

Petition for Rule-Making
In the Wisconsin Supreme Court

In re the Amendment of Wis. SCR 20:3.4(a)

Petition

Christopher L. Wiesmueller, HEREBY MOVES THE COURT to amend Wis. SCR
20:3.4(a) as follows:

SCR 20:3.4 Fairness to opposing party and counsel.

A lawyer shall not:

- (a) ~~unlawfully~~ obstruct another party's access to evidence, unless through legal process; or ~~unlawfully~~ alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Respectfully Submitted,
November 10, 2014

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Memorandum in Support of Amendment

Wis. SCR 20:3.4(a) needs clarification to assist practitioners in steering away from potential pitfalls and rule violation, and to advance preservation of evidence.

Deleting the use of the word “unlawfully” will make clear that at no point or at any stage may an attorney to obstruct, alter, destroy, or conceal anything of potential evidential value, or to permit the attorney to advise some one to do so. This would make the rule clear that this rule need not incorporate application of other law.

As it currently reads, a reasonable attorney could turn to state and federal statutes and determine a destruction, concealment, or alteration could be permissible, under the rule, if no other law is offended. An attorney could consider destruction or concealment of potential evidence permissible if there is a lack of a then-existing discovery request, subpoena, preservation order, public records request, or search warrant. This is especially true where a civil liability issue or misdemeanor may be involved, as Wisconsin only has a statute barring destruction of evidence that aides a felon.

As it stands, the Office of Lawyer Regulation interprets this rule as not requiring a separate law to be broken. *See In Re Public Reprimand of Wiesmueller*, 13OLR11, <http://www.wicourts.gov/services/public/lawyerreg/statusreprimands/wiesmueller.pdf>. (violation of Wis. SCR 3.4(a) alleged without citation to additional violation of statute).

I certainly wish the rule had been written in 2010 as the OLR interpreted it in 2013. As it stands, the words “unlawfully” are misleading, in that it is contrary to OLR’s apparent interpretation.

The addition of the phrase “unless through legal process;” is intended to clarify that an attorney can obstruct a party’s access to evidence through discovery objections, motions to suppress, motions to quash, or other appropriate legal maneuvers, consistent with Wis. SCR 20:3.4(c)&(d).

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