

JAMES E. DOYLE INNS OF COURT

PRESENTATION BY:
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When new lawyers see professional misconduct: *the conundrum of being new, yet responsible*

We teach law students that lawyers hold historic and special status as a *self-regulating profession*. That privilege is a social contract. In exchange for freedom from more intrusive administrative regulation (like other professions), we offer the public the assurance that we will police and control the errant behavior of our own members. A good part of the public doubts that the legal profession lives up to its part of the bargain. We teach our students about the Rules of Professional Conduct, including those that address difficult situations in which we see another lawyer engage in professional impropriety. That difficulty is magnified when the perceived impropriety is by a member of our own firm or office.

Not everything that appears to be misconduct necessarily is such. A self-regulating professional must exercise judgement and discretion as well as scrutiny and sometimes courage. We must all take our professional responsibilities seriously.

I can report to you that fairly regularly I get calls from new lawyers, experienced lawyers, law firms, and an occasional judge wrestling with the question of what to do when it appears that another lawyer has engaged in misconduct. Often it involves a member of their own firm or someone otherwise closely affiliated. These are particularly difficult issues for new lawyers who may feel isolated or vulnerable.

It occurs to me that the professional role models and mentors of the James E. Doyle chapter of the Inns of Court are an authoritative source to provide professional guidance to new lawyers who may find themselves faced with one of these difficult situations.

The following scenarios arise from actual situations raised by lawyers and some reported cases. *In each scenario, the voice is that of a new lawyer.*

In each case, consider the following:

- What do the Rules of Professional Conduct require?
- Are there prevailing local standards or customs that apply?
- Are there countervailing pressures, such as professional taboos on reporting or even risks to a young lawyer's livelihood? How should they be accounted for?
- Who can/should a new lawyer turn to for reliable guidance?

Procedure. I will present these scenarios to the senior lawyers and judges of the Inn and ask them to respond as they might to a new lawyer coming to them for guidance. I strongly urge the younger lawyers and law students to add their perspective as well. *Discussion, I suspect, will ensue!*

Applicable provisions of the Wisconsin Rules of Professional Conduct and their Comments are attached for your review.

Scenario 1. I just got a new client. She wants to sue her former lawyer. My firm agreed to take this case on a contingent fee basis. After reviewing the case very thoroughly, it is

clear to me that the lawyer defrauded her and in so doing misappropriated funds from his trust account. I think I am required to report this to the Office of Lawyer Regulation. I spoke to my firm's managing partner and while she agrees that this looks like a deliberate fraud, she said this involves confidential client information and we cannot report this lawyer to the OLR. She also said that if we did report it, it could work to the client's disadvantage in collecting anything from this lawyer.

Scenario 2. I represent a young woman in a divorce matter. The lawyer on the other side claims that money she inherited during the marriage is a marital asset. We have a very strong argument that it is not. My client is vulnerable and very risk averse. She called today and told me her husband took her to lunch and tried pressured her into agreeing to give him half of the inheritance. She now thinks that it may be the best solution. She remarked that he seemed well-prepared for this meeting. He said his lawyer prepared him and encouraged him to meet with her. I called the lawyer and told him I thought preparing his client to pressure my client on pending issues was improper. His responses was that parties have the right to talk to each other and he has the right to prepare his client for such a meeting. I want to report his conduct to the OLR, but the lawyer I work with says not to do so because that will just cause bad blood between our respective firms and we will be working with that lawyer and his firm long after this matter is concluded. He also doesn't want me talking to our client about the possibility of reporting this lawyer to the OLR.

Scenario 3. I work for a lawyer with a criminal practice. It's just the two of us and one secretary. He and I met this morning with a man who tells us that he shot and killed his ex-wife two days ago. The police are looking for him, but he is in hiding. It was pretty easy to get him to accept turning himself in to the police – he is really tired of hiding. But, first he wanted to know what to do with the gun he used in the shooting. As he asked this, he actually pulled the gun out of his pocket. He wanted to know if he should dispose of the gun in a way that it would never be found. My boss said no, but he agreed to keep the gun in our office safe. The man agreed but wanted an assurance that it would never be turned over to the police. My boss agreed to not voluntarily give it to the cops and then put the gun in our safe. That didn't seem right to me though I'm not really sure. When I told my boss, I thought that might be concealing evidence and maybe even obstruction of justice, he said “ technically it could be, but it is a lot better than having him toss the gun off a bridge where it could never be found.” I wish I had someone else I could check this out with.

Scenario 4. Several of the young lawyers in my firm go out for drinks on Thursdays after work. We meet up with a group of other young lawyers and professionals. Much of what we talk about is “young professional” talk– including a lot of boasting about the important matters we are handling. I admit I do it too though I never mention client names and always keep the facts vague enough that no one could know who I am talking about. Some others in my firm are not so discrete and mention client names and some of it isn't too flattering to the clients. I have suggested to them they ought not to do that. They acknowledge that, but the next week they get to partying and it happens again. I probably should stop going out to drink with them, but that will create hard feelings and I need to get along with the people I work with.

Scenario 5. I have been working with a senior partner on a big case that has taken us out of state for depositions on multiple occasions. Each night he drinks very heavily and he also drinks at lunch during the day. He sometimes nods off during depositions and sometimes acts strangely. I have seen him say things to opposing lawyers that reveal information that I don't really think he should be revealing. I spoke with a senior

associate about it and she told me that the firm knows he is a drunk, and it causes some real problems in cases, but they expect he will retire in a year or two. She said I should try to keep him out of bars when we are on the road and try to steer him away from talking informally with opposing lawyers if I can. I'm not exactly sure how to do that.

Scenario 6. I am going to work for this law firm as soon as I get sworn in to the bar in about 8 weeks. I have been working there as a law clerk for over a year. I had to send a client some documents needed for a real estate closing. I was surprised to see that the firm stationary listed me as one of the lawyers in the firm, which is technically not correct. I called this to the attention of the office manger and she said the managing partner said it was OK so long as I put under my signature the phrase "Law Clerk." That seems odd to me, but if the managing partner says its OK, I'm not going to question her.

Scenario 7. I work for a firm that represents a lot of corporate clients. I noticed on one of our bills (it was on my secretary's desk) that I am listed as a junior partner. I am not a partner, but expect to become a shareholder (we are a service corporation) in about a year. I am told that these clients pay different rates for partners and associates. I asked the head of my department (who is also the billing attorney on this matter) about this and he said that the firm thinks of all of us as partners in the sense that we are all working together as a team. What I am not is a shareholder. He said that "partner" has no legal meaning in the context of a service corporation. I pressed the point a bit further and he said that the general counsel who handles these bills, recognizes that our rates are quite low comparatively and has agreed that this is an acceptable designation to assure we are paid fairly.

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ATTACHMENT: Rules of Professional Conduct for Lawyers in Wisconsin

SCR 20:5.2 Responsibilities of a subordinate lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

ABA COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

SCR 20:8.3 Reporting professional misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) If the information revealing misconduct under subs. (a) or (b) is confidential under SCR 20:1.6, the lawyer shall consult with the client about the matter and abide by the client's wishes to the extent required by SCR 20:1.6.

(d) This rule does not require disclosure of any of the following:

(1) Information gained by a lawyer while participating in a confidential lawyers' assistance program.

(2) Information acquired by any person selected to mediate or arbitrate disputes between lawyers arising out of a professional or economic dispute involving law firm dissolutions, termination or departure of one or more lawyers from a law firm where such information is acquired in the course of mediating or arbitrating the dispute between lawyers.

WISCONSIN COMMENT

The change from "having knowledge" to "who knows" in SCR 20:8.3(a) and (b) reflects the adoption of the language used in the ABA Model Rule. See also SCR 20:1.0(g) defining "knows." The requirement under paragraph (c) that the lawyer consult with the client is not expressly included in the Model Rule.

It deletes reference to judges. The reference to confidential lawyers' assistance programs includes programs such as the state bar sponsored Wisconsin Lawyers' Assistance Program (WISLAP), the Law Office Management Assistance Program (LOMAP), or the Ethics Hotline.

ABA COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers' assistance program; such an obligation, however, may be imposed by the rules of the program or other law.