

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

**MEMORANDUM**

TO: Mayor Satya Rhodes-Conway  
Common Council Members

FROM: City Attorney Michael Haas  
Law Clerk Nick Orihuela

DATE: June 7, 2024

RE: Informed Consent Related to Communications of Legal Counsel

**Short Summary**

A recent opinion published by the American Bar Association Ethics and Professional Responsibility Committee regarding the use of professional listservs has prompted the Office of the City Attorney (OCA) to consider the broader practice of consulting with other attorneys on general issues of municipal law or specific legal matters. Based on the ABA opinion as well as the input of State Bar of Wisconsin staff as well as other municipal attorneys, the OCA requests that the Common Council consider providing its informed consent to allow the OCA to communicate information related to its representation of the City to other attorneys when such communication benefit the City and does not disadvantage the City's legal position.

This memorandum outlines the rules of professional conduct related to attorney communications and the considerations and options related to the Council providing its informed consent for such communications. The OCA has drafted a proposed amendment to MGO 3.07 which would provide and document that informed consent.

**Discussion**

Informed consent is the agreement by a client to a proposed course of conduct after being advised by their attorney of the information, explanations, risks, and reasonable alternatives. Wisconsin [Supreme Court Rules \(SCR\) 20:1:0 \(f\)](#). Under SCR 20:1.6 [subsection \(a\)](#), lawyers cannot "reveal information relating to the representation of a client unless the client gives informed consent." Similar to the Supreme Court Rules, Wisconsin Statute section [905.03 \(2\)](#) states that a client has the right to refuse disclosure of confidential communications between the client's lawyer and a lawyer representing another. Madison ordinances currently do not mention or document any level of general or specific informed consent from the City to the OCA.

It has long been a common practice for attorneys within the OCA, as well as municipal attorneys throughout Wisconsin, to engage in communications with other attorneys who have expertise in municipal law or in specific legal matters. This collaboration may take the form of questions posted on a listserv sponsored by the League of Municipalities or

the International Municipal Lawyer Association, presentations or conversations at various conferences or meetings, or one-on-one conversations with individual attorneys who may have encountered similar legal issues or may be involved in litigation similar to matters being handled by the OCA.

Recently, the American Bar Association (ABA) published [Formal Opinion 511](#), which interprets one of its Model Rules of Professional Conduct related to disclosing client information and applies it to an attorney's use of listservs. The Formal Opinion states that "a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client." This includes even the identity of the client and the fact that the attorney represents that client. The prohibition on an attorney's communication of information related to the client applies regardless of whether the information is already publicly known. The Wisconsin Supreme Court has adopted a nearly exact version of the ABA model rule, which applies to Wisconsin attorneys. SCR [20:1.6 \(a\)](#) (2021-22).

The ABA Model Rule and the Wisconsin rule permit attorneys to disclose information related to a client under certain circumstances. First, attorneys may consult with an attorney outside of their organization in a one-on-one setting if the information is disclosed in an anonymized form or posed as a hypothetical that cannot be connected to an identifiable client. The attorney on the receiving end of the information must also agree that it will not be further disclosed. Second, an attorney may disclose information related to a client and their legal matters if the attorney has obtained the informed consent of the client.

The legitimate concerns targeted by these ethical rules often do not apply to or do not neatly fit the practice of law by governmental attorneys and specifically municipal attorneys in Wisconsin. The identity of our clients is public information, and often our clients' legal issues are, at least in part, also publicly known. Unless a listserv or conference of municipal attorneys can anonymize questions or feedback, any question that a municipal attorney poses or feedback they provide can be connected to their client. This predicament for government lawyers is recognized in the ABA's Formal Opinion. In addition, unlike more general listservs aimed at categories of attorneys, such as those specializing in personal injury or business litigation, it is rare that the City would have a legal dispute with another municipality represented by an attorney on the League's listserv. In such a case, we would not communicate about such a matter on the listserv.

Communicating with other attorneys representing municipalities, other governmental jurisdictions, or even other public or private clients can be a valuable and indispensable benefit to the OCA and the City. Questions are raised, discussed, and answered on professional listservs that other attorneys have previously worked through and who can convey the lessons of their experience. The weekly Zoom call for municipal attorneys hosted by the League of Wisconsin Municipalities is a chance to explore either common legal issues that municipalities are addressing or to find an attorney with expertise in handling a situation that rarely arises. As state legislation is enacted and court decisions are issued, these outlets also allow attorneys to share how their municipalities address

the legal issues related to implementing new laws. Finally, it is not unusual for our office to engage in individual conversations with attorneys who are handling or who have handled similar litigation issues or even have engaged with the same party that our office is dealing with.

These communications and conversations can be very helpful to the work of the OCA and, in turn, benefit the City. Given the wide variety of topics involved in municipal law and its constant change and development, we can leverage the expertise of other attorneys to supplement or fill gaps in our staff's knowledge and experience. Other attorneys can point us to resources, convey practical lessons learned from their experience, and make our work more efficient and effective. Individual attorneys facing the same party or issue in litigation can share information and help brainstorm regarding legal arguments and strategies. OCA attorneys certainly provide feedback and input to our municipal attorney colleagues and, in return, benefit from their expertise in responding to our inquiries.

We have drafted a proposed amendment to MGO 3.07, which would provide and memorialize that the Common Council has provided its informed consent to OCA staff to communicate information related to our representation of the City. Granting this informed consent would assist attorneys by allowing them to continue collaborating with and benefiting from the experience and expertise of other attorneys. It also would protect OCA attorneys from potential complaints filed with the Office of Lawyer Regulation alleging that they have violated one of our rules of professional conduct.

The proposed amendment would prohibit OCA attorneys from communicating information that would disadvantage the City's legal position or would likely result in the information being provided to a party that is adverse to the City or to their attorney. The amendment also authorizes the Mayor to provide informed consent on behalf of the City in specific instances where the OCA seeks guidance. Arguably, the Mayor could provide informed consent on their own as the City's chief executive officer, but in our opinion, the better approach is to involve the Council for both legal and practical reasons.

Finally, the ordinance requires that the OCA include information about the ordinance and the Council's informed consent in its orientation of new alders. This would remind the Council of the level of informed consent it has provided to the OCA and prompt consideration of any changes it may wish to make. The informed consent established by the ordinance amendment may be revisited and/or revoked at any time.

To be clear, the Council is not required to provide its informed consent in this manner which would apply to all communications of the OCA. Providing this general level of informed consent prevents the Council from restricting OCA in its communications with other attorneys regarding City legal matters. It also prevents the Council from considering and determining whether informed consent should be provided in specific legal matters, which it otherwise has a right to do. The Council could withhold its informed consent entirely or put conditions on it related to specific matters or categories of matters. Such restrictions may limit the avenues for the OCA to research issues more efficiently and effectively, but that is a decision for the Council.