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Quality of Life/Ethics Track – Session 6

Risky Business When Representing Friends and Family

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About the Presenters...

Matt Beier is the Senior Vice President and Director of Business Development, Communications and Marketing with Wisconsin Lawyers Mutual Insurance Company. Prior to joining WILMIC in November 2016 as a Claims Attorney, Matt was a civil litigation attorney in Madison, with experience before state and federal courts as well as Wisconsin administrative agencies. He has broad experience in diverse areas of the law, including personal injury, employment law, contract law, business law, commercial law, and debtor/creditor law. Matt is a 1996 graduate of South Dakota State University, with a degree in Political Science. He graduated from the University of Wisconsin Law School in 2000.

Erin R. Ogden is a trademark and copyright nerd who loves helping businesses grow. Whether helping clients directly or working with other attorneys to help their clients, she helps identify, protect, and monetize intellectual property while looking at the business holistically. Her firm's points of culture are Make things as simple as possible, but no simpler; Play well with others; Speak English, not legalese; and Be the reason it works. She loves putting that into practice with her colleagues and business clients. Drop her a line or connect on social media. We'll nerd out together!

Risky Business When Representing Friends and Family

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Solo, Small Firm and General Practice Conference

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Risky Business When Representing Friends and Family

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I. Introduction

Lawyers may feel inclined to provide legal services to family members or friends out of goodwill or a sense of obligation, but such representation brings with it significant risks. Conflicts of interest, loss of objectivity, blurred boundaries, and the potential for strained personal relationships make it a precarious endeavor. Lawyers must carefully weigh these risks before agreeing to represent loved ones, ensuring that they can maintain the necessary professional distance, uphold ethical standards, and protect both their personal relationships and legal career.

II. Can Turning Away Clients Really Be Good Business? – WILMIC

A. Initial Contact

1. Many of the same client intake policies and procedures apply whether the potential client is a family member, friend, or a complete stranger. An initial contact is not only the first time you meet a potential client, but also the first discussion of a new matter with an existing client.

2. How can you "underwrite" a potential client or matter in the initial interview?

   a. Assess client's attitude toward the matter specifically and lawyers generally.

   b. Honestly assess your expectations, including:

      i. Time for matter: SCR 20:1.3 – Diligence.

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

            Comment [2] - A lawyer's work load must be controlled so that each matter can be handled competently.

ii. Competence: SCR 20:1.1 - Do I do this kind of work now, or do I have time and resources available to handle competently?

iii. Is the size and scope of client's matter reasonable for my practice?

iv. Chance of success: As defined by client? As defined by me?

ii. Cost: will it be in proportion to size of problem?

iii. Will I get paid?

c. Assess the client's expectations through good listening techniques.

d. Communicate mutual expectations: What are the client's goals? What are the lawyer's goals?

B. "NO," is a complete sentence. Seriously consider refusal or referral of matter: Refer competently. (There is a potential claim for negligent referral.)

1. Warning signs

a. If you are not a potential client's first lawyer, it may be an indication that the client will never be satisfied no matter which lawyer he or she hires.

b. If the client has unreasonable expectations, there could be trouble ahead.

c. If the client doesn't want to listen, knows everything, or attributes all his or her problems to other people, you are in for a long, difficult case. Those are clients you might be better off declining.

2. Other considerations to keep in mind.

a. See SCR 20:1.2(a) Scope of Representation: "… [A] lawyer shall abide by a client's decisions concerning the objectives of representation, ... (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

b. Listen to your stomach: Act on your instincts—if there are red flags or you feel uncomfortable at the first meeting, it will likely only get worse.

C. Conflicts of Interest

1. Who is your client? Who is not your client?

   a. You can be liable to persons other than the person you understand is your client.

   b. "Clients" want you to represent opposing interests, e.g., husband/wife in divorce; buyer/seller in sale of business; lender/ borrower in loan.

      - Can you represent both parties? See SCR 20:1.7(b).

      - What malpractice risks are there? What do the Rules of Professional Conduct require?

      - How can risks be minimized?

2. Define your role carefully, especially when you have more than one person in your office at a time or when the referral source (banker, broker, title company) sends you clients of <u>theirs</u> to make their deals work

3. Don't take a matter that makes you uncomfortable because you feel a loyalty to the client

4. Watch for problems arising out of being the "family lawyer"

   a. you did Mom and Dad's will, and now, after Dad's death, Mom's (with a little help from one child)

   b. you've represented the family corporation for years; now son runs it and wants you to do his will

   c. while representing the corporation, one of the shareholders wants you to do her estate planning

   d. you serve on the board of directors and do the legal work for the company

   e. you have business relationships with your client (even a security interest or second mortgage to secure your fees counts)

III. Expectations of Relationship

A. General Considerations

1. Understand that you get yourself into a precarious position when you represent family, friends, friends of friends, or even longtime clients. The risks of doing this can be managed, but the lawyer must understand why this can be dicey and be proactive about management.

2. You will want to do what the family/ friend/ longtime client wants you to do, even when that might not be what you would recommend or do for a "regular" client. (For this reason, you really don't want to be represented by a good friend, either, should you ever need a lawyer.)

3. You need to treat these clients as what they are: real clients. All the regular procedures should apply, even if you will not be sending out a bill. That means you still need to conflict check, write letters (!) including an engagement letter. An engagement letter may not be "required" if you are not planning to bill your time or charge a contingency fee (or are not expecting to charge more than $1,000), but it is still a great idea. It fulfills the "explaining" requirements listed in B. above, especially by defining what you are/are not doing, and it identifies the client.

4. With all your clients, be wary of cutting corners, being "willfully blind" (willing to look the other way when something "may" be happening that would make you squirm as a result of your duties to someone else or the court, or that simply feels "wrong" to you morally or ethically). No lawyer is required to represent every client or do what s/he believes is outside the scope of what is morally reasonable for you. Don't aid a cover- up, or succumb to pressure or (maybe worse) greed. No fee should be big enough to compromise your reputation or honesty and integrity.

B. Special Issues Governing Limited Scope Representation

1. Limitations on scope must be informed (SCR 20:1.2) and should be in writing (*must* be in writing if representation will be at least $1,000 SCR 1.5)

2. Limited scope representation in Wisconsin is permitted by the Rules of Professional Conduct.

   SCR 20:1.2(c) reads as follows:

   "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

3. What is reasonable?

Assisting a party with forms or providing a brief consultation may suffice for a simple uncontested divorce, but may be unreasonable for a matter involving complicated marital property and tax issues.

4. What is proper informed consent?

SCR 20:1.0(f) defines "informed consent" as follows:

"An agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."

Best advice – define the representation specifically, in writing, and get the client's confirmation in writing as well.

5. Potential risk taking limited scope cases: Failing to review the entire case, as you would if you were providing full representation in the matter.

Remember: Limited scope cases are not an opportunity to pay less attention.

A lawyer may have a duty to advise a client of readily apparent and relevant information, even if it falls outside the scope of a limited representation, and to advise the client to seek independent advice if appropriate.

C. Engagement and Processes

1. Letters

a. Engagement

Who client is/goals and expectations/scope of retainer: what you will—and sometimes—will not do/timing/fees and costs/client's responsibilities/how best to communicate. (Most clients don't know what to expect; the ones who "think" they do are even a greater threat.)

b. Non-engagement.

Just say not representing/give no opinion on merits/recommend they immediately contact other lawyer/return documents, if any/do not opine on statute of limitations/say thank you (if applicable).

c. Disengagement

For a matter you looked at and considered handling. See above and best to refrain from commenting on merits/advise as to time constraints generally, not specific statute of limitations advice/return any documents/thanks for the opportunity.

d. Termination of Representation

Thanks/closing file/returning papers/file retention message: ask for your copies now/follow up and who's doing what.

D. Billing

At WILMIC, we often field the question from our insured attorneys, "Should I sue my client for fees?" This is our cue to inform the attorney of the risks associated with doing so, including the increased likelihood of the client bringing a counterclaim alleging legal malpractice. Statistics vary, but the risk is real. "An American Bar Association (ABA) study found that 7% of all legal malpractice claims… arose in connection with an attempt to collect an unpaid fee…legal malpractice defense attorneys estimate that at least 20% to 30% of all malpractice claims and counterclaims are directly or indirectly attributable to disputes over legal fees…" Charlton-Perrin, Gawain, "How to Manage the Risks of Fee Disputes in a Tough Economy," (2009). Sometimes the "risk response" ends the conversation, but it offers little practical advice to solve the problem, which is the client's non-payment. "Dear Client: Happy Holidays. Please Pay Your Bill." Watson, *Wisconsin Lawyer,* Vol. 90, No. 11, December 2017

1. **Supreme Court Rule 20:1.5 Governs Fees**

a. If the total cost of representation **exceeds $1,000**, the lawyer must communicate this to the client in writing, but the communication does not need to be signed by the client. SCR 20:1.5(b)(1)and (2).

i. Must include the scope of the representation.

ii. Must include the rate of the fee and expenses.

b. Must include provisions regarding any retainer or advanced fee.

i. Retainer is defined in SCR 20:1.0(mm): "Retainer" denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees

or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

ii. Advanced fee is defined in SCR 20:1.0(ag): "Advanced fee" denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services, whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(e)(4)h., SCR 20:1.15(g), and SCR 20:1.16(d).

iii. Flat fee is defined in SCR 20:1.0(dm): "Flat fee" denotes a fixed amount paid to a lawyer for specific, agreed-upon services, or for a fixed, agreed-upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed-upon stage in the representation. A flat fee, sometimes referred to as "unit billing," is not an advance against the lawyer's hourly rate and may not be billed at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), SCR 20:1.15(f) (3) b.4., and SCR 20:1.16(d).

c. Must be made before or within a reasonable time after representation begins.

2. If the total cost of representation is **less than $1,000**, the lawyer must communicate the scope of representation, the rate of the fee, and expenses. The communication may be oral or in writing, but must also be made before or within a reasonable time after representation commences. SCR 20:1.5(b)(1).

3. A contingent fee agreement must be in writing and signed by the client. It must include: the scope of representation, the method of determining fee, who has responsibility for what expenses, and be signed before or within a reasonable time after representation commences. SCR 20:1.5(c).

4. Provisions That Should Be Avoided

a. A lawyer should avoid or at least be cautious of provisions that unilaterally impose responsibility for collection costs on the client.

i. Although a lawyer may seek legitimate fees and costs in an action to collect legal fees when appropriate, a lawyer should avoid provisions that seek to unilaterally and prospectively impose such costs on the client.

ii. Statements in fee agreements that the client will be responsible for any collection costs are not explicitly prohibited by the Rules, and there is no Wisconsin ethics opinion or case that forbids or even addresses the issue.

b. A lawyer is prohibited from seeking to prospectively limit a lawyer's malpractice liability to the client unless the client is independently represented in making the agreement. SCR 20:1.8(h)(1)

c. A lawyer must follow the client's decision regarding settlement and is also prohibited by SCR 20:1.2(a) from drafting an agreement with clients that gives the lawyer the authority to settle the matter.

d. A lawyer is prohibited from seeking to limit or to impose financial penalties on the client's ability to discharge the lawyer at any time and for any reason. SCR 20:1.16(a)(3).

e. SCR 20:1.16(b) provides various permissive grounds for withdrawal. SCR 20:1.16(b)(5) permits a lawyer to withdraw if the client fails to substantially fulfill an obligation to the lawyer, such as the payment of fees as previously agreed, and if the client has been given reasonable warning that the lawyer will withdraw because of the unfulfilled obligation.

5. Practical Tips to Avoid Malpractice Claims When Collecting Debts from your Clients

a. Begin with the End in Mind - Potential malpractice claims and grievances can be avoided through the use of effective letters of engagement. An attorney should first speak with the client and be as clear as possible about all of the following:

- The identity of the client (and the identities of those NOT represented, where appropriate);
- The scope of representation and the nature of the legal services, including a statement about when the representation ends with no continuing obligation (e.g., only through trial and not appeal);
- No guarantee of outcome;
- The nature of the attorney-client relationship;
- The identities of the personnel who will work on the matter – attorneys, paralegals, experts, consultants, and other personnel;
- Fees – hourly rate, flat fee, reduced fee, contingent fee, incentive arrangements, etc., (SCR 20:1.5(a);
- Expenses;
- Fee estimates (where feasible);
- Billing practices (frequency, interest (SCR20:1.5(b)(1)), withdrawal for non-payment (SCR 20:1.15(b)(5)));
- Confidentiality/attorney-client privilege, including electronic communication expectations and the potential impact of the use of social media (SCR 20:1.4);
- Conflicts of interest, if any;
- Client responsibilities and cooperation;
- Solo practitioner/limited liability entity (SCR 20:1.3, SCR 20:5.7(e)(2)
- Termination of services (SCR 20:1.16)

b. Follow-Up

- Stick to your billing cycle;
- Identify and address an event of non-payment as quickly as possible;
- Open up effective lines of communication – more than one.

c. Follow Through - Lawsuits for unpaid fees often generate a malpractice counter-claim. Statistics vary, and range anywhere from 7% to 30% of all malpractice claims are related to fee disputes. Before bringing such a suit, undertake the following analysis:

- Was the client pleased with the outcome of the underlying representation?

- Are you critical of your own performance?
- Has an uninvolved attorney assessed your representation for possible areas of criticism?
- Is the amount at stake worth the risk of a claim? (i.e., what's your malpractice insurance deductible?)
- Is there any alternative to a lawsuit for unpaid fees, i.e., State Bar Fee Arbitration program?
- How would such a suit harm your reputation?
- How will your malpractice insurance carrier handle such a claim?
- Would a judgment be collectible?

IV. Dabbling

A. Approximately 40% of all claims involve areas of practice in which lawyers practice LESS than 10% of the time

B. Less than 1% of all claims involve areas of practice in which lawyers practice 90 – 100% of the time

C. SCR 20:1.1 Competence – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

a. Comment 2: A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. 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. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

V. Communication

"The single biggest problem in communication is the illusion that it has taken place."
--*George Bernard Shaw*

A. SCR 20:1.4 Communication

(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;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests by the client for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

B. With the client:

a. Candor is critical.

b. Rules of Professional Conduct require:

1) Keep client regularly informed (SCR 20:1.4 Communication);

2) This includes the good and the bad. (SCR 20:1.4 and 20:1.7)

"What to Do After Making a Serious Error." Pierce & Anderson. Wis. Law. Feb. 2010.

3) Respond to client inquiries in timely manner: If you can't, be sure someone else in your office can;

4) Provide client with sufficient information to allow client to make informed decisions (SCR 20:1.4(b)).

c. Communication must be clear:

1) Non-technical.

2) Geared toward each client's individual level of sophistication: Your job to figure out what that is (and to know that if it goes wrong, whatever you did may not be enough).

a) A primary area of claims is plaintiff's

personal injury representation; an area with few claims is insurance defense.

b) Recognize relative sophistication of clients, e.g., insurance company has an understanding of costs and risks; ability to convey and receive technical information; feeling of control during lawsuit; ability to envision life after the lawsuit in a realistic manner.

d. Communication needs to be documented:

1) Letter of engagement outlining scope of representation and fee agreement;

2) Advice regarding risks and unanticipated costs;

3) Advice regarding alternative approaches;

4) Status reports: even if it's "nothing has occurred;"

5) Instructions to client or from client, particularly if instructions run counter to your advice. Do an "IAY" letter: "I advised you ..."

e. Communication includes good listening skills:

1) Conversational techniques;

2) Providing client with an opportunity to speak and think, to establish client's level of sophistication and understanding;

3) Elicit information: ask questions.

VI. Conclusion

Representing family and friends poses significant risks for lawyers, which must be navigated with caution. While the desire to help loved ones is understandable, it can lead to conflicts of interest, loss of professional objectivity, and potentially strained personal relationships. To mitigate these risks, lawyers should treat such cases as they would with any other client by conducting thorough conflict checks, maintaining clear communication, and adhering to ethical

guidelines. This includes defining the scope of representation, formalizing engagement agreements, and setting clear expectations regarding fees and the legal process. By remaining objective, adhering to ethical standards, and maintaining a professional distance, lawyers can protect both their personal relationships and their legal careers, ensuring the best outcomes for all parties involved.