STATE BAR OF WISCONSIN

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March 25, 2016

Henak Law Office, S.C.
316 North Milwaukee Street, #535
Milwaukee, Wisconsin 53202

Email Address: henaklaw@sbcglobal.net

Dear Mr. Henak:

The State Bar's Standing Committee on Professional Ethics (the "Committee") met on March 15, 2016, to review and consider your letter dated February 23 2016. Unfortunately, the proposals contained in your letter do not satisfy the Committee's concerns. Comment [1] to SCR 20:1.9 explicitly recognizes that a lawyer has certain ongoing duties with respect to confidentiality after the termination of the representation.

You propose to amend SCR 20:1.9(c)(1) 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. <u>"Generally known" information is information that is publicly available at the time the attorney uses it.</u>

Preliminarily, it is important to recognize that SCR 20:1.9(c)(1) governs the *use* of information, not the *disclosure* of information. The current SCR 20:1.9(c)(1) permits the use of information that is adverse to the interests of a former client when that information has become generally known; but it does not permit the disclosure of such information. It is *not* the case that SCR 20:1.9(c)(1) governs adverse disclosure and SCR 20:1.9(c)(2) governs non-adverse disclosures.

Restatement (Third) of the Law Governing Lawyers §60 cmt. c(i) discusses the distinction between use and disclosure of information:

> Both use and disclosure adverse to a client are prohibited. As the term is employed in the Section, use of information includes taking the information significantly into account in framing a course of action, such as in making decisions when representing another client or in deciding whether to make a personal investment. Disclosure of information is revealing the information to a person not authorized to receive it and in a form that identifies the client or client matter either expressly or through reasonably ascertainable inference. Revealing information in a way that cannot be linked to the client involved is not a disclosure prohibited by the Section if there is no reasonable

> likelihood of adverse effect on a material interest of the client. Use of confidential client information can be adverse without disclosure. For example, in representing a subsequent client against the interests of a former client in a related matter, a lawyer who shapes the subsequent representation by employing confidential client information gained about the original client violates the duty . . . not to use that information, even if the lawyer does not disclose the information to anyone else.

Comment [5] to SCR 20:1.8(b), which governs lawyers' use of information of current clients, further explains the meaning of "use":

> [5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c),3.3, 4.1(b), 8.1, and 8.3.

Thus, different Rules regulate the use of information, SCR 20:1.8(b) and SCR 20:1.9(c)(1), and the disclosure of information, SCR20:1.6 and SCR 20:1.9(c)(2).

SCR 20:1.9(c)(1) permits the adverse use of information once it becomes "generally known." Courts that have considered the definition of "generally known information," however, have agreed that information that is publically available is not, by that fact alone, information that is "generally known." For example, one court explained[1]:

> A lawyer may not disclose privileged or secret information and may not use case-related information to the disadvantage of his client unless it has become "generally known." Rule 1.9(c)(1). … "Generally known" does not mean information that someone can find. It means information that is already generally known. For example, a lawyer may have drafted a property settlement agreement in a divorce case and it may be in a case file in the courthouse where anyone could go, find it and read it. It is not "generally known." In some divorce cases, the property settlement agreement may become generally known, for example, in a case involving a celebrity, because the terms appear on the front page of the tabloids. "Generally known" does not require publication on the front page of a tabloid, but it is more than merely sitting in a file in the courthouse. See Virginia State Bar Legal Ethics Opinion 1609 (information regarding a judgment obtained by a law firm on behalf of a client, "even though available in the public record, is a secret, learned within the attorney-client relationship.")

[1] Sobel v. Sells (In re Gordon Props., LLC), 2013 BL 50210, No. 09-18086-RGM (Bankr. E.D. Va. Feb. 25, 2013). See also e.g. Pallon v. Roggio, 2006 BL 91075, Civ. No. 04-3625 (JAP) (D.N.J. Aug. 22, 2006); New York Rule 1.6, Comment [4A].

It appears that no state rule or court adopts a definition of "generally known" information as the equivalent of "publicly available" information.

Moreover, the plain meaning of "generally known" does not support a claim that it means publicly available. Merriam-Webster defines "known" as "included in the knowledge that all people considered as one group have" or "familiar to people." Merriam-Webster defines "generally" as "by or to most people." Similarly, Black's Law Dictionary defines "general knowledge" as "[w]idely known facts that a significant segment of the population would be familiar with." Black's Law Dictionary 1004 (10th ed. 2014).

The proposed definition of "generally known information" therefore significantly broadens the scope of information that lawyers can use to the detriment of their former clients. We see no reason or necessity to lessen the protections of former clients.

II You propose to amend SCR 20:1.9(c)(2) 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:
>
> . . .
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client. Information that is publicly available or has been disclosed in a public forum has already been revealed.

As discussed above, the Rules deliberately distinguish between use and disclosure of information. Just as there can be both adverse and non-adverse use of information, there can be adverse and non-adverse disclosures of information. Under your proposed changes, adverse use of information is more limited than potentially adverse disclosures, which is exactly the opposite of the current rule. Under your proposed definition of "reveal," there is no limit on disclosure of information once it is "disclosed in a public forum," such as a courtroom, thus allowing a lawyer to disclose any information to anyone once it has been discussed in court. Further, because the duty of confidentiality owed to former clients is governed by SCR 20:1.6 (see SCR 20:1.6, Comment [18]), this definition of "reveal" affects current clients as well.

Historically, the duty of confidentiality has protected at least some information that has been publicly disclosed or available from other sources. The American Bar Associations (ABA) Canons of Professional Ethics (1908-1969) recognized that lawyers may be bound to hold in confidence certain information even if there are other available sources of that information.[2] Neither the now superseded ABA Model Code nor the current Model Rules exclude information that "has been disclosed in a public forum" from the duty of confidentiality. Quite to the contrary, the ABA Comment to SCR 20:1.6, which is closely modeled on ABA Model Rule 1.6, plainly states that the rule covers all information relating to the representation, whatever its source, and prohibit lawyers from *disclosing* such information except as authorized or required by the Rules or other law.

[2] See Canon 37.

You are familiar with *Disciplinary Proceedings against Harman,* 244 Wis.2d 438, 628 N.W.2d 351 (2001) in which the court stated:

> 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 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.

Note that the court was addressing Attorney Harman's argument that he could not be disciplined for violating SCR 20:1.6(a) for *disclosing* protected information because the information had been previously disclosed in a public forum and thus was not "confidential."

Other jurisdictions have also recognized that the protections of the confidentiality rule extend to publicly available information. See, e.g., *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995); *Iowa Supreme Court Attorney Disciplinary Bd. v. Marzen*, 779 N.W.2d 757 (Iowa 2010); *In re Bryan*, 61 P.3d 641, (Kan. 2003); *Akron Bar Ass'n v. Holder*, 810 N.E.2d 426, (Ohio 2004); *State ex rel. Oklahoma Bar Ass'n v. Chappell*, 93 P.3d 25 (Okla. 2004).

Ethics opinions also are clear on the scope of information covered by the rule. ABA Formal Ethics Op. 04-430 recognizes that even information that may be available from public sources remains protected as long as it is information relating to the representation of a client:

> We also note that Rule 1.6 is not limited to communications protected by the attorney-client privilege or work-product doctrine. Rather, it applies to all information, whatever its source, relating to the representation. Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer. [Footnotes omitted.]

See also Arizona Ethics Op. 2000-11 (2000) and Nevada Ethics Op. 41, (2009).

We have reviewed the confidentiality rules of all fifty states. None take the position that the duty of confidentiality affords no protection for any information once that information had been "disclosed in a public forum." It appears that the only support for the interpretation of the rule you claim is the *Hunter* decision, but that case addressed only former clients.

This proposed definition of "reveal" represents a significant revision of the intended and interpreted meaning of the rule and lessens protections afforded to both current and former clients. By this definition, there is no restriction whatsoever on the information a lawyer may disclose to whoever the lawyer chooses, provided that the information had been disclosed once in a courtroom somewhere. We cannot support Wisconsin being the first jurisdiction to adopt such a lax approach to confidentiality and to afford even less protection to current and former client than the old Canons of Professional Ethics.

Striking the right balance in the confidentiality rules has always proven difficult. Some states have retained the Model Code protection of "confidences and secrets" (which does include protecting some publicly available information) because the Model Rule protection of "all information relating to the representation of the client" was considered too broad. Others have added interpretive comments beyond the ABA Comments. Ethics opinions also provide guidance. Greater guidance for Wisconsin

lawyers is certainly desirable. The Committee intends to consider drafting proposed comments to the court that address "generally known information" and a possible limited permissive disclosure for educational purposes.

Based upon these considerations, the Committee cannot support your suggested rule changes. The Committee believes that the language of SCR 20:1.9(c) should remain as is with a clarifying comment on revealing information for educational purposes.

Sincerely,

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Dean R. Dietrich, Chair
Standing Committee on Professional Ethics

pc: Court Commissioner Julie Rich [Julie.rich@wicourts.gov]
Michael D. Cicchini [mdc@cicchinilaw.com]
Terry W. Rose [rose-law@sbcglobal.net]
Keith L. Sellen [keith.sellen@wicourts.gov]
Dean R. Dietrich [ddietrich@ruderware.com]
Edward A. Hannan [ehannan@hannanlegal.com]
Members of the State Bar's Standing Committee on Profession