

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 21-01

In the Matter of the Amendment of
Supreme Court Rules 20:1.0 and 20:1.10

FILED

OCT 6, 2021

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On May 25, 2021, Ben Kempinen, Chair of the State Bar of Wisconsin Standing Committee on Professional Ethics, and Kelli Sue Thompson, Wisconsin State Public Defender, filed this rule petition, asking the court to amend Supreme Court Rule (SCR) 20:1.0 and SCR 20:1.10 to clarify that conflicts of interest involving public defenders should be controlled by SCR 20:1.10 rather than SCR 20:1.11.

Consistent with standard practice, the court voted to solicit written comments and schedule a public hearing. Letters were sent to interested persons on July 15, 2021. No comments were received.

The court conducted a public hearing on September 28, 2021. Attorney Ben Kempinen and Attorney Kelli S. Thompson presented the petition to the court.

The court discussed the petition at a closed administrative conference and voted to grant the petition.

IT IS ORDERED that, effective January 1, 2022:

SECTION 1. Supreme Court Rule 20:1.0 (er) is created to read:

(er) A "government lawyer" includes a "prosecutor" as defined by SCR 20:1.0 (j) and any lawyer who represents a governmental actor or entity and is employed by a governmental entity. It does not include an attorney employed as a public defender or a private attorney contracted to represent a governmental agency.

SECTION 2. A Comment to Supreme Court Rule 20:1.0 is created to read:

2022 WISCONSIN COMMITTEE COMMENT

Supreme Court Rule Chapter 20 treats conflicts of interest differently for government and non-government lawyers but does not clearly define who is a government lawyer. Subsection SCR 20:1.0 (er) defines government lawyer but excludes two groups - public defenders and private attorneys contracted to represent a government agency. Conflicts of interest for government lawyers are addressed by SCR 20:1.11 whereas imputation of conflicts of interest for private lawyers and public defenders are addressed by SCR 20:1.10.

Excluding attorneys employed by the state and federal public defender or private attorneys contracted to represent a governmental agency from the definition of "government lawyer" is limited to the Rules of Professional Conduct for Attorneys, SCR Chapter 20, and should not be construed to apply to any definition of "government lawyer" outside of this chapter.

SECTION 3. Supreme Court Rule 20:1.10 (a) (3) is created to read:

(3) The prohibition arises under SCR 20:1.9 and the conflict arises within the public defender agency, and

(i) the personally disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to any affected former client to enable the affected client to ascertain compliance with the provisions of this rule.

SECTION 4. A Comment to Supreme Court Rule 20:1.10 is created to read:

2022 WISCONSIN COMMITTEE COMMENT

Subsection (3) addresses former client conflicts with public defenders. The rule applies to both state public defenders and federal defenders licensed in Wisconsin. For purposes of this rule, reasonable efforts to notify an affected former client should be deemed in compliance with the requirements of SCR 20:1.10 (a) (2) (iii) and (a) (3) (ii). The definition of "government lawyer" in SCR 20:1.0 (er) makes clear that public defender conflicts are controlled by SCR 20:1.10 (a) (3) rather than SCR 20:1.11 (f). Pursuant to SCR 20:1.0 (d), the committee views the state public defenders and federal defenders as statewide law firms for purposes of applying this rule.

IT IS FURTHER ORDERED that the Comments to SCR 20:1.0 and SCR 20:1.10 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rules.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 6th day of October, 2021.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

