

Potential OLR Allegations & Defenses

Mike Tobin
Director, Trial Division

Overview of Actionable Misconduct

All attorneys are subject to discipline for professional misconduct, SCR 11.01, 20:8.4. SCR 20:8.4 sets forth several broad categories of professional misconduct, including criminal acts, fraudulent conduct, violation of statutes or rules regulating attorney conduct, and violation of the attorney's oath. The most common allegation in a disciplinary proceeding is that an attorney has violated a specific provision of SCR chapter 20 (the Rules of Professional Conduct).

Attorneys are subject to SCR chapter 20 in its entirety. However, the nature of criminal practice and the history of complaints against SPD staff suggest that the following rules will most often be pertinent.

SCR Most Pertinent to Public Defender Practice

SCR 20:1.2 Scope of Representation

Subsection (d) of this rule prohibits an attorney from advising or assisting a client to engage in criminal or fraudulent conduct. Thus, a defense attorney may not advise a client to jump bail or to conceal stolen property.

Defense Tip

A client may misunderstand permissible information (e.g., "the legal consequences of any proposed course of action," SCR 20:1.2(d)) with advice to engage in a course of information. Thus, an attorney who tells a misdemeanor client that extradition is unlikely may later be accused of advising the client to jump bail.

Documentation of the information and advice given is very helpful to prove that the attorney did not violate the rule. Less probative, but still helpful, is the attorney's statement about advice customarily given in similar circumstances.

SCR 20:1.3 Diligence

This rule prohibits unreasonable neglect of a client's case. For many SPD clients, particularly those released on bail, a speedy resolution of their cases may not be in their best interests. Thus, this rule does not always compel defense counsel to move a case toward resolution. However, in some situations clients can be hurt by a failure to act promptly. Failure to comply with time limits for briefs, motions, and plea negotiations could violate this rule. Failure to respond to the client's requests or inquiries may also be problematic under this rule.

Defense Tip

Documentation, defense strategy, the client's acquiescence with counsel's strategy, and local practice may all be relevant areas for defense against an alleged violation of this rule. If the client has expressed similar dissatisfaction with other attorneys, this history may help to show that the client's expectations were unrealistic.

SCR 20:1.4 Communication

This topic is a frequent source of friction, primarily because clients want and expect more communication than the attorney believes to be reasonable or appropriate. As with many allegations, clients in custody and/or who receive unfavorable sentences are most likely to file a complaint alleging insufficient communication

Defense Tips

Documentation is far and away the best defense strategy against this type of allegation. It is hard to remember or recreate the degree of communication months after the case is closed. Jails and prisons often maintain visitors logs that can corroborate that visits occurred to clients at those institutions. Evidence of local practice and of the lack of need for any greater communication may also be helpful. As with the previous rule, a history of complaints against other attorneys may indicate that the client's expectations were unrealistic.

SCR 20:1.6 Confidentiality

This rule is very broad, encompassing "information relating to representation." There are several exceptions, not all of which are contained in 1.6 itself. A violation of this rule could be alleged by a client upset about disclosure of information by the attorney to family members, the prosecutor, the court, or other parties.

Defense Tip

Most often, disclosure of client-related information occurs pursuant to one of the exceptions to confidentiality. For example, a major exception is information “impliedly authorized in order to carry out the representation” SCR 20:1.6(a).

SCR 20:1.7-1.10 Conflict of Interest

These rules cover different types of conflict situations: conflict between two present clients, conflict between interests of client and attorney, conflict between present client and former client, and vicarious conflict (imputed to all attorneys in a single firm). Although these rules are important in all types of legal practice, they are rarely alleged in disciplinary proceedings against appointed attorneys. In large part, the SPD rule against representation of co-defendants helps to avoid problems in the area of conflicts.

Defense Tip

It is easier to allege a potential conflict, much harder to prove that an attorney’s representation was materially limited because of an actual conflict. Often the defense can show that despite a potential conflict or the appearance of a conflict, the attorney properly represented the client in question.

Also potentially helpful may be evidence of the attorney’s consultation with other attorneys, research of the ethical issue, and attempt to withdraw from representation.

SCR 20:1.16 Declining or Terminating Representation

This rule forbids an attorney from becoming the client’s accomplice in fraudulent or criminal conduct. It also outlines responsibilities after terminating representation (such as preserving and making available the client’s file).

Defense Tip

The attorney’s knowledge is critical when the accusation is that he or she assisted the client in wrongful conduct (for example, using a false name in court). If the client is the complainant, the client has waived confidentiality regarding the facts in question. If someone else is complaining, confidentiality still applies to attorney-client conversations (absent some other exception).

SCR 20:3.3 Candor toward Tribunal

This rule prohibits false statements of law or fact to a court. It also imposes an affirmative duty of disclosure when necessary “to avoid assisting a criminal or fraudulent act by the client . . .” Additional subsections of the rule require disclosure of directly adverse and controlling legal authority and prohibit the knowing introduction of false evidence. Duties under rule 20:3.3 generally take precedence over the confidentiality rule (20:1.6); however, the comments indicate that the constitutional obligations of a defense attorney may trump 20:3.3 in some circumstances.

Defense Tip

The issue of knowledge will often be in dispute under this rule. For example, an attorney may have serious doubts about a client’s alibi defense without knowing for certain that it is false. Also, the comments to this rule recognize that the rule “may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.” Thus, defense counsel in the OLR proceeding should research case law that interprets the right to present a defense, the right to testify, the right to counsel, and other potentially relevant constitutional rights.

Another potential issue is whether the attorney assisted (or merely ignored) the client’s misrepresentation to the court. For example, if the client lies about his or her prior record, the attorney, by not restating or relying upon the client’s misstatement, may arguably walk a tightrope between disclosure and assistance.

SCR 20:3.4 Fairness to Opposing Party and Counsel

This rule contains several subsections that generally prohibit obstructing access to evidence and require compliance with court orders. The most ambiguous subsection may be 20:3.4(f), which restricts the circumstances under which an attorney may counsel a witness not to talk to the other side.

Defense Tip

There is a subtle difference, for both the prosecution and defense, between advising a witness not to talk and informing a witness that he or she is under no obligation to talk. Witnesses often do not recall clearly the exact words used, and they do not always repeat them verbatim when declining the other side’s invitation to talk. If the attorney’s exact communication with the witness is not available, evidence of his or her standard practice may be helpful.

SCR 20:3.5 Impartiality and Decorum of Tribunal

An attorney may not bribe a judge, unlawfully engage in ex parte communication, or intentionally try to disrupt court.

Defense Tip

The ex parte communication is probably the most likely of the subsections to be raised under this rule. Defense counsel should investigate local practice, as well as the nature of the alleged ex parte communication. If the communication was not regarding the merits of a case, any violation may be more technical than substantive (and counsel can present a strong argument for an informal resolution).

SCR 20:4.1 Truthfulness in Statements to Others

This rule prohibits an intentionally false statement of material fact to a third person. Another subsection requires disclosure of material facts when necessary “to avoid assisting criminal or fraudulent conduct by the client” The disclosure requirement does not apply, however, when the information is protected by the confidentiality rule (20:1.6).

Defense Tip

The commentary exempts statements made regarding the status of negotiations from the coverage of the rule. Issues of the attorney’s knowledge and the materiality of a statement are likely sources of a defense under this rule.

SCR 20:4.2 Communication with Person Represented by Counsel

This rule prohibits direct communication with a party known to be represented by an attorney. The rule covers only communications relating to the subject matter of the party’s legal representation.

Defense Tip

The major issues are likely to be knowledge (that the party had an attorney), the scope of the legal representation of the party in question, and subject matter of the communication. A sound preventative measure is to routinely and preliminarily ask witnesses, particularly co-defendants, whether they are represented by counsel. For the purposes of this rule, the prosecutor does not represent the alleged victim or other witnesses in a criminal proceeding.

SCR 20:4.3 Dealing with Unrepresented Person

This rule prohibits an attorney from stating or implying to an unrepresented third party that the attorney is disinterested. The rule also requires that an attorney “make reasonable efforts” to correct any apparent misunderstanding by the third party as to the attorney’s role.

Defense Tip

As with other rules (e.g., SCR 20:3.4, above), disputes may arise regarding the conversation between the attorney and the third party. For example, a witness may mistake information (you have a right not to incriminate yourself) for legal advice (you should not testify next week). If the attorney cannot document the contents of the conversation, evidence of the attorney’s standard practice may be helpful. If the attorney provided the third party with a business card, that fact will be strong evidence that the attorney accurately represented his or her role in the case.

SCR 20:8.4 Misconduct

This general rule contains seven subcategories of actionable professional misconduct. Most subsections incorporate or paraphrase other provisions of the SCR. Subsection (b) provides that it is professional misconduct to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”

Defense Tip

Offenses involving dishonesty, such as fraud, embezzlement, and perjury, are likely to result in discipline. Any offense committed against a client is also likely to be viewed as reflecting adversely on fitness to practice law. For other types of offenses, however, a strong argument can be made that there is not a substantial relationship between the offense and the attorney’s fitness to practice.

OLR is likely to rely upon the finding of a criminal court, rather than to conduct its own trial to determine the nature of the offense. Therefore, if a criminal charge can be negotiated to avoid a conviction for an offense generally associated with misconduct under this rule, the chance of discipline from OLR will be lessened.