MENTOR PROGRAM ETHICS ISSUES

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The Rules of Professional Conduct for Attorneys (the "Rules") do not provide explicit guidance, with one exception, as to the propriety of one lawyer consulting with another lawyer from a different firm about a client's case. Further, ethics opinions on this topic are scant (there is no Wisconsin opinion on this topic) and case law appears to be non-existent. Nonetheless, such consultations are clearly desirable in most circumstances as they promote the goal of providing competent representation, and the Rules have never been interpreted as prohibiting such consultations. Precautions should be observed, however, and this handout is a brief discussion of some considerations. Most of the following recommendations are based upon *ABA Formal Ethics Opinion 98-411,* which is the leading source of guidance on this issue. Any lawyer consulting another lawyer or participating in a mentoring program should read this opinion carefully. This outline briefly touches upon some of the issues involved in lawyer-to-lawyer consultation. It is not an exhaustive discussion of the topic and lawyers are encouraged to do their own research.

ISSUES FOR THE CONSULTING LAWYER

1. **Confidentiality and client consent:** Whether a lawyer consulting with another lawyer must seek advance client consent is, to some extent, an open question. SCR 20:1.6 requires lawyers to keep all information relating to the representation of a client confidential, unless a client gives informed consent to disclosure. There are two relevant exceptions to this general rule. The first is that lawyers are impliedly authorized to reveal certain information in order to carry out the representation. The second is that SCR 20:1.6(b)(3) allows lawyers to reveal information to secure legal advice about compliance with the Rules. Therefore a mentee asking a mentor about an ethics issue is explicitly permitted under the Rules and no client consent is needed. Whether client consent is needed to discuss other issues is not settled.

ABA Formal Opinion 98-411 ("98-411") takes the position that client consent for such consultation is not needed unless the consulting lawyer intends to reveal information that is protected by attorney-client privilege[1] or would likely otherwise be prejudicial to the client is to be revealed. That opinion recommends that consultations use hypotheticals or general descriptions when at all possible, but when seeking the necessary client consent for discussion of issues requiring the use of privileged or potentially prejudicial information, the lawyer must advise the client of all possible risks and consequences.[2]

The Restatement of the Law Governing Lawyers (Third), §60, comment H, takes the position that lawyer-to-lawyer consultations are permissible and do not require client consent as long as there is no material risk to the client entailed. The Law of Lawyering appears to take a similar position in §9.17, Illustration 9-2.

2. **Protecting Confidentiality:** Absent explicit intent or unusual circumstances, consultations between lawyers, such as in a mentor-mentee discussions, do not result in the formation of a lawyer-client relationship (see *98-411).* Thus, the consulted lawyer will not have a duty under SCR 20:1.6 to keep the information confidential. The consulting lawyer, even in situations of permissible disclosure to third parties, has a duty to take reasonable steps to protect the confidentiality of information. The consulting lawyer may therefore wish to elicit a formal or informal promise of confidentiality from the consulted lawyer. While analysis of the legal enforceability of such a promise is beyond the scope of this outline, it does show a good faith effort to protect the confidentiality of client information.

3. **Conflicts:** The consulting lawyer is generally not formally retaining the consulted lawyer to assist in the representation, but they must still be mindful of conflicts. Revealing confidential information to a lawyer who represents, or whose firm represents, a current or likely future adversary creates serious problems for the consulting lawyer. Thus a consulting lawyer should take reasonable care in choosing who to consult with. While counsel for opposing parties are readily apparent, the consulting lawyer should also avoid consulting with a lawyers who may have represented adversaries in the past on related matters because of

[1] It is important to distinguish between the evidentiary rule of attorney-client privilege and a lawyer's ethical duty of confidentiality under SCR 20:1.6. An important issue to consider is whether such consultation about privileged matters my result in waiver of the privilege. There appears to be no Wisconsin law on this issue.

[2] See definition of "informed consent" in SCR 20:1.0(f).

the possibility of further related proceedings. The reasonably foreseeable possibility of future adversity should also be considered, and lawyers should avoid consulting with lawyers from firms who regularly represent the other side in matters. For example, an employee side labor lawyer should avoid consultation with lawyers who regularly represent management.

ISSUES FOR THE CONSULTED LAWYER

1. **Confidentiality:** Because the consulted lawyer normally does not represent the consulting lawyer or the consulting lawyer's client, the consulted lawyer does not owe a client a duty of confidentiality under SCR 20:1.6. *98-411* further takes the position that the consulted lawyer does *not* owe any duty of confidentiality concomitant to that owed to prospective client (see SCR 20:1.18). That being said, prudent consulting lawyers are likely to request confidentiality from the consulted lawyer and *98-411* opines that promises of confidentiality may be inferred from circumstances. Again, while the precise legal effect of such a promise of confidentiality is beyond the scope of this outline, it is the author's opinion that courts and disciplinary agencies would likely afford such promises considerable weight.

2. **Conflicts:** Knowingly providing advice to an adverse party that is contrary to the interests of one's own client is an obvious breach of the duty of loyalty (see SCR 20:1.7). In keeping with the prohibition on knowingly engaging in such conduct, lawyers must also take reasonable steps to avoid conflicts of interest (see SCR 20:1.7, comment [3]). Thus a consulted lawyer should ascertain, when possible, the client of the consulting lawyer, and when not possible, make some reasonable effort to ascertain information to assure that advice is not being given to an opposing party. However it is worth noting that *98-411,* takes the position that a lawyer who unwittingly renders such advice, for example in a hypothetical consultation, has not violated SCR 20:1.7.

Another issue related to conflicts is whether the consulted lawyer will have future conflicts arising from the consultation. Conflicts are based in large part upon a lawyer's duty of confidentiality, and where a consultation is undertaken with no expectation of confidentiality, conflicts will likely not arise. However, when consultations are undertaken with an express or implied promise of confidentiality, the conflicts will certainly arise and the consulted lawyer should enter the appropriate name into the conflicts checking database when possible. Wisconsin has case law on conflicts arising out of implied attorney-client relationships that is

worth reviewing [see *Burkes v. Hales, 478 N.W.2d 37, 165 Wis.2d 585 (App. 1991)]*. The consulted lawyer may also wish to ask the consulting lawyer to waive conflicts conditioned upon appropriate screening of the consulted lawyer (see *98-411*).

RESOURCES

ABA Formal Ethics Opinion 98-411 (available for a fee at www.abanet.org)

Maine Ethics Opinion 171 (1999) (available at www.mebaroverseers.org)

Restatement of the Law Governing Lawyers (Third) § 60, comment h.

The Law of Lawyering, Hazard and Hodes, § 9.17 and § 9.21B