

**Ethical Issues Important to In-House Counsel:**

*Wisconsin's Lawyer*      *Discipline System*  
*...a quick primer*

December 3, 2013  
 3:45 - 5:00 p.m.

Presented by: **Reinhart**  
Attorneys at Law

**TOP**  
 CORPORATE  
 COUNSEL

**Fran Deisinger** is Reinhart's General Counsel. He is also a shareholder in its Litigation Practice, which he joined in 1982. In addition, Fran acts as chair of the firm's Ethics Committee, through which he provides ethics advice to the firm and its attorneys. As a litigator for more than 30 years, Fran has been successful not only as a trial lawyer, but also as a creative negotiator and advisor able to design and achieve effective and practical solutions for his clients. He represents and defends attorneys in liability matters, in grievance matters before the Office of Lawyer Regulation and in licensing matters. Fran also represents fiduciaries, beneficiaries and family members in trust and guardianship litigation and has defended manufacturers in product liability matters nationwide.



**Mark Cameli** represents business clients from a broad range of industries including manufacturing, health care, defense contractors and others operating under government-funded programs targeted in federal and state investigations for noncompliance and fraud. In addition, Mark has considerable experience successfully representing businesses and individuals in complex commercial litigation, including businesses victimized by fraud. Prior to joining the firm, Mark built a distinguished career in the public sector, where he served as chief of the Civil Division of the United States Attorney's Office in the Western District of Wisconsin, and was also the district's first Affirmative Civil Enforcement Coordinator. He was also chief of the Financial Litigation Unit, where he tried commercial disputes between the government and third parties. Mark is a member of Reinhart's Board of Directors and a shareholder in the Litigation Practice, where he chairs the White Collar Litigation and Corporate Compliance team.

**Kate E. Maternowski** is an attorney in Reinhart's Litigation department. She practices in the area of commercial litigation and her experience therein includes co-chairing a federal jury trial before the District Court for the Eastern District of Wisconsin. Kate has written and presented on various topics related to commercial litigation with a special emphasis on media law issues. Work representative of Kate's practice includes presentations and publications on Wisconsin defamation law, obtaining and admitting social media evidence in civil litigation and hot topics in First Amendment law concerning online and commercial speech.



## AGENDA

3:45 p.m.

**Registration and Networking**  
*Online participants may log on*

4:00 p.m.

**Presentation**

5:00 p.m.

*Live Seminar Attendees*

**Networking Reception and  
Preview of The Business Journal Serving Greater  
Milwaukee's "Top Corporate Counsel Awards"**

3

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4

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questions as possible.

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## Problems Unique to In-House Counsel

- In-house attorneys have one client that acts through many representatives
- The attorney himself is an employee of its client
- The in-house attorney is sometimes involved in both legal and business matters
- Nevertheless, all lawyer ethics rules apply to in-house attorneys

6

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## Agenda

- Who is the "client?"
- When must you report your client's misconduct?
- What is the corporate Miranda warning and when do you give it?
- Is Wisconsin licensure required for Wisconsin in-house counsel?
- Hot topics:
  - Serving on boards
  - In-house counsel resignation
  - The problem of employee e-mails

7

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## Organization as Client

### Supreme Court Rule 20:1.13

*A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents*

8

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## The Client

- Because corporations can act only through their agents (employees, officers, and directors), in-house lawyers can advise their clients only through those agents
- In-house lawyers nevertheless must consider the entire entity when giving advice, not just the agent with whom they are dealing

9

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## Example Cases

- **"Entity Rule":** *Jesse v. Danforth*, 169 Wis. 2d 229 (Wis. 1992)
  - Lawyer retained to incorporate an entity is deemed to represent the entire entity, not just the person who retained him, for purposes of that matter

10

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## Example Cases (cont.)

- **Attorney-Client Privilege:** *Lane v. Sharp Packaging Systems, Inc.*, 2002 WI 28
  - While a corporate client can act only through its constituents, a *former* director cannot act on behalf of the client corporation and waive the lawyer-client privilege
  - Former director lacks authority to waive the privilege even as to documents created while he yielded corporate power

11

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## Example Cases (cont.)

- **Derivative Actions:** *Einhorn v. Culea*, 235 Wis. 2d 646 (Wis. 2000)
  - Most derivative actions are a normal incident of a corporation's affairs, to be defended by the corporation's lawyer like any other suit
  - But, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise

12

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## Constituent Misconduct

### Supreme Court Rule 20:1.13

*Under what circumstances must an in-house attorney report constituent misconduct and to whom?*

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## Reporting Misconduct

- Sarbanes-Oxley Act (SOX)
  - In-house attorneys at publicly traded companies are subject to the requirements of Section 307 of SOX:
    - Attorney must report "evidence of a material violation" up the ladder

14

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## Reporting Misconduct (cont.)

- What is "evidence of a material violation"?
  - "Credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is *reasonably likely* that a material violation has occurred, is ongoing or is about to occur." 17 C.F.R. § 205.29(e).

15

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## Reporting Misconduct (cont.)

- Wisconsin Rule – SCR 20:1.13(b)-(e)
  - Applies to all attorneys, not just those at publicly traded companies
  - Contains both "reporting up" and "reporting out" provisions

16

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## Reporting Misconduct (cont.)

- Confidentiality concerns – SCR 20:1.6
  - Wisconsin Rule differs from the ABA Model Rule in that Wisconsin has both *mandatory* and *permissive* disclosure provisions for certain information an attorney learns about a client's misconduct, while the Model Rule has only *permissive* disclosure provisions

17

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## Reporting Misconduct (cont.)

- There are important differences between Wisconsin's permissive and mandatory disclosure provisions
- Rule 20:1.6(b)—**Mandatory Disclosure**
  - A lawyer **shall** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another

18

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## Reporting Misconduct (cont.)

- Rule 20:1.6(c)—**Permissive Disclosure**
  - A lawyer **may** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
    - to prevent reasonably likely death or substantial bodily harm;
    - to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
    - to secure legal advice about the lawyer's conduct under these rules;
    - to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
    - to comply with other law or a court order.

19

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**Practice Tip:**  
Don't go it alone.

20

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## Corporate "Miranda Warning"

Supreme Court Rule 20:1.13(f)

*A lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing*

21

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## "Corporate Miranda"... *Upjohn*

- *Upjohn v. United States*
  - Communications by employees to a corporate lawyer are protected if:
    - "(1) it is communicated for the express purpose of securing legal advice for the corporation;
    - (2) it relates to the specific corporate duties of the communicating employee; and
    - (3) it is treated as confidential within the corporation itself."

22

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## Upjohn

- *Upjohn* implications for in-house counsel:
  - Flexibility for companies to conduct internal investigations through interviewing employees

*but also*

- Tension because only the company, not the individuals, can decide to waive the attorney-client privilege that covers such communications

23

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## Upjohn (cont.)

- Before undertaking any internal investigation, counsel should:
  - Provide a proper *Upjohn* warning
  - Memorialize that the warning was given
  - Review the record of representation to ensure that in-house counsel has not represented any director, officers or employees individually in the past and that no conflict exists
  - If a conflict exists, consider waiver or outside counsel

24

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## Licensure in Wisconsin Supreme Court Rule 10.03(4)(f)

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## In-House Counsel Practicing Without Wisconsin License

- Procedure:
  - Register as in-house counsel within 60 days after commencement of employment by submitting to the Board of Bar Examiners:
    - A completed application
    - Fee of \$250
    - Proof of admission to practice another jurisdiction
    - An affidavit from employer

26

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## In-House Counsel Practicing Without Wisconsin License (cont.)

- An in-house lawyer can provide legal services for employees of the entity, but only on matters directly related to their work for the entity
- An in-house lawyer not licensed in Wisconsin cannot sign pleadings without seeking pro hac vice admission

27

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## Licensure (cont.)

- Becoming licensed in Wisconsin (waiving in)
  - Time spent by the lawyer providing legal services for a Wisconsin entity counts toward the practice requirements for a lawyer to petition to become licensed in Wisconsin
  - Requirement is three years of practice within the five years prior to application for admission

28

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## Privilege and Unlicensed Attorney Communications

- *Anwar v. Fairfield Greenwich Ltd.*, No. 09 Civ. 118 (S.D.N.Y. July 8, 2013):
  - Plaintiffs deposed *unlicensed* in-house lawyer and defendants instructed him not to answer based on privilege
  - Defendants relied on case law suggesting that such communications are privileged if the client has reasonable belief in-house counsel is licensed

29

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## Privilege and Unlicensed Attorney Communications (cont.)

- The court rejected defendants' privilege argument, finding:
  - The in-house lawyer had never been licensed in any jurisdiction and
  - The lawyer did not hold himself out as a licensed attorney or perform tasks such as appearing in court
- Advice: Keep up-to-date records on in-house attorneys' licensures

30

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# Hot Topics in Ethical Obligations of Corporate Counsel

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## Sitting on Board of Directors

- Is it permissible for in-house counsel to sit on a BOD?
  - ABA Formal Opinion 98-410: Not *per se* ethically impermissible
  - Must exercise caution because of potential conflicts of interest, the protection of confidences, and the attorney-client privilege

32

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## Sitting on Board of Directors (cont.)

- Consider the potential issues:
  - May be called upon to advise corporation on the actions of the directors
  - May have to resign from board in the event of conflict

33

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## Sitting on Board of Directors (cont.)

- Best practices
  - Advise board of risks of conflicts and consequences of resignation or recusal
  - Advise board that in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege

34

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## Resignation/Withdrawal

- For in-house counsel, quitting in effect is a withdrawal from the representation of a client
- SCR 20:1.16: A lawyer may withdraw from representing a client if: "Withdrawal can be accomplished without material adverse effect on the interests of the client"

35

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## Resignation/Withdrawal (cont.)

- What if resignation would have material adverse effect?
  - Rule may not apply to prevent a resignation, but could be applied to extend notice period
- Representing competing company
  - Rule 20:1.9 (Duties to Former Clients) may prevent in-house counsel from representing competing companies depending on facts

36

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## In-House Counsel and Employee E-mails

- When an employee retains his own counsel...
  - ABA has stated that an employer's counsel is not ethically obligated to notify an employee's counsel that the employer has copies of e-mail messages between the employee and her counsel on the employer's e-mail system. *ABA Formal Opinion 11-460* (August 4, 2011).

37

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## E-mails (cont.)

- However, some states take a tougher approach:
  - For example, a New Jersey court held that the failure to disclose communications from an employee to her attorney on a personal e-mail account sent on a work computer violates that jurisdiction's ethical rules  
*Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010)

38

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## E-mails (cont.)

- Instructing employer to access employee's personal e-mail
  - At least one state's ethics committee has stated that this would violate rules that prohibit lawyers from (1) counseling a client to engage in criminal or fraudulent conduct, and (2) engaging in conduct involving dishonesty or deceit

*North Carolina State Bar Ethics Comm., Op. 2012-5 (Oct. 26, 2012)*

39

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*Information in the following slides was prepared by Mr. Keith Sellen, director of the Wisconsin Office of Lawyer Regulation. Reinhart gratefully acknowledges his permission to incorporate this material in this presentation.*

40

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## The Wisconsin Lawyer Regulation System

- Purpose and mission
- Organization
- Procedures
- Substantive considerations

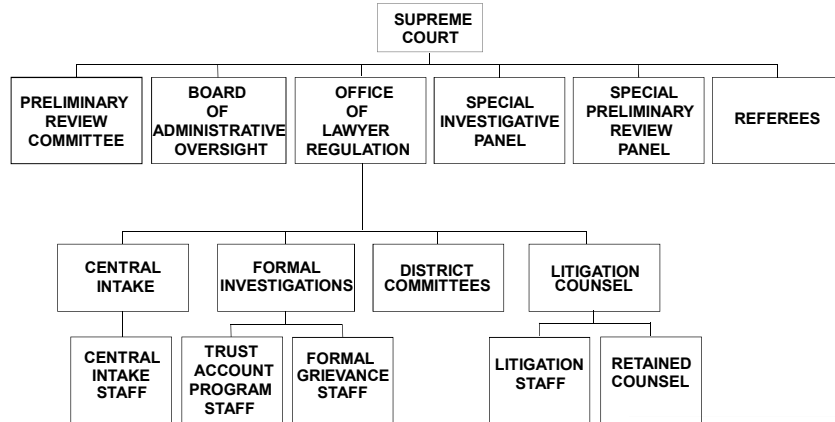
41

## Purpose and Mission

- The Lawyer Regulation System is established to carry out the Supreme Court's constitutional responsibility to supervise the practice of law and protect the public from misconduct by persons practicing law in Wisconsin." (SCR, Chapter 21, Preamble.)
- The Office of Lawyer Regulation receives and responds to grievances, investigates allegations of misconduct and medical incapacity, and prosecutes disciplinary proceedings. (SCR 21.02.)

42

## Organizational Chart of the Lawyer Regulation System



43

## Procedures

- Intake evaluation
  - [SCR 22.01 and 22.02]
- Formal investigation
  - [SCR 22.03 and 22.04]
- Resolution
  - [SCR 22.05 through SCR 22.24]

44

## Procedures: Intake Evaluation

- Written or telephonic filings
- Contact with grievant
- Contact with respondent attorney
- Evaluation and disposition
  - Forward to another agency
  - Reconcile a minor dispute
  - Close for lack of cause to proceed
  - Refer for diversion or investigation
- Grievant right of review

45

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## Sources of Grievance

Source of Grievance	Percentage of Total Source of Grievance
Adverse Party	15.79%
Attorney	3.15%
Client	53.74%
Guardian ad Litem	3.87%
Judge	
OLR Staff	6.07%
Other Party	17.12%
No Source Listed	0.26%

46

## Areas of Practice

Area of Practice	Percentage of Total Allegations
Administrative & Government Law	2.01%
Bankruptcy-Receivership	4.44%
Collections, Garnishments	1.97%
Contracts, Commercial, Consumer Law	1.18%
Corporate-Banking	0.61%
Criminal Law	32.75%
Environmental	0.08%
Estate-Probate, Guardianship & Wills	7.59%
Family Law & Juvenile	21.48%
Immigration & Naturalization	0.3%
Insurance	0.3%
Labor, Unemployment Compensation	1.18%
Landlord-Tenant	0.95%
Litigation	7.17%
Patent/Trademark	0.19%
Real Property Law	3.3%
Taxation	0.23%
Torts-Civil Rights	5.31%
Workers Compensation, Social Security	2.13%
Not Available-Other	6.83%

47

## Allegations

Allegations	Percentage of Total Allegations
Conflict of Interest	4.97%
Improper Advocacy	12.56%
Lack of Communication	11.5%
Lack of Diligence	23.04%
Misrepresentation/Dishonesty	8.58%
Scope of Representation	3.49%
Trust Account Violations	3.98%
Unauthorized Practice	1.29%
Unreasonable Fees	6.22%

48



## Intake Appeals

Month/Year	No. of Appeals Received	No. of Appeals Approved
July 2011	26	0
August 2011	26	3
September 2011	20	2
October 2011	27	3
November 2011	33	6
December 2011	32	5
January 2012	33	6
February 2012	28	4
March 2012	23	1
April 2012	27	1
May 2012	42	1
June 2012	25	5

49

## Procedures: Central Intake

Central Intake	FY 2012
Matters open beginning of period	380
New grievances	2677
Grievances reopened at intake	115
Matters closed or referred for formal investigation	
Referred to Formal Investigation . . . . . 17%	2715
Director Denies Appeal of Intake Matter . . . . . 11%	
Director Dismissal . . . . . 0%	
Dispute Resolution . . . . . 4%	
Diversion . . . . . 6%	
Diversion Dismissed . . . . . 6%	
Director IFOR . . . . . 1%	
Insufficient Evidence. . . . . 42%	
Intake Matter Withdrawn by Grievant . . . . . 8%	
Inquiries Falling Outside Rules . . . . . 0%	
No Contact . . . . . 5%	
PRC Denies Further Investigation of Dismissal. . . . . 0%	
Refer to Another Agency . . . . . 0%	
It took an average of 58 days from date opened to completion or referral of an intake matter	
Intake matters pending end of period	457

50

## Procedures: Formal Investigation

- Notice of formal investigation
- Lawyer's response
- Grievant's comment
- Investigation by district committee or OLR staff
- Report to grievant and lawyer for comment
- Disposition decision
- Grievant may request review of dismissals

51

## Procedures: Formal Investigation (cont.)

Formal Investigations	FY 2012
Investigations open at beginning of period	591
New investigations	492
Reopened in this stage	25
Investigations Closed or Referred on for Prosecution	
Assigned to Litigation . . . . . 18%	519
Assigned to Referral . . . . . 3%	
Director Approves Dismissal w/Advisory . . . . . 7%	
Director Approves IFOR . . . . . 4%	
Director Dismissal . . . . . 16%	
Director Refers Pending Reinstatement . . . . . 3%	
Diversion . . . . . 8%	
Diversion Dismissed . . . . . 6%	
PRC Denies Further Investigation of Dismissal . . . . . 4%	
Private Reprimand . . . . . 7%	
Public Reprimand . . . . . 5%	
Revocation/License w/Consent . . . . . 12%	
Special Investigator Dismissal . . . . . 3%	
Special Investigator Dismissal w/Advisory . . . . . 0%	
Special Investigator Dispute Resolution . . . . . 0%	
Special Investigator Insufficient Evidence . . . . . 3%	
Special Review Panel Dismissal . . . . . 0%	
Temp/Susp. Pending Reinstatement . . . . . 1%	
It took an average of 414 days from referral to completion of an investigative matter.	
Formal investigations pending end of period	589

## Procedures: Resolution

- Dismissal
- Diversion
- Consent reprimand
- Presentation to preliminary review committee
- Filing of public complaint
- Hearing and review

53

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## Questions?



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**Thank You!**

54

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## THANK YOU!

Thank you for attending our presentation. If you have questions, please contact your Reinhart attorney or one of our presenters.

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