STATE OF WISCONSIN
SUPREME COURT

IN THE MATTER OF:

RULE PETITION 15-04
THE PETITION OF MICHAEL D. CICCHINI AND TERRY W. ROSE TO MODIFY SCR 20:1.9(C)

RESPONSE TO ROBERT HENAK'S FEB. 23, 2016 MEMORANDUM

TO: THE JUSTICES OF THE SUPREME COURT

I write this very short memorandum in response to the February 23, 2016 memorandum filed by Attorney Robert Henak. I also write briefly to follow-up on one issue that was raised by Attorney Pierce at our February 23, 2016 public hearing.

FIRST, I agree with Robert Henak's proposed rule change. It is a subtle change from the original petition, yet it accomplishes a great deal: It resolves, in a clear and simple manner, the issue of an attorney potentially using private information to his former client's disadvantage. Attorney Henak's simple rule change addresses this issue much more clearly and effectively than I did in my original law review article or in the original rule petition.

SECOND, my recollection is that, earlier today at the public hearing, attorney Pierce stated that obtaining informed consent from a client is relatively easy to do, and can be accomplished verbally and *need not be in writing*. (If my memory fails me, I offer my apologies to Attorney Pierce for misquoting him.)

While part I.E.4 of my article address the numerous difficulties and problems associated with obtaining informed consent, I failed to respond that, in Wisconsin, informed consent *must be in writing*. This confusion demonstrates yet another pitfall for the unsuspecting lawyer. Below is footnote no. 91 from my article that addresses this issue; I believe this writing requirement applies to informed consent for purposes of Rule 1.9(c)—although, the rule is so unclear that I cannot say this with absolutely certainty. In any case, here is the relevant footnote no. 91 from the article:

> Some states require the informed consent to be in writing. *See, e.g.*, WIS. SUP. CT. R. 20:1.9 cmt. ("The Wisconsin Supreme Court Rule differs from the Model Rule in requiring informed consent to be confirmed in a

> writing 'signed by the client.'"). But this has its advantages and disadvantages for the attorney. One advantage is that, aside from a later claim of coercion, at least there would be a document proving that the client did, in fact, consent. But one disadvantage is that asking for a signature might prevent the client from giving consent in the first place. A formal, written document would probably raise clients' suspicions that they are being asked to give away something very valuable—especially when no client would ever imagine that their attorney would need their consent to discuss the public aspects of the attorney's own case.

In short, this is just another layer of confusion and ambiguity that is simply not constitutionally acceptable in a rule that perpetually bans commercial *and political* speech, with regard even to widely and publicly available information, for any and all purposes.

Finally, for those not present at the hearing today, the citation for my article is Michael D. Cicchini, *On the Absurdity of Model Rule* 1.9, 40 VERMONT L. REV. 69 (2015). (I provided the citation and a reprint of the article to Julie Anne Rich, Supreme Court Commissioner, at the public hearing.)

Thank you again for your attention to this matter.

Submitted this 23rd day of February, 2016.

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