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**E-83-4      An attorney's cost obligations in a claim  
for frivolous action costs**

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**Question**

What are an attorney's obligations to his plaintiff-client when a counterclaim is made alleging a frivolous action by the plaintiff, and the defendant demands costs and attorney fees to be assessed against the plaintiff and the plaintiff's attorney under sec. 814.025, Wis. Stats.?

**Opinion**

While it is clear that an answer or counter claim alleging the principal action to be frivolous under sec. 814.25, Wis. Stats., poses a potential conflict of interest between attorney and client, the attorney is not required to withdraw from representation. Rather, the propriety of continued representation should be decided on a case-by-case basis after the attorney has made full disclosure to the client of the possible conflicts of interest.

The standard set forth in sec. 814.025(3)(b), Wis. Stats., that is, whether the party's attorney knew or should have known the position taken was frivolous, is determined by what a reasonable attorney would have known or should have known under the same or similar circumstances. *Sommer v. Carr*, 99 Wis. 2d 789, 299 N.W. 2d 856 (1981). The Supreme Court held that sec. 814.025 does not permit a trial judge to conclude frivolousness or lack thereof without findings stating which statutory criteria were present. *Sommer*, at 792. In reaching its decision, the court stated: "The question is not whether a party can or will prevail, but rather is that party's position so indefensible that it is frivolous and should that party or its attorney have known it." *Sommer*, at 797.

The Wisconsin Supreme Court rules reflect the statutory language of sec. 814.025. SCR 20.15(1) provides that a lawyer shall not accept employment on behalf of a person if the lawyer knows or it is obvious that the person wishes to bring legal action for the purposes of harassing or maliciously injuring any person. Similarly, SCR 20.15(2) forbids a lawyer from presenting a claim or defense in litigation that is not warranted under existing law, unless it can be

supported by a good faith argument for an extension, modification, or reversal of existing law. *See* SCR 20.16(2), 20.36(1)(a).

An attorney may, however, urge any permissible construction of the law favorable to his or her client, without regard to his or her professional opinion as to the likelihood that the construction will ultimately prevail. SCR 20.34(a).

Under the rules, an attorney is required to exercise his or her professional judgment solely for the benefit of the client and his or her personal interests should not be permitted to dilute a lawyer's loyalty to the client. SCR 20.23(1). Additionally, a lawyer may not accept employment if the exercise of his or her professional judgment on behalf of the client will be or reasonably may be affected by his or her own financial interests, except with the consent of the client after full disclosure. SCR 20.24(1). Yet it is clear the lawyer's independent professional judgment "will be or reasonably may be" affected by the assertion of sec. 814.025 claim since it places the attorney in the position of representing himself as well as the client.

The ABA Committee on Ethics and Professional Responsibility, in Informal Opinion 889, addressed the propriety of an attorney representing himself and others and held that though such representation would not be improper under all circumstances, it would be improper if any conflict of interest exists between the attorney and client.

On the other hand, a sec. 814.025 claim should not become a tool used to force automatic withdrawal of an opposing party's counsel. Requiring withdrawal based solely on the assertion of a sec. 814.025 claim may leave the client with inadequate protection of his or her rights and might conflict with the provisions of SCR 20.16(2)(b) prohibiting withdrawal from employment without taking reasonable steps to protect the client's rights.