4(c) was added and reads as follows:
      1. “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information contains information protected by the lawyer-client privilege or the work product rule and has been disclosed to the lawyer inadvertently shall:
         1. [I]mmediately terminate review or use of the document or electronically stored information;
         2. [P]romptly notify the person or the person's lawyer if communication with the person is prohibited by SCR 20:4.2 of the inadvertent disclosure; and
         3. [A]bide by that person's or lawyer's instructions with respect to disposition of the document or electronically stored information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.”
   3. A Wisconsin Committee Comment was added to SCR 20:4.4 and reads as follows:
      1. “This Rule, unlike its Model Rule counterpart, contains paragraph (c), which specifically applies to information protected by the lawyer-client privilege and the work product rule. If a lawyer knows that the document or electronically stored information contains information protected by the lawyer-client privilege or the work product rule and has been disclosed to the lawyer inadvertently, then this Rule requires the lawyer to immediately terminate review or use of the document or electronically stored information, promptly notify the person or the person's lawyer if communication with the person is prohibited by SCR 20:4.2 of the inadvertent disclosure, and abide by that person's or lawyer's instructions with respect to disposition of the document or electronically stored information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction. Due to substantive and numbering differences, special care should be taken in consulting the ABA Comment.”
4. **SCR 20:5.3 - Responsibilities regarding nonlawyer assistance.**
   1. Comments [1] and [2] acknowledges the use of non-lawyers outside of the firm to assist the lawyer in providing representation and requires that lawyer make reasonable efforts to ensure that services are done in a way that is compatible with the lawyer’s professional obligations.
   2. Comment[3] to SCR 20:5.3 was added and reads as follows:
      1. “A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.”
5. **SCR 20:5.8 – RESPONSIBILITIES REGARDING LAW-RELATED SERVICES**
   1. This new rule was created in Wisconsin based upon the ABA Model Rules.
   2. New rule reads as follows:

“(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

* + - 1. by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
      2. in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”

* 1. The rule provides that law-related services to clients must comply with the Rules of Professional conduct if the law-related services are provided by the lawyer in a context that is not distinct from the lawyer’s rendering of legal services, or by an entity controlled by the lawyer if the lawyer fails to disclaim to the client obtaining the services that the services are not law services and are without the normal client-attorney protections.
  2. A Comment emphasizes that a lawyer should take great care to keep the rendering of law-related services separate from the legal services provided by the lawyer.

1. **SCR 20:7.2 - ADVERTISING**
   1. Comment [2] to SCR 20:7.2 was amended to provide that the rule permits the public dissemination of a lawyer’s email address and website.
   2. Comment [3] to SCR 20:7.2 was amended to eliminate the language listing TV as the “most powerful media”, and now instead reads
      1. “Television, the internet, and other forms of electronic communication are among the most powerful media for getting information to the public.”
   3. Comment [5] to SCR 20:7.2 was amended to provide as follows:
      1. Lawyers are not permitted to pay others for recommending the lawyer’s services or channeling professional work in a manner than violates SCR 20:7.3. The comment also now clarifies that a communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.
      2. Lawyers may pay other parties for generating client leads, specifically internet-based client leads, as long as the lead generator does not recommend the lawyer, and payments and communications with the lead generator are consistent with the rules.
2. **SCR 20:7.3 – SOLICITATION OF CLIENTS**
   1. The name of the rule was changed from “Direct Contact with Prospective Clients” to “Solicitation of Clients.”
   2. The amendments removed the language “from a prospective client” language of the rule itself, clarifying that the solicitation of clients could apply in any circumstances.
   3. Renumbered Comment [3] to SCR 20:7.3 was amended to clarify that communication by email or other electronic means that do not involve real-time contact and do not violate other rules governing solicitation are permitted. (e.g. email vs. text message)
   4. Comment [1] to SCR 20:7.3 was added and reads as follows:

* + 1. “A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.”
    2. A solicitation is:
       1. A targeted communication;
       2. Initiated by the lawyer;
       3. Directed to a specific person; and
       4. And that offers to, or can reasonably be understood to provide, legal services.
    3. Communication is not a solicitation if:
       1. Directed at general public; or
       2. Automatically generated internet search response

1. **SCR 20:1.15 – TRUST ACCOUNT RULE**
   1. Practitioners and bankers worked together to amend the rule.
   2. The rule change removes specific recordkeeping requirements from the SCRs and places them instead in a resource document prepared by the OLR.
      1. SCR 20:1.15(g)(1) “The office of lawyer regulation shall publish guidelines for trust account record-keeping.”
      2. Records must be maintained, but the specific format is not dictated, making it a more flexible tool for practitioners
   3. The rule now provides for an expanded use of e-banking services for transfer of funds between trust account and business account.
   4. The rule now allows the use of e-banking services provided that the lawyer uses commercially-reasonable security measures and programs to ensure the protection of client funds.
      1. In order to use e-banking services, a lawyer must create an e-banking trust account and use such account for the receipt of electronically transferred funds from client or other sources and then transferring of funds to appropriate account.
   5. A rebuttable presumption is created that a lawyer has violated the Trust Account Rule if the lawyer is unable to produce records showing the location and status of funds or property held by the lawyer in trust for a client.
   6. Key takeaways:
      1. Likely that all recordkeeping will be automated once the banking industry catches up the lawyers’ needs.
      2. There are certain regulatory roadblocks in the banking industry that make it impossible to be completely friendly to our niche profession’s needs.
      3. Failure to keep adequate records can get you suspended. It’s ok to have someone else do it, but the ultimate responsibility falls on the lawyer.
      4. Corporate accounts ONLY have 24 hours to report errors, unlike the 60 days provided to consumer accounts.
2. **MALPRACTICE IN ACTION**
   1. Lawyer has been practicing law for 45 years in a small town. Although his practice is not as active as it used to be, he still litigates cases. Our lawyer refuses to use emails and computers because he doesn’t think it’s worth it to learn all this new technology at this point in his career.
      1. Is the lawyer complying with the Rules of Professional Conduct?
   2. Lawyer discovers that computers are fun, and gets a few for his firm and home. Although he is now comfortable with the use of email, he is still not the most tech-savvy practitioner. Recently, one of his large landlord client sent him answers to discovery requests in Excel and Word format. The lawyer forwards the electronic documents as is to plaintiff’s counsel.
      1. Did the lawyer violate the Rules of Professional Conduct?
   3. Given his small town practice, our lawyer is very judicious in keeping his overhead low. Our lawyer had his son-in-law, a wedding photographer by trade who has a solid understanding of computers, set-up his firm’s computers and Wi-Fi system.
      1. Does this comply with the applicable Rules?
   4. Our small town lawyer sometimes enjoys taking a break, and he walks from the office down to the Driftless Café during the work day with his laptop. While at the Café, our lawyer uses the free Wi-Fi access provided by the Café to check his client emails.
      1. Is our lawyer compliant with the Rules of Professional Conduct?
   5. The son-in-law, seeing our lawyer’s budding enjoyment of technology, decides to give him an iPad for Christmas. Our lawyer enjoys it so much that he decides to buy one for the office. The son-in-law helps our lawyer set-up the iPad so that our lawyer can use it to review his client emails. One day, our lawyer forgets the iPad on the Café bar.
      1. Does the lawyer violate the Rules of Professional Conduct?
   6. Our lawyer has been negotiating a new lease for the local hospital. While at the Driftless Café, our lawyer receives a text message from the hospital’s CEO asking him for a status update on the lease. Our lawyer happily texts the newest offer’s details over the Café’s Wi-Fi.
      1. Does the lawyer violate the Rules of Professional Conduct?
   7. Our lawyer has been hearing his son-in-law talk more and more about the “cloud.” Following a few conversations on the topic, our lawyer decides that he would like to bring the “cloud” to his law firm and his clients, so his son-in-law agrees to install a “cloud” server in our lawyer’s office. Unfortunately for our lawyer, he had been making derogatory comments online against the Russians and one Australian guy for quite some time. Following the installation of his server, the Russians promptly hack our lawyer’s server and share all our lawyer’s clients’ information with the Australian guy, who in turns publishes it all on the internet.
      1. Has our lawyer violated the Rules of Professional Conduct?
      2. See Wisconsin Formal Ethics Opinion EF-15-01: Ethical Obligations of Attorneys Using Cloud Computing, March 23, 2015.
   8. Our lawyer’s daughter has recently joined his law firm. Prior to joining him in the practice, his daughter was an attorney at one of the big law firms in Milwaukee for ten years. Our lawyer’s daughter has full access to their firm’s new cloud server.
      1. Have the lawyers violated any Rules of Professional Conduct?
   9. In an effort to expand his revenue streams prior to selling his law practice to his daughter, our lawyer decides to use his real estate expertise to open a title service company in the empty office in the same building as his law firm.
      1. Does our lawyer have to follow the requirements of new rule 20:5.8?
   10. Our lawyer has been observing his daughter and son-in-law texting each other with rather vigorous consistency. Given his newfound love of technology, our lawyer decides to go get with the times and gets the bright idea to use a mass texting service to reach prospective clients.
       1. Would the use of text message in this manner violate the Rules of Professional Conduct?
   11. Our lawyer has been hearing his colleagues around town talk about AVVO. Once our lawyer figured out what AVVO was, he decided that he was not going to miss out on this new avenue of potential referrals. The next day, our lawyer starts offering $100 credit on his clients’ legal bill if they will provide voluntary, honest, and self-drafted reviews of our lawyer’s service on the site.
       1. May our lawyer do so?
   12. True or False – A lawyer is required by the SCR to encrypt certain emails to clients?
   13. Our lawyer recently attended a real estate luncheon organized by his local rotary club. As part of the lunch, he received a handout that included everyone’s email address. Our lawyer wishes to send an email to all attendees with information about the legal services that his firm provides.
       1. May our lawyer send out such an email to the luncheon attendees?
   14. In an effort to increase her exposure and hopefully generate business for herself, the lawyer’s daughter has created a legal blog to discuss salient business law issues.
       1. May our lawyer’s daughter operate a legal blog under the Rules of Professional Conduct?
   15. Our lawyer’s daughter gets a call from a new internet-based referral service provider that promises better results than all internet referral service that came before it, for a small fee, of course.
       1. May the law firm use the services of this new referral service provider?
   16. True or False – to comply with SCR 20:1.4, a lawyer must promptly respond to a client’s email by sending the requested information?