
A MESSAGE FROM YOUR GOVERNOR

District 6

State Bar of Wisconsin
October 2004

To our colleagues:

There are several critical issues facing the State Bar, and we want to make sure that every member of our district is aware of the issues and has an opportunity to participate in the discussions.

Wisconsin Trust Account Foundation (WisTAF) petition. WisTAF seeks a mandatory assessment of \$50 per attorney to fund civil legal services for people who cannot afford an attorney. A hearing is scheduled for Jan. 12 at 9:30 a.m.

WisTAF is not a State Bar entity. The Wisconsin Supreme Court created WisTAF in 1986 to collect, manage, and grant the monies generated by the interest on lawyers trust accounts (IOLTA funds). The petition states that interest rates have been low for so long that it has little or no money to make grants for civil legal services. The petition also asserts that private fundraising efforts have produced little result.

State Bar President Michelle Behnke appointed a committee to study the WisTAF petition. The committee is considering the effects of such an assessment on Bar membership and other issues raised by imposition of an assessment that is exclusive to lawyers. The committee will present its findings to the Board of Governors at its November meeting when board anticipates taking a position on the petition. The petition, other resources, and a member feedback email link are available at www.wisbar.org.

Member feedback is important, and the State Bar is uniquely qualified to share your feedback with the supreme court.

Ethics 2000. The Wisconsin Supreme Court created the Ethics 2000 Committee to study the American Bar Association (ABA) proposed changes to the model rules. The Committee's report and petition sets forth its recommendations. This is the most comprehensive proposal for changes to SCR Chapter 20, Rules of Professional Conduct for Attorneys, since the mid-1980s. The supreme court has not yet set a hearing date for this petition.

The Board discussed the petition at its September meeting. While there are a number of changes, the Board hopes to focus on the most substantive changes and

provide suggestions and alternatives where necessary. Following is an outline of some of the changes, but lawyers should take time to review the entire petition, which is redlined for easy review, at www.wisbar.org.

Rule 1.1 Terminology. There are new definitions for: "firm or law firm" that would include a corporation or a government entity's legal department; "informed consent," which must be obtained from a client in approximately 15 different instances before a lawyer may act; and "prosecutor," which includes a municipal prosecutor.

Rule 1.2 Scope of representation. The modifications to this rule allow a lawyer to limit the scope of representation if reasonable and informed consent is given.

Note: The State Bar Legal Assistance Committee has a proposal for unbundling of legal services that would expand the proposed language in this rule and the comment.

Rule 1.5 Fees. The committee recommends written fee agreements. Fees of \$1,000 or less are exempt.

Note: Additional revisions could be made to this rule to address issues on "flat fees" and "advance minimum fees" that have surfaced from changes to the trust account rules.

Rule 1.6 Confidentiality. The proposal contains the distinctive exception to the duty of confidentiality that is in the current rule, arising in certain cases involving client crimes and frauds. The proposal adopts the model rule exceptions for compliance with a court order to testify and for disclosures that "comply with other law." This change provides a safe harbor for lawyers against disciplinary action.

Rule 1.8 Conflicts of interest: prohibited transactions. The committee recommends deletion of the insurance defense exception to the requirement that a client consents to the lawyer's fee being paid by a third party. Lawyers must clarify their relationships with their clients.

Rule 1.10 Imputed disqualification: General rule. The committee proposes that, when a lawyer changes firms, the lawyer's conflict of interest in a matter will not be imputed to lawyers at the new firm under certain circumstances. The committee believes this limited screening rule protects important client interests, while responding in a fair and practical way to the abuse of disqualification motions as a litigation strategy.

Rule 1.18 Duties to prospective clients. The committee recommends that the court adopt this new rule, which currently has no counterpart in chapter 20.

Rule 2.2 Intermediary; Rule 2.4 Lawyer serving as third-party neutral. The committee recommends Rule 2.2 be deleted in its entirety, as it is in the revised model rules, because the issues it addresses are better dealt with in other rules, including conflicts of interest rules and new Rule 2.4.

Rule 3.8 Special responsibilities of a prosecutor. The committee proposes new provisions that clarify what communications are permissible between a prosecutor and an unrepresented defendant. The committee believes that a prosecutor should be able to negotiate a plea with an unrepresented defendant, but the prosecutor should not provide other legal advice or assistance to the defendant in the process.

Rule 3.10 Threatening criminal prosecution. The committee recommends deleting this provision. The standards for establishing a violation of the rule are high, and the facts of individual cases will often contain sufficient ambiguity to make the rule inapplicable.

Rule 4.1 Truthfulness in statements to others. The committee proposes new text, which recognizes that prosecutors may advise and supervise others with respect to lawful undercover investigations involving deception. The current rules do not address this issue, which leaves such conduct largely unregulated. The change will further ensure the protection of suspects' rights.

Rule 4.5 Guardians ad litem. The committee proposes a new rule in order that guardians ad litem understand that their conduct is governed by the rules, even though their responsibilities may differ, in some respects, from those in the usual representation.

Rule 6.1 Pro bono: Pro bono publico service. The committee proposes an aspirational goal of 50 hours per year of pro bono legal service (or the financial equivalent). The committee also proposes that lawyers be required to file a report annually concerning their pro bono activities.

Rule 6.5 Nonprofit and court-annexed limited legal services programs. This new rule provides limited protection against disqualifying conflicts of interest for certain legal advice hotlines and advice-only clinics that qualify.

Rule 7.6 Political contributions to obtain government legal engagements of appointments by judges. This is a new model rule designed to prohibit "pay-to-play" practices. The committee did not see this as a problem in Wisconsin, but believes that the express prohibition of such practices is sound policy.

Rule 8.3 Reporting Misconduct. The committee retained an exclusion from reporting misconduct if the lawyer is serving as a mediator in a law firm dispute resolution program, but not if the lawyer is serving as arbitrator.

Rule 8.4 Misconduct. The committee proposes new text with the purpose of reinforcing the strong commitment to equal justice under the law. The proposed text states that lawyers must cooperate in the investigation of a grievance, and lawyers must not harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status in connection with the lawyer's professional activities.

Additionally, the issue of mandatory malpractice insurance disclosure may also come under consideration. After the committee submitted its report, the ABA took a position to amend the model rules to include a requirement that lawyers disclose to the highest court in their state, whether the lawyer has malpractice insurance. The ABA model rule also anticipates that this information would be made available to the public when requested.

More information. The November *Wisconsin Lawyer* will include articles on the Ethics 2000 Committee and WisTAF recommendations. These resources, along with the petitions, also are available at www.wisbar.org. Please share your thoughts via ethics-feedback@wisbar.org, wistaf-feedback@wisbar.org, or contact one of your board representatives. Feedback can also be sent to Dan Rossmiller, Public Affairs Director, State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158.

James L. Dunlap
(262) 547-5517
jdunlap@cwlaw.net

John P. Macy
(262) 548-1340
jmacy@ammr.net