STATE BAR OF WISCONSIN
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MEMORANDUM

To: Julie Rich, Supreme Court Commissioner

From: State Bar Professional Ethics Committee

Copy: Lisa Roys

Date: February 9, 2016

Re: Rules Petition 15-04

The State Bar's Standing Committee on Professional Ethics[1] (the "Committee") agrees with comments of Office of Lawyer Regulation Director Keith Sellen in response to Rules Petition 15-04. We offer the following in addition to Director Sellen's comments.

The current SCR 20:1.9(c) was adopted by this court in 1988 and mirrors the language of ABA Model Rule 1.9(c).[2] There have been few reported instances of Wisconsin lawyers being disciplined for violating this rule in the nearly 28 years since the rule was adopted.[3] The Committee sees no reason to deviate from the current rule which serves to protect the interests of clients and, as indicated by the relatively few instances of professional discipline based upon the rule, has not proved problematic for most lawyers.

We urge the court not to amend the rule for the following reasons:

I. The rule does not pose the problems suggested by petitioners

We agree with Director Sellen that SCR 20:1.9(c) does not prohibit lawyers from complying with SCR 20:8.3 or SCR 20:4.1. If a lawyer believes that making a mandatory report under SCR 20:8.3(a) would involve disclosing information protected by SCR 20:1.6(a), the lawyer complies with all of their obligations under the rules by consulting with the client and abiding by the client's decision as required by SCR 20:8.3(c). A lawyer likewise complies with disclosure obligations under SCR 20:4.1(a)(2) by availing themselves of any applicable exception to

[1] Current members of the Committee are Atty. Dean Dietrich (Wausau) Chair; Atty. Will McKinley (Appleton) Vice Chair; Atty. Michael Apfeld (Milwaukee); Atty. Peter Carman (Appleton); Atty. Diane Diel (Milwaukee); Atty. Charles Hanson (La Crosse); Atty. Amy Jahnke (Stevens Point); Atty Devon Lee (Madison); Atty. Margaret Raymond (Madison); Atty. H. S. Riffle (Waukesha); Atty. Joseph Russell (Milwaukee); Atty. Susan Walker (Virgin Islands); Atty. Michael Cohen (Milwaukee); Atty. Tim Pierce (Madison) Staff Liaison; Atty. Aviva Kaiser (Madison) Staff Liaison.

[2] The rule was originally SCR 20:1.9(b).

[3] A search of the compendium of disciplinary cases available on OLR's website reveals the following *Disciplinary Proceedings Against Ratzel*, 218 Wis. 2d 423, 578 N.W.2d 194 (1998**);** *Disciplinary Proceedings Against Harman* 2001 WI 71, 244 Wis. 2d 438, 628 N.W.2d 351 (2001); *Public Reprimand of Russell R. Falkenberg* 1992-2; Private Reprimand 1994-3.

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confidentiality under SCR 20:1.6(b) and (c). Confidentiality obligations do not prevent lawyers from complying with other rules.

Also, the petitioners assert that the rule prevent lawyers from complying with sec. 802.045(2)(e) and (4)(d) Stats. because disclosing a client's address as required by the statute would violate SCR 20:1.6(a). This is incorrect. SCR 20:1.6(c)(5) permits lawyers to disclose information to the extent required by other law. Thus, the rules do not prohibit disclosures required by statute.

Petitioners assert that lawyers somehow may not obtain informed consent from former clients if there appears to be little risk to the client in the proposed course of conduct. This is not the case. If there are no material risks to the proposed course of conduct, then the lawyer simply has no material disadvantages to discuss with the client. That does not mean the lawyer cannot obtain informed consent from the current or former client.[4] The presence or absence of foreseeable material risks simply alters the content of the communication needed to obtain informed consent, but the absence of risk does not prevent the lawyer from obtaining informed consent.

The Committee also does not agree that the rules prohibit effective Continuing Legal Education (CLE). The members of the Committee collectively have given hundreds, if not thousands, of CLE presentations and most of the members of the Committee are practicing lawyers. The confidentiality obligations of lawyers under the current rule have not proved to be a barrier to effective presentations.

II. The proposed amendment lessens protections for clients.

The Committee also has concerns that the proposed amendment would harm former clients. As proposed, the rule would permit lawyers to use or disclose any information about a former client that had been "disclosed in a public forum." This offers less protection than even the provisions of the old Model Code, which prohibited lawyers from revealing information that would likely be embarrassing or detrimental to the former client. The proposed amendment contains no such limitations and would permit lawyers to use and disclose highly embarrassing or detrimental information about former clients as long as it was previously disclosed in an obscure hearing that was open to the public, even if no members of the public were present. Thus a lawyer who represents a client on an embarrassing and sensitive matter that did not result in any published opinion or publicity at the time, but had one open hearing, would be free to prominently feature that embarrassing information about the client in the lawyer's advertising, for example, even over the client's objections. The Committee does not believe this serves to protect clients or the public.

In Disciplinary Proceedings against Harman, 244 Wis.2d 438, 628 N,W.2d 351 (2001), as referenced by Director Sellen, this court stated as follows:

> 33. We agree with Referee Jenkins' interpretation of this rule and her conclusion that the information obtained by Attorney Harman from his client, S.W., even if not protected or deemed confidential because it had previously been filed in the Wood County case, could

[4] See SCR 20:1.0, Comment [6].

not be disclosed without S.W.'s permission because that information was obtained as a result of the lawyer-client relationship he had with S.W.

The proposed amendment would allow lawyers to provide damaging information to adversaries of their former clients if that information had "been disclosed in a public forum." The Committee believes the Harman decision illustrates how the duty of confidentiality protects the interests of clients and we do not believe there is a need to lessen those protections.

SCR 20:1.9(c) is consistent with the ABA Model Rules, consistent with the law of many other jurisdictions, has not proven problematic for most lawyers and serves to protect clients. The Committee urges the court not to amend the rule.