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January 18, 2016

Wisconsin Supreme Court
ATTN: Deputy Clerk - Rules
P.O. Box 1688
Madison, WI 53701-1688

RE: Rule Petition 15-04, In the Matter of the Petition to Modify SCR 20:1.9(c)

Dear Honorable Justices:

I provide the following comments in support of the petition currently pending before this Court to amend the Rules of Professional Conduct for Attorneys provision dealing with Duties to Former Clients. I understand that this petition is scheduled for hearing on Tuesday, February 23, 2016, at 9:30 a.m. I write both on behalf of myself and as Amicus Chair for the Wisconsin Association of Criminal Defense Lawyers.

WACDL and I agree fully with the need for the amendments set forth in the petition. However, contrary to the position of the petitioners, the amendments are necessary, not to change the scope or meaning of the provision, but to clarify what the rule already requires, thereby avoiding misunderstandings, inappropriate ethics complaints, and chilling of constitutionally protected speech.

While agreeing with much of their rationale, I find the need to write because the authors of the petition begin with a faulty premise that their petition seeks to *change* the scope of what information regarding a prior client an attorney may use or disclose under SCR20:1.9(c). In fact, their petition merely clarifies that the rule *as written* and presumably as intended already prevents lawyers from using or discussing information relating to the representation of a client *only* when that information is not already in the public realm. While the amendments are necessary to prevent misinterpretation of the rule, they in fact do not alter the scope of the rule.

As currently written, SCR 20:1.9(c) provides as follows:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with

> respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

As modified by the Legislative Reference Bureau, the petition seeks to amend SCR 20:1.9(c) as follows:

> SCR 20:1.9 (c) is renumbered SCR 20:1.9 (c) 2.and amended to read:
>
> > SCR 20:1.9 (c) 2. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter do any of the following:
> >
> > > a. Use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known.
> > >
> > > b. Reveal information relating to the representation except as these rules would permit or require with respect to a client.
>
> SCR 20:1.9 (c) 1. is created to read
>
> > SCR 20:1.9 1. In this paragraph, "generally known" information has already been revealed and includes information that is publicly available or has been disclosed in a public forum.

I. SCR 20:1.9(c), as currently written, does not bar an attorney from using or discussing the publicly available aspects of a former client's case.

The real impact of the proposed amendment is to clarify that an attorney is not barred from speaking regarding information that is already in the public realm on the pretense that such information nonetheless is somehow "confidential."

Although the plain language of the current rule already says that, the petition here reflects the fact that some have misinterpreted the rule to suggest otherwise, making further clarification necessary.

A. The plain meaning of current SCR 20:1.9(c) does not bar attorneys from using or discussing the publicly available aspects of their former cases.

Construing a statute or rule is not intended to see how far the language may be stretched or distorted, but to assess its purpose. Therefore, when construing a rule, as with a statute, interpretation begins with its language. ***Bar-Av v. Psychology Examining Bd.***, 2007 WI App 21, ¶10, 299 Wis. 2d 387, 728 N.W.2d 722; *see* ***Filppula-McArthur ex rel. Angus v. Halloin***, 2001 WI 8, ¶¶48-50, 241 Wis. 2d 110, 622 N.W.2d 436 (applying "plain meaning" standard to SCR provision). If the meaning is plain, the inquiry should stop. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 110. Plain meaning may be ascertained not only from the words employed in the rule or statue, but from the context. ***Id.*** ¶46. Thus, courts interpret language in the context in which the words are used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related rule or statutes; and reasonably, to avoid absurd or unreasonable results. ***Id.*** Moreover, "statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." ***Id.***

Beginning with the language of current SCR 20:1.9(c), we see that the rule addresses two actions which are regulated with regard to information relating to the representation of a former client, specifically, the "use" of that information and the "reveal[ing]" of that information. When it comes to the term "use," current SCR 20:1.9(c)(1) recognizes that there is no need for protection, and thus no bar to attorney use, "when the information has become generally known."

While current SCR 20:1.9(c)(2) does not now include the same "generally known" language as 20:1.9(c)(1), it should not need it since the same concept is encompassed in the verb "reveal." "We give the text its common, ordinary, and accepted meaning, except that we give technical or specially defined words their technical or special definitions." ***Bar-Av***, 2007 WI App 21, ¶10 (citation omitted).

As defined and used in common communication, the ordinary and accepted meaning of "reveal" connotes the act of making something known that was previously hidden. *See, e.g.*, Merriam Webster Online Dictionary, http://www.merriam-webster.com/dictionary/reveal Of course, that which is already available to the public or generally known is not hidden and thus cannot rationally be "revealed."

Nor is there any apparent reason why the term "reveal" in SCR 20:1.9(c) should be given some technical meaning contrary to its ordinary and accepted meaning. Had the Court intended SCR 20:1.9(c)(2) to apply to *any* communication or volunteering of information relating to the prior representation, regardless of whether that information already was publicly available, it would have said so rather than using a term that inherently reflects the contrary. Also, as already demonstrated by the language of SCR 20:1.9(c)(1), there is no need to protect information relating to the representation of a former client "when the information has become generally known."

B. The *Harman* decision does not alter the plain meaning of SCR 20:1.9(c)'s language

Contrary to the petitioners' suggestion, Memorandum in Support of Petition to Modify SCR 20:1.9(c) at 4-5, ***In re Disciplinary Proceedings Against Harman***, 2001 WI 71, 244 Wis.2d 438, 628 N.W.2d 351, did not hold otherwise. The Court there addressed former SCR 20:1.9(b) (currently, SCR 20:1.9(c)(1), defining impermissible uses of information.[1] While representing the client, Harman gained access to her medical records that previously were part of a public court record in a medical malpractice action that had been dismissed. After he was discharged as her attorney, Harman sent copies of the medical records to the district attorney and various others in an attempt to harm her credibility.

The court file in the prior medical malpractice case had been destroyed following its dismissal, so the medical records were not publicly available at the time of Harman's representation and later conduct. *Id.*, ¶19. Accordingly, the "generally known" exception could not apply. Instead, Harman argued that, because they had been filed publicly in the past, the medical records were no longer privileged or "confidential." The Court rejected the argument on the grounds that attorney-client confidentiality under the Professional Rules is not limited to the scope of the medical privilege. *Id.*, ¶¶30-34.

The ***Harman*** Court did not discuss or decide the scope of the "generally known" language of what is now SCR 20:1.9(c)(1). Because the medical records were not publicly accessible since the medical malpractice case file had been destroyed, that

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[1] The "reveal[s]" language in current SCR 20:1.9(c)(2) did not exist at the time. It was added during the overhaul of the Professional Rules in 2007. *See* Suprem Court Order 06-04, §9, filed May 2, 2007.

provision was not at issue in the case. Likewise, the Court did not discuss or decide the scope of the "reveal[s]" provision of what is now SCR 20:1.9(c)(2), both because that provision did not then exist and because, the public record containing the medical records having been destroyed, Harman in fact did disclose or reveal what otherwise was hidden or unavailable to the public. Accordingly, there would have been no doubt that Harman's acts would have violated the plain meaning of that provision as well had it been in effect at the time.

C. Public policy supports the plain meaning of SCR 20:1.9(c)

For the reasons stated in the petitioners' Supporting Memorandum at 5-10, there is every reason to believe that "reveal," as used in SCR 20:1.9(c), has exactly its ordinary and accepted meaning of making something known that was previously hidden even if the plain language of that provision were not already clear. A basic requirement of statutory interpretation is to avoid absurd, ***Kalal***, 2004 WI 58, ¶46, or unconstitutional results, ***Panzer v. Doyle***, 2004 WI 52, ¶65, 271 Wis.2d 295, 680 N.W.2d 666.

Construing SCR 20:1.9(c) as preventing an attorney from discussing publicly available information would have the absurd effect of barring an attorney who previously represented a client from discussing the public aspects of that case while an attorney in another firm right next door could do so freely, and indeed would have a constitutional right to do so. Construing SCR 20:1.9(c) that broadly would mean that an appellate attorney could not even cite to a published opinion in which he or she represented one of the parties absent written consent by that party. No attorney could teach a continuing legal education program or write a scholarly article in their area of expertise if to do so would require them to discuss the publicly available court decisions in their own cases.

D. The interpretations of similar language by the courts of other states do not justify this Court rejecting the plain language of SCR 20:1.9(c)

As noted in the petitioners' Memorandum in Support, the courts of some states have ignored the plain meaning of provisions similar to SCR 20:1.9(c). Of course, those decisions do not support so distorting Wisconsin law as to bar attorneys from even mentioning the public aspects of their prior cases. As Justice Smith of this Court admonished with regard to the Wisconsin Constitution soon after the state was founded:

> The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. *Let them construe theirs-let us construe, and stand by ours.*

The Attorney General ex rel. Bashford v. Barstow, 4 Wis. 567, 785 (1855) (emphasis added).

If the courts of some other states choose to ignore the plain meaning of their statutes or rules in order to reach a particular result, they are free to do so. Under established principles of statutory construction, this Court is not. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." ***Kalal***, 2004 WI 58, ¶46, *quoting* ***State v. Pratt***, 36 Wis.2d 312, 317, 153 N.W.2d 18 (1967).

II. Despite the Plain Meaning of SCR 20:1.9(c), the Proposed Clarification is Necessary and Appropriate

Even though the language of SCR 20:1.9(c) already bars its application to an attorney's act of using or discussing publicly available information regarding a former client's case, the petitioners' supporting memorandum reflects the need for clarifying language to emphasize that point. That memorandum details and reflects the confusion and misinterpretation of the rule's language among both foreign courts and Wisconsin attorneys. Indeed, I have attended a number of ethics programs in which the issue has arisen and caused a great deal of debate and consternation, with Tim Pierce from the State Bar suggesting that the Office of Lawyer Regulation itself interprets the language of SCR 20:1.9(c) as barring attorney comment regarding public information about a prior client's case.

Accordingly, even though the rule on its face does not in fact bar attorneys from discussing or using aspects of their prior cases that are in the public realm, there remains the danger that attorneys will be investigated and charged by OLR with a violation for such actions, or will chill their own speech to avoid such investigations, absent clarification of the rule by this Court.

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I appreciate the opportunity to provide my views on this important topic.

Respectfully yours,

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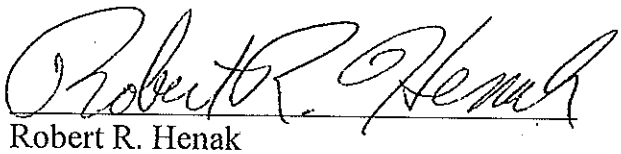

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cc: Attorney Michael D. Cicchini
Attorney Terry W. Rose

WACDL Comment re Rule Petition 15-04.wpd