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Rules of Professional Conduct for Attorneys
which the Wisconsin Supreme Court has improved.

1. Rule 8.4 is the basic attorney discipline rule, and Wisconsin got rid of section (d) which said an attorney could be disciplined for "conduct prejudicial to the administration of justice" because that language was considered too vague, and instead it took language out of the ABA comment and turned it into sections (f), (g), (h) and (i) of the rule itself to provide better notice of what's prohibited.

2. In rule 7.1, which deals with lawyer advertising, Wisconsin took information out of the ABA comments and put it into the text of the rule itself to provide better notice of what sort of ads might be misleading.

3. In rule 1.2, which governs the relationship between an attorney and a client, allocating certain areas of decision to the client and certain areas to the attorney, Wisconsin took language from an ABA comment about limiting representation in insurance cases and put it into the rule itself.

4. Wisconsin created rule 4.5 regarding GALs, which has no counterpart in the ABA Model Rules. It articulates the "best interest" standard, and then says that even though the person under the G.A.L.ship isn't strictly a client, the other rules should apply to the extent possible.

5. In rule 1.5 on lawyer's fees, Wisconsin has stricter disclosure requirements. The ABA rule says a lawyer must communicate to the client "the scope of representation and the basis or rate of the fee and expenses", before or within a reasonable time after commencing the representation, preferably in writing." As I tell my classes, that's the only place in the rules where you see the meaningless word "preferably". Wisconsin went ahead and made the disclosure language mandatory, saying simply that it shall be communicated to the client in writing.

6. In that same rule, Wisconsin added a section that isn't in the ABA rule at all that requires an attorney to respond promptly to clients' requests for information about fees and expenses.

7. In rule 1.8, one of the conflict of interest rules, the ABA language says "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client." Wisconsin went beyond that to say "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, nor prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, except where (1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances."

8. In that same rule, the ABA says than an attorney shall not
(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

Wisconsin made what I consider to be a very valuable addition to that section by adding a third subsection that says an attorney may not "make an agreement limiting the client's right to report the lawyer's conduct to disciplinary authorities."

9. And in section (j) of that rule, covering sexual relations with a client, Wisconsin took another subsection out of the ABA comments and added it to the rule itself, related to sexual relations with a supervisor in a client organization. Incidentally, I'm aware because I was involved in the process in 1995, that Wisconsin adopted a rule against sexual relations with a client before the ABA did, which a few years later become part of the ABA's Model Code.

10. Wisconsin made what I consider to be a significant change to the confidentiality rule, 1.6, by making disclosure of confidential information mandatory, rather than permissive, in order to prevent death, bodily harm, or financial injury from a client's future crime or fraud.

11. Two of the other conflicts rules, 1.7 and 1.9, talk about getting informed consent from clients to continue representation even if there is a conflict. The ABA rules require that the informed consent be memorialized in writing, but it can be the attorney's writing. Wisconsin very sensibly requires that the client sign it.

12. Rule 3.3, Candor Toward the Tribunal, has two provisions added by Wisconsin that please me. First, an attorney has an obligation to correct a false statement of fact or law in court; the ABA says the obligation ends when the case is over; Wisconsin removed the language that terminated the obligation, so it continues even after the case is over.

13. Second, as one of my textbooks said, "amendments in 2008 establish obligations to address wrongful convictions. ... Wisconsin became the first state to adopt the wrongful conviction rules, (g) and (h). At the time the third edition of this book went to press, no other state had followed Wisconsin's lead." Since that time, though, other states including New York have now adopted them.

13. Finally, the ABA version of rule 4.3, which discusses an attorney's obligations to unrepresented persons, says "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." The Wisconsin rule goes farther and simply says "the lawyer shall inform the unrepresented person of the lawyer's role". The ABA rule permits the lawyer to be silent on his or her role whereas Wisconsin imposes a duty to be truthful and forthright. As I tell my classes, this is the sort of thing that gives me hope that Wisconsin may still be a leader in improving the rules.

JNS, 9/12/13