

Ethics for Municipal Attorneys

Hon. Michael J. Aprahamian
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Lawyer's Duties

Duties regarding plying the trade (advertising, billing, trust accounts)
Duties owed to third parties
Duties owed to the system of justice

Duties owed to clients

1. Duty of care
2. Duty of confidentiality
3. Duty of loyalty

Who is the Client -Representing Organizations



Organizations are generally persons under the law, and have legal needs like real persons, and need legal representation

What is complication?

Organizations have to speak and act through agents - officers, directors, managers, employees, and other constituents, etc.

Who speaks for organization, and what should lawyer do when an agent is not acting in best interests of organization?

SCR 20:1.13(a)

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

General rule.

Form of organization (corporation, limited liability company, partnership, government entity) as a general matter is irrelevant.



Comment 9

“Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules....Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.”

Duty to Report



SCR 20:1.13(b) identifies a duty to report “in” the organization and “up” the organizational ladder.

When is duty triggered?

- Constituent of organization engaging, intending, or refusing to act
- 1. Violation of a legal obligation to organization or
- 2. Violation of law reasonably imputed to organization
- And
- 3. Likely to result in substantial injury to the organization.

SCR 20:1.13(b)

What does SCR 20:1.13(b) provide once duty is triggered?

"shall proceed as is reasonably necessary in the best interest of the organization."

What does that mean???

Report to prevent injury to organization caused by constituent.
Report to whom?

"to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act in behalf of the organization as determined by applicable law."

"Up the ladder" of the organization.



What is highest authority in an organization?

Corporation - board of directors.

Partnership - e.g. management committee



What is hierarchy of authority in municipal entity?

Generally, can assess hierarchy of authority by looking at reporting responsibilities of managers, as well as legal ability to hire and fire.

What is highest authority?

May depend upon who has relevant authority

SCR 20:1.13(c)(1)



(c) Except as provided in par. (d), if,
(1) despite the lawyer's efforts in accordance with par. (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

What does that mean?

- (1) Lawyer tried,
- (2) went up ladder all the way to highest authority,
- (3) no remedial action by highest authority, and
- (4) to address clear violation of law

SCR 20:1.13(c)(2)



(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not SCR 20:1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

- 1. Violation reasonably certain to result in substantial injury to organization
- 2. May reveal information relating to representation outside the organization to extent necessary to prevent injury

20:1.13(b) deals with duty to report "up the ladder" within the organization. Mandatory obligation

20:1.13(c) deals with reporting outside the organization. Permissive.

Changes to Rules as a result of late 1990's and early 2000's corporate and legal misconduct. Enron, Worldcom.



SCR 20:1.13(d)

If lawyer is retained to investigate or defend against claim arising out of alleged violation of law, duty to report under 1.13 not apply.

Why?

"This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim." Comment 7



SCR 20:1.13(f)

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Lawyer represents organization, not its constituents. When interests of organization are adverse to those of constituent, lawyer has duty to inform constituent that she represents the organization and does NOT represent constituent.



Comment 10

Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

SCR 20:1.13(g)

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of SCR 20:1.7. If the organization's consent to the dual representation is required by SCR 20:1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Can represent two parties, but must comply with "conflict process"

Duties Owed to Clients

1. Duty of Care - how lawyer handles substantive representation of client
 - A. Competence - 1.1
 - B. Allocation of Responsibility 1.2
 - C. Diligence - 1.3
 - D. Communication 1.4



Competence

Rule 1.1 - Very first rule of legal ethics and one of the most important

SCR 20:1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

What skills necessary in representing municipality?

Basic municipal law,
Planning,
Legislative drafting,
Legislative interpretation,
Negotiating,
Prosecutorial skills,

Legal Knowledge and Skill

Factors -

- Complexity and specialized nature of the matter
- Get help from lawyer of established competence
- Lawyer's general experience
- Lawyer's training and experience in field
- Preparation and study lawyer able to give to the matter

Baby lawyers

New lawyers have obligation to develop skills and competence, to seek help when necessary.

Managers in firm have duty to take reasonable efforts to ensure that new lawyers are properly trained in order to satisfy duty of competence.



SCR 20:1.1

What is crucial legal skill an attorney must develop to practice competently?

Issue spotting!!

Comment 2. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.

Thoroughness and Preparation

Competence includes adequate preparation.

Comment 5. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence

Preparation

Continuing Education

Competence requires attorneys to study and adapt

Comment 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.

Technology



Comment 8 amended to require lawyers to keep pace with "relevant technology" in conjunction with duty to practice competently.

Why?

- Protection of confidential information
- Knowledgeable about technological impact on evidence and discovery.
- Maximize efficiency for benefit of clients

SCR 20:1.2(d)

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

What is the prohibition?



What are the exceptions?

SCR 20:1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.



SCR 20:1.3

Comment 1. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.

Managing and Controlling Caseload

Biggest cause of neglect often is excessive caseload.

Best Practices for managing and controlling caseload:

1. Manage number of cases so you can give proper attention to the cases you have.
2. Godfather Days - communication and consultation generally lead to action towards achieving objectives
3. Electronic Calendaring of deadlines
4. Obtain appropriate help, lawyer or nonlawyer assistance.

Communication



Client needs information to make good decisions.

One of the most important responsibilities of a lawyer—to communicate effectively with the client.

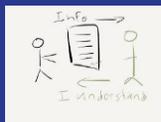
SCR 20:1.4(a)(1)

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

Examples?

- Conflict of interest
- Disclose confidential information
- Prior work conflict



SCR 20:1.4(a)(2)



(a) A lawyer shall:
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

Goes back to scope of representation.
Means vs. objectives

Must lawyer affirmatively consult with client about all matters?
No. Reasonable consultation.

SCR 20:1.4(a)(3)



(a) A lawyer shall:
(3) keep the client reasonably informed about the status of the matter;

What is difference between two rules, (a)(2) and (a)(3)?

Examples talk about the "bare minimum." Not a violation for failing to communicate with client as often as client would like.

Most client complaints involve or originate as a result of a failure to keep a client apprised of the matter.

SCR 20:1.4(a)(4)

(a) A lawyer shall:
(4) promptly comply with reasonable requests by the client for information;

Return client calls.
If you can provide the information requested by client, promptly provide it, and confirm you did so.



SCR 20:1.4(b)

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

What does this obligation entail?

In conjunction with 1.2(a)(3) (keep informed).
Communication is not just words, but ensuring that the recipient understands the concepts and the consequences.

Irony of Modern Communication

At this point in the history of the world, we can communicate with anyone more easily and cheaply than ever before.

- Email
- Text
- Video conferences



While quantity of communication may be increasing, quality is decreasing.



Best Practice - Godfather Days

Michael Corleone in The Godfather - takes care of "all family business" in one day.

Schedule "Godfather Days" every 2-4 weeks.

Look at every matter you are handling.
Address next steps.

Consult and inform client personally.
Confirm conversation and direction in writing.



Duties Owed to Clients

- 2. Confidentiality - 1.6
 - A. Free flow of information fosters effective advice and representation.
 - B. Risk of disclosure or use by attorney inhibits free and frank communication between client and lawyer



Confidentiality

A lawyer's duty of confidentiality is one of the most important duties a lawyer owes to her client.

The duty of confidentiality is different from and broader than the attorney client privilege



SCR 20:1.6(a)

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

What is duty?

How compare to attorney client privilege?

Attorney-client privilege is limited evidentiary privilege that applies in judicial proceedings and prevents compulsory production of evidence regarding a client.



Elements of Attorney-Client Privilege

1. Communication between lawyer and client, or agent of one or both;
2. Relating to the solicitation or provision of legal advice; and
3. Is meant to be confidential and is kept confidential.



SCR 20:1.6(a)

What are three exceptions to disclosure of confidential information under 1.6(a)?

1. Client gave informed consent
Example - Settlement
2. Disclosure is impliedly authorized to carry out representation
Example - Share information with expert
3. Disclosure required or permitted under 20:1.6(b) or (c)

SCR 20:1.6(b)

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

Mandatory
Preventative - criminal or fraudulent act
Result - death, substantial bodily harm, substantial financial injury

SCR 20:1.6(c)(1)

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably likely death or substantial bodily harm;

SCR 20:1.6(c)(2)

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

How different from 20:1.6(b)?

Here, crime or fraud has already occurred, and disclosure is not to prevent crime or fraud, but to prevent or mitigate harm.

SCR 20:1.6(c)(3)

(3) to secure legal advice about the lawyer's conduct under these rules;

Ethics Hotline

Other lawyer, but should do what?

Ensure that lawyer agrees to keep information confidential

SCR 20:1.6(c)(4)

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

SCR 20:1.6(c)(5)

(5) to comply with other law or a court order; or

SCR 20:1.6(c)(6)

(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.

Wisconsin Comment

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.

SCR 20:1.6(d)

(d) 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.

ABA Formal Op. 11-459 (lawyer's duty to protect confidentiality of electronic communications with clients; communicating with client on employer's email).

Duties Owed to Clients



- 3. Loyalty - duty of loyalty protected by conflicts of interest rules - 1.7, 1.8, 1.9, others. Why important?
 - A. Trust. Client must trust lawyer, who is fiduciary, so client is comfortable turning matter over to lawyer. Duty of undivided professional loyalty fosters trust.
 - B. Conflicts degrade quality of representation by dampening lawyers' vigor and zealous representation.
 - C. Conflicts may result in misuse of confidential information to advance others' interests.
 - D. Conflicts may undermine integrity of adversary system.

"You are your client's CHAMPION!"

You are a fiduciary, an agent, a CHAMPION, for someone else



SCR 20:1.7(a)

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or*
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*

SCR 20:1.7(a)(1)



What is direct adversity?

Zero-sum game. One wins, other loses, and vice-versa.

Litigation involving two clients.
Transaction between two clients.

Does it matter if representation of one client is not related to representation of other client?

SCR 20:1.7(a)(2)



What does it mean that "significant risk" that lawyer's representation will be "materially limited" by lawyer's other responsibilities or interests?

Risk that lawyer will "pull her punches" in representation of client because of other concerns.

"the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client." Comment 8

Source of competing concern?

1. Another existing client
In representing Client A in criminal matter, Lawyer does not pursue defense because it would incriminate Client B.
2. Former client
In representing Client A in collection matter against company, Lawyer limited in pursuing alternatives because Client B, a former client, has interest in company's assets.
3. Third person
Lawyer representing Client A in evicting tenant, which would negatively impact nonprofit sharing space in building.

Source of competing concern

- 4. Personal Interest of the lawyer
 Lawyer represents Client A in litigation against company, and lawyer's firm is considering subleasing space to company.
 Lawyer represents Client in litigation with X and lawyer's spouse represents X is same litigation.
 Lawyer represents Client, and fees are being paid by X, who has strong ideas of how matter should be handled.
 Lawyer represents Client on matter in which Lawyer has strongly held personal views.

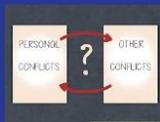
Source of competing concern

- 4. Personal Interest of the lawyer
 SCR 20:1.8 has specific rules involving conflicts associated with personal dealings with client, including transactions and relationships (including prohibition against sexual relationship, which is strictly prohibited).



Prior work conflicts

Example. Atticus drafts ordinance for city. There is litigation over ordinance, and city hires Atticus' partner, Scout, to represent city in litigation. Other side challenges language of ordinance, which could have been drafted more clearly. Scout is concerned about vagueness of the ordinance because it might jeopardize effectiveness of ordinance and hurt Atticus.



Is the conflict waivable?

The first three subsections SCR 20:1.7(b) determine whether the conflict is waivable/consentable.

1. Lawyer reasonably believes can provide competent and diligent representation to each affected client.

waivable

Is the conflict waivable?



2. The representation is not prohibited by law; substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client

Is the conflict waivable?

3. assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Same litigation. Why?

SCR 20:1.7(b)(4)

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent).

implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.

Comment 18.

Problems with Informed Consent

What is obstacle in getting informed consent from both clients?

"when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent."

Comment 19

Informed consent

Model rule requires consent confirmed in writing, which means that oral consent confirmed in a writing by lawyer is sufficient.

SCR 20:1.7(b)(4) requires that informed consent confirmed by writing **signed** by client.

SIGNED

Former Clients

Lawyers have duties to former clients. With respect to former clients, duty of loyalty not compelling, except as it relates to the protection of confidential information learned from prior representation.



SCR 20:1.9(a)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

SCR 20:1.9(a)



Example. Atticus wants to represent Bob Ewell in a matter involving Tom Robinson. Atticus had previously represented Tom, but no longer represents Tom. Can Atticus take on the matter for Bob?

Depends.

- 1) Are the interests of Bob in the matter materially adverse to those of Tom?
- 2) Is the representation of Bob the same matter for which Atticus represented Tom? Is it substantially related to the matter on which Atticus represented Tom?

Substantially Related

What does "substantially related" mean?

Based upon the nature of the matters, there is "substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Comment 3

Example. A lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.

Confidential Information

"Substantially related" is a proxy for the type of confidential information learned in prior matter that could be used against client in new matter.

Former client does not have to identify specific confidential information, but the type of information that normally would have been disclosed in prior representation.

SCR 20:1.9(b)

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and*
- (2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter, unless the former client gives informed consent, confirmed in a writing signed by the client*

SCR 20:1.9(c)



Lawyer may not REVEAL or DISCLOSE information of a former client except as rules would require or permit with respect to a client.

Lawyer may not USE information of a former client to the former client's disadvantage except as rules would require or permit with respect to a client, UNLESS information becomes generally known, e.g. in newspaper.

Even if becomes generally known, lawyer may not disclose information except as rules would permit or require as to client.

Examples Applying Process

"Fork in the Road"
Dealing with a current client or former client?
1.7 vs. 1.9?



Example. Atticus has represented city on 3-5 matters over the last ten years, all of them concluded satisfactorily. Atticus has not represented city on any matter for last year. Atticus takes on a matter for company against city. Governed by 1.7 or 1.9?

Conflict Process



1. Identify the client or clients
 - A. Is there a client relationship?
 - * Objective view of formation of relationship
 - * Representation of divisions or members of entity
- client?
 2. Current client or former client?
 - A. "Fork in the road"
 - B. Objective, "client-centered" view of representation
 - C. "Hot potato rule"

Conflict Process (cont'd)

- 3. Does conflict of interest exist?
 - A. Current client
 - 1. Direct adversity
 - 2. Materially limited - v
 - A. Another existing client
 - B. Former client
 - C. Third Person
 - D. Personal interest of lawyer
 - * Prior work conflicts



Conflict Process (cont'd)

- 3. Does conflict of interest exist?
 - ...
 - B. Former Client
 - * same or substantially related matter

Conflict Process

- 4. Is conflict waivable?
- 5. Is waiver valid?
 - A. Informed consent, signed by party
 - B. Advance waivers



Consequences of conflict are significant

1. Violation of rules
2. Disqualification
3. Malpractice
4. Disgorgement of fees

Lawyers must adopt procedures for identifying and resolving conflicts.

1. To determine whether lawyer can take on representation
2. To determine whether lawyer can continue with representation or withdraw

Takeaways

1. Who is the client?
Identify who the client is and if an organization, keep that steadfastly in mind when dealing with its constituents.



Takeaways

2. Allocation and Communication
Client has right to direct the objectives of the representation, but needs information and advice to do so.

Implement Godfather days to ensure proper communication with client, feedback regarding objectives and diligence in pursuit of the matter.



Takeaways

3. Duty of confidentiality is broader than attorney/client privilege.



Takeaways

4. Following conflicts process will assist you in honoring duty of loyalty.

Identify the client, the nature of the conflict, and keep in mind the "fork in the road" to identify the appropriate rule.