

WIPLA ETHICS CLE

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Scenario 1 → Fee communication

Under Wisconsin SCR 20:1.5, is it necessary to communicate with a client regarding fees for each distinct matter? In other words, let's say I engage a new client for a patent application, and I estimate to him that it will cost \$4,000-\$6,000 to place the application on file, I inform him of my hourly rate, and he signs the client engagement letter stating same. Then, let's say 5 months later, where my billing rate has not changed, he would like me to perform a patent search for him. I have not previously estimated (in writing) the cost of a patent search, which is normally \$1200-\$2000. Aside from whether it would be a good idea, which it would be, do I need to confirm the patent search estimate in writing to the client under Rule 1.5? Does it matter that it is a search? Does it matter that I hadn't previously estimated the search cost to him in writing? What if, at the 5-months-later time, he requested a second patent application? Do I need to provide another written estimate if it would be the same estimate of \$4,000-\$6,000? What if the estimate changed due to technology changes? Or, is it sufficient that he is aware of my hourly rate?

SCR 20:1.5 Fees

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(b)(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, , except before or within a reasonable time after commencing the representation when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney's fees, is more than \$1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

Wisconsin Committee Comment

Paragraph (b) differs from the Model Rule in requiring that fee and expense information usually must be communicated to the client in writing, unless the total cost of representation will be \$1000 or less. In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that a change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses. A lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client.

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Fee Estimates

Compliance with the following guidelines is a desirable practice: (a) the lawyer providing to the client, no later than a reasonable time after commencing the representation, a written estimate of the fees that the lawyer will charge the client as a result of the representation; (b) if, at any time and from time to time during the course of the representation, the fee estimate originally provided becomes substantially inaccurate, the lawyer timely providing a revised written estimate or revised written estimates to the client; (c) the client accepting the representation following provision of the estimate or estimates; and (d) the lawyer charging fees reasonably consistent with the estimate or estimates given.

Scenario 2 → Client Identity: Sole member or small LLC

We represent some clients that have an LLC in place for, let's say, making and selling a patented article. However, the natural person client wishes to own the patent, rather than assigning it to the LLC. Generally, can we represent both the individual and the LLC? More specifically, can we be "lawyer for the situation" with respect to assignments and/or licenses between the inventor and the LLC which he controls?

SCR 20:1.7 Conflicts of interest current clients

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- (b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in a writing signed by the client.

Some Controversial Provisions in the Wisconsin Rules

SCR 20:4.1 Truthfulness in statements to others

- (a) In the course of representing a client a lawyer shall not knowingly:
- (1) make a false statement of a material fact or law to a 3rd person; or
 - (2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by SCR 20:1.6.
- (b) Notwithstanding par. (a), SCR 20:5.3(c)(1), and SCR 20:8.4, a lawyer may advise or supervise others with respect to lawful investigative activities.

SCR 20:4.4 Respect for rights of 3rd persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

SCR 20:1.10 Imputed disqualification: general rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 unless:
- (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition arises under SCR 20:1.9, and

(i) the personally disqualified lawyer performed no more than minor and isolated services in the disqualifying representation and did so only at a firm with which the lawyer is no longer associated;

(ii) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written notice is promptly given to any affected former client to enable the affected client to ascertain compliance with the provisions of this rule.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by SCR 20:1.6 and SCR 20:1.9(c) that is material to the matter.

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