HENAK LAW OFFICE, S.C.
Attorneys at Law

Robert R. Henak
Ellen Henak

316 North Milwaukee Street, #535
Milwaukee, Wisconsin 53202
Telephone [414] 283-9300
Facsimile [414] 283-9400

May 5, 2016

VIA EMAIL AND U.S. MAIL
ddietrich@ruderware.com

Attorney Dean R. Dietrich
c/o State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158

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

Dear Mr. Dietrich:

Thank you for your letter of March 25, 2016, on behalf of the State Bar Ethics Committee. I apologize for the delay in responding, but an active small firm practice leaves very little time for extra activities.

I am disappointed that you persist in misinterpreting the plain language of SCR 20:1.9(c). However, I am encouraged by the fact that you at least recognize that your interpretation is inconsistent enough with real world practice to require an exception for "educational purposes."

Of course, as I have explained previously, the plain language of SCR 20:1.9(c) requires no such exception since it already permits discussion of information that is in the public realm. My proposed language merely clarifies what the rule already provides.

Your letter appears to be based on a number of misconceptions regarding both the plain language of the current rule, the effect of the proposed clarifications, and the authorities you cite.

1. Publicly discussing information is a "use" of that information

You start by misinterpreting the structure of SCR 20:1.9(c) and the type of uses of confidential information that is covered by it. You suggest that sub. (c)(1) covers uses and that sub. (c)(2) covers "disclosures." You appear to assume that "use" of information is distinct from and does not include "disclosure." That is not correct.

Under any common sense meaning of the terms, discussion of information (which may or may not constitute "disclosure") is but one means by which information may be used. Public discussion of information, and thus the further subset of disclosure, therefore are merely subsets of "use." As reflected in your quotation from the Restatement (Third) of the Law Governing Lawyers, §60 cmt. c(i), although use does not necessarily require public discussion or disclosure, "revealing" or "disclosing" information is one form of use.

The Supreme Court recognized as much in *Disciplinary Proceedings against Harman*, 2001 WI 71, 244 Wis.2d 438, 628 N.W.2d 351 (2001). There, Harman was disciplined under what is now SCR 20:1.9(c)(1), barring "use" to the detriment of a former client of information that is not generally known. His violation, or "use," was the disclosure of the former client's medical records:

> Count 8: By his December 1998 distributions of [S.W.'s] medical records, [Harman] used information obtained from a former client during his prior representation of her, to her disadvantage, in violation of SCR 20:1.9(b).

Id., ¶30. If, as you assert, discussion or disclosure is not included within the term "use," then the Court could not have upheld the finding that Harman "used" information related to his representation of S.W. by "distribut[ing]" that information to others.

Contrary to your suggestion, therefore, there are three types of attorney actions that are contemplated by the current SCR 20:1.9(c), each with different requirements:

1. Use (which may include public discussion and disclosure) of confidential information that is harmful to the former client. Such use is controlled by SCR 20:1.9(c)(1), which bars such use unless *either* "the information has become generally known," *or* the use is otherwise authorized by the Ethics Rules.

2. Use of information in a manner that "reveal[s]" previously non-public information, regardless of whether it is harmful to the former client. Such use is barred by SCR 20:1.9(c)(2) absent authorization by some other provision of the Ethics Rules.

3. Use of information related to the representation that is neither harmful to the client nor involves the "reveal[ing]" of such information. Such use is not barred by the rules, at least absent a specific request by the former client. Such use may

involve either the private use of such information by the attorney or the attorney's public use or discussion of the information to the extent that it already is in the public realm such that nothing is "reveal[ed]" by the attorney.

Nothing in your quotations from either the Restatement nor the Comments to the Rules conflicts with this common sense, plain reading of the Rule's language.

2. Several other courts and the Restatement have recognized the common sense meaning of "generally known" as including publicly available information.

Second, you state that "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.'" You further state that "[i]t appears that no state rule or court adopts a definition of 'generally known' information as the equivalent of 'publicly available' information." Neither assertion is accurate.

For instance, you quote at length from *dicta* in the footnote of an unpublished Bankruptcy Court decision discussing Virginia's ethics rules, *Sobel v. Sells (In re Gordon Props., LLC)*, 2013 BL 50210, 2013 WL 681430 (Bankr. E.D. Va. Feb. 25, 2013), but fail to note that, three days after that decision, the Virginia Supreme Court rejected that interpretation of the rules as contrary to the First Amendment. *Hunter v. Virginia State Bar ex rel. Third Dist. Comm.*, 285 Va. 485, 503, 744 S.E.2d 611, 620 (2013).

You also cite to the unpublished decision in *Pallon v. Roggio*, 2006 BL 91075, 2006 WL 2466854 (D.N.J. Aug. 22, 2006). However, that citation likewise is misplaced since that decision misrepresents the authority on which it relies. Specifically, *Pallon* cites *State v. Irizarry*, 271 N.J. Super. 577, 639 A.2d 305, 314 (App. Div. 1994), for the proposition that "'[g]enerally known' does not only mean that the information is of public record. . . . The information must be within the basic understanding and knowledge of the public." *Pallon*, *7. However, *Irizarry* holds to the contrary, stating that "[t]he facts known to the prosecutor/witness concerning defendant's cooperation are essentially matters of public record, and do not constitute the type of information that R.P.C. 1.9 seeks to protect." *Irizarry*, 639 A.2d at 314.

As you note, there are a few decisions that interpret the language of other states' ethics rules as you would prefer to interpret SCR 20:1.9(c). However, for various reasons, those decisions have no rational application here. For instance, the court's comment

in *Akron Bar Ass'n v. Holder*, 102 Ohio St.3d 307, 810 N.E.2d 426, 435 (2004), that "an attorney is not free to disclose embarrassing or harmful features of a client's life just because they are documented in public records," must be read in the context of addressing a state rule which, unlike Wisconsin's contains no "generally known" exception.

Your citation to several other cases is misplaced for much the same reasons. Although the alleged disclosures involved *former* clients, neither the courts nor apparently the attorneys referenced or interpreted the states' rules paralleling SCR 20:1.9(c) and its "generally known" language. *Iowa Supreme Court, Attorney Disciplinary Bd. v. Marzen*, 779 N.W.2d 757 (Iowa 2010) (claimed violation of the equivalent of SCR 20:1.6 for disclosures regarding a former client; neither the court nor apparently the attorney referenced or interpreted Iowa's SCR 20:1.9(c) equivalent, *see* I.C.A. Rule 32:1.9(c), or its "generally known" exception); *State ex rel. Oklahoma Bar Ass'n v. Chappell*, 93 P.3d 25 (Okla. 2004) (same; neither court nor attorney referenced or interpreted state equivalent of SCR 20:1.9(c), *see* OK ST RPC Rule 1.9, or its"generally known" language); *In re Bryan*, 61 P.3d 641 (Kan. 2003) (same; attorney unsuccessfully defended on the grounds that his disclosures were necessary to prevent fraud by former client and to defend himself from her allegations against him; neither the court nor apparently the attorney referenced or interpreted Kansas' SCR 20:1.9(c)(1) equivalent, *see* KRPC 1.9(c), or its "generally known" exception).[1]

Moreover, contrary to the assertion in your letter, several other courts, in addition to *Hunter*, *Izarry*, and those cited in the Memorandum in Support of Petition to Modify SCR 20:1.9(c) at 14, reject your view. *See, e.g.*, *CenTra, Inc. v. Estrin*, 538 F.3d 402, 422-23 (6th Cir. 2008) (publicly filed information is "generally known" for purposes of Rule 1.9(c), citing, *inter alia*, State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Formal Opinion Number R–4 (Sept. 22, 1989)); *Freund v. Butterworth*, 165 F.3d 839, 864-65 (11th Cir. 1999) (finding that information contained in public arrest records and charging documents was generally known; therefore the information is not confidential under Florida's ethical rules prohibiting the use of former client confidences); *Cohen v. Wolgin*, 1993 WL 232206 (E.D.Pa. Jun. 24, 1993) (holding that information from pleadings filed in prior litigation is generally known).

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[1] *Disciplinary Proceedings against Harman*, 244 Wis.2d 438, 628 N.W.2d 351 (2001), of course, does not support your position because the information at issue in that case was not publicly available at the time of Harman's actions, the public court file having been destroyed, and thus not "generally known."

Indeed, although you cite the Restatement (Third) of the Law Governing Lawyers for other purposes, you fail to note that it likewise equates "generally known" with "publicly available."

> *d. Generally known information.* Confidential client information does not include information that is generally known. Such information may be employed by [a] lawyer who possesses it in permissibly representing other clients (see § 60, Comments g & h) and in other contexts where there is a specific justification for doing so (compare Comment e hereto). Information might be generally known at the time it is conveyed to the lawyer or might become generally known thereafter. At the same time, the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.
>
> *Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.*
>
> A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Moreover, if a current client specifically requests that information of any kind not be used or disclosed in ways otherwise permissible, the lawyer must either honor that request or withdraw from the representation (see § 32; see also §§ 16(2) & 21(2)).

Restatement (Third) of the Law Governing Lawyers § 59, cmt. d (emphasis added). *See also Dougherty v. Pepper Hamilton LLP*, --- A.3d ----, 2016 WL 430551 (Pa. Super. Ct. 2016).[2]

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[2] Wisconsin law defines the information to be protected as that "relating to the (continued...)

The proposed definition of "generally known" information to include "information that is publicly available at the time the attorney uses it" thus is consistent with common sense and the Restatement, fully protects the rights and expectations of former clients, and provides the type of objective standard required for restrictions on First Amendment rights.

However, given the nuances discussed in the Restatement, I would have no problem with including the second, italicized paragraph of that discussion in the comments to provide further guidance on what is "generally known" under SCR 20:1.9(c)(1).

3. The common sense, plain meaning of "reveal" as used in current SCR 20:1.6 and 20:1.9(c)(2) and clarified in my proposed language meets First Amendment standards while causing no harm to either current or former clients

Your objections to the proposed clarification of SCR 20:1.9(c)(2) again rest on your failure to recognize both that public discussion or disclosure of information is a form of use, and thus subject to the more restrictive provisions of SCR 20:1.9(c)(1) wehn detrimental to the former client, *see* Section 1, *supra*; *Harman*, *supra*, and that the specific choice of the term "reveal" rather than "publicly discuss" in Rule 1.9(c)(2) and SCR 20:1.6 must be given meaning. As I have explained previously, the plain meaning of "reveal" necessarily contemplates actions which make public that which was previously hidden. That plain meaning thus fully protects client confidences while not interfering with the attorney's First Amendment rights to discuss information already in the public realm. That plain meaning also avoids the absurd results of your contrary interpretation, such as requiring client consent before citing to a published

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[2](...continued)
representation," without regard to the nature or source of the information. SCR 20:1.6(a). It then creates common sense exceptions for information regarding a former client that is in the public realm (i.e., by allowing the public discussion and other use of even information detrimental to the former client that is "generally known" and by banning only such public discussion of non-detrimental information that does not disclose otherwise non-public information), SCR 20:1.9(c). By use of term "reveal[s]," it likewise creates a common sense exception allowing non-detrimental discussion of information related to the representation of a current client that does not disclose otherwise non-public information. *See* SCR 20:1.6; SCR 20:1.8(b) (banning any detrimental use of information relating to the representation of a current client). However, the Restatement includes the "generally known" exception in the definition of "Confidential Client Information." Restatement (Third) of the Law Governing Lawyers § 59; *see id.* Rptr's Note to Cmt. d. Since what is at issue here is the meaning of "generally known" rather than the nature of the information protected, the differing methods of reaching the same result are irrelevant.

decision in that former client's case or discussing the public aspects of the case in a CLE program.

Correcting your misinterpretation of the respective scope of Rules 20:1.9(c)(1) and (2) resolves your concerns that the plain meaning of Rule 1.9(c)(2) would permit the public discussion of harmful information that is not publicly available. Nothing in the proposal "allow[s] a lawyer to disclose any information to anyone once it has been discussed in court," without regard to potential harm to the former client. Because public discussion of information is a form of "use," the public discussion of information that is potentially harmful to the former client is limited by current Rule 1.9(c)(1) and the proposed clarification to information that is publicly available or otherwise generally known at the time of the discussion. The broader, "disclosed in a public forum" provision inherent in Rule 1.9(c)(2)'s concept of "reveal[s]" and the clarifying language of the proposal thus applies *only* where the public discussion does not disadvantage the former client.

You express concerns that acknowledging the plain meaning of SCR 20:1.9(c)(2) would risk harming *current* clients since SCR 20:1.6 likewise is limited to "reveal[ing]" information and thus does not itself bar discussing information already in the public realm absent one of its specified exceptions. Once again, however, you fail to account for the fact that discussing information publicly is a form of "use." For current clients, that use is controlled by SCR 20:1.8(b). Unlike SCR 20:1.9(c)(1), that provision contains no "generally known" exception to the ban on detrimental uses of information related to the representation. Accordingly, although the public discussion of information that is in the public realm does not constitute "revealing" such information, any public discussion or other use of confidential information to the detriment of a *current* client is barred by Rule 1.8(b), regardless of whether that information is publicly available or previously was disclosed in a public forum.

It is this contrast between the language of SCR 20:1.8(b) and SCR 20:1.9(c)(1), and their equivalents in other states, that renders the remainder of the cases you cite irrelevant to the meaning of "generally known." Those cases address alleged violations of the equivalent of SCR 20:1.6 regarding damaging disclosures regarding *current* clients for which there is no "generally known" exception for the harmful uses under SCR 20:1.8(b) or other state equivalents. As such, those decisions do not address or interpret any equivalent of SCR 20:1.9(c) or its "generally known" language. *In re Anonymous*, 654 N.E.2d 1128, 1129–30 (Ind.1995) (holding that a lawyer violated the duty of confidentiality *to a current client* under equivalent of SCR 20:1.6 and 20:1.8(b), even though that information "was readily available from public sources and

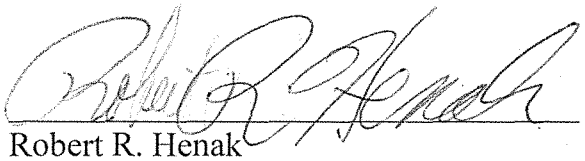
not confidential in nature"); *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850, 851 (1995) (Addressing duties *to current client* under equivalent of SCR 20:1.6, court holds that "The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it."). Moreover, none of those cases addresses the importance of defining the action regulated in Rule 1.6 as "reveal[ing]," i.e., making public that which was previously hidden, rather than "publicly discussing."

Accordingly, giving effect to the plain meaning of Rule 1.9(c)(2) through the proposed clarifying language would provide the objective guidance required for regulations impacting First Amendment rights while fully retaining existing protections for the legitimate confidentiality interests of both current and former clients.

I hope that this helps to clarify the confusion over the existing rule and the clarifying proposals. If you require any additional information or if you would like me to meet with the Committee to further address your concerns, please let me know and I will be glad to oblige.

Sincerely,

HENAK LAW OFFICE, S.C.



Robert R. Henak

Email address: henaklaw@sbcglobal.net

cc: 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]
Timothy J. Pierce [tpierce@wisbar.org]
Edward A. Hannan [ehannan@hannanlegal.com]