DATE: January 25, 2016

TO: Clerk of Supreme Court
Attn: Deputy Clerk – Rules

FROM: Petitioners Michael D. Cicchini and Terry W. Rose

RE: Rules Petition 15-04
Response to comment of Keith L. Sellen, Director of OLR

We write this memorandum in response to the comment of Keith L. Sellen, Director of OLR, dated January 15, 2016.

The Director cites the *Harman* case in opposition to our petition. However, the attorney in that case used information (in the form of client medical records) that was *not* publicly available. The records were purported to have once been part of a different court's file in a different case, but that court had destroyed its file three years before Harman's use of the information. More importantly, Harman used the medical records for the purpose of representing another party directly adverse to his client; he was also disciplined under a different ethics rule for the representation itself. So in short, Harman's actions would be prohibited under numerous ethics rules with or without our proposed modifications to Rule 1.9(c).

The existing Rule 1.9(c) is incredibly broad. It prevents an attorney from discussing, writing about, or otherwise "revealing" even widely available, public information (such as a former client's published appellate court decision), for any purpose (including political speech, CLE presentations, and law review publications). Using such an unimaginably broad, perpetual gag order just to serve as a means of duplicative punishment in an anomalous case like *Harman* is the equivalent of using a giant sledge hammer to swat a housefly. Conversely, our proposed modifications would offer at least some constraint of the rule's never-ending, blanket prohibition on the discussion of all public information for all purposes. **Our proposal to amend Rule 1.9(c) would also accomplish the following:**

First, our proposed amendment would reduce conflicts with other ethics rules and statutes. For example, with regard to SCR 20:4.1, the Director writes that "The current rule [1.9(c)]. . . does *not* conflict with SCR 20:4.1." However, immediately thereafter he writes that "ABA Comment 1 to the rule provides guidance that *helps resolve this conflict*." And there is, as the Director concedes, a conflict; we even cited a case where a lawyer was disciplined because compliance with one rule necessarily violated the other. We also demonstrated other conflicts—such as the rule's clash with Wis. Stats. secs. 802.045(2)(e) and (4)(d)—that the Director did not address.

Second, our proposal would help the profession by permitting, among other things, the publication of law review articles and the presentation of material at lawyer CLE conferences. As discussed in our supporting memorandum, at least one state has recognized the importance of scholarly and educational activities for the legal profession and has created an exception to its

version of Rule 1.9. Also, having access to critical commentary about the legal system is in the public's best interest. Both of these issues are discussed in our original memorandum. The Director's response does not address these issues.

Third, our proposal would bring the rule in line with client expectations. In today's electronic age where information such as trial court activities, jury verdicts, appellate briefs, and appeals court decisions are easily accessible and free of charge on the internet, modern-day clients could never even imagine that their attorneys would be subjected to a perpetual gag order regarding public information about the attorneys' own closed cases.

The Director states that promoting client candor is a justification for Rule 1.9. However, as explained in our memorandum, this was a good justification for the old Model Code which protected client confidences and secrets. But promoting client candor is not aligned with the perpetual ban on the attorney's use or discussion of all public information, regardless of its source, for all purposes.

In fact, a bar association made the same argument in *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013), where it argued that allowing attorneys to discuss the public aspects of their closed cases "could inhibit clients from freely communicating with their attorneys [and] would undermine public confidence in the legal profession." In striking down its ethics rule of confidentiality—a rule that was much less suffocating than Wisconsin's—the Virginia Supreme Court responded: "Such concerns, however, are unsupported by the evidence."

Fourth, Rule 1.9 is so flawed that it is easy to focus on its glaring problems while ignoring the biggest issue of all: the First Amendment.[1] The Director does not address this issue. However, the Supreme Court of Virginia has, where it struck down its rule that was far less oppressive than Wisconsin's. The Virginia rule prohibited an attorney from disclosing only "two types of information: 1) that which is protected by the attorney-client privilege, and 2) that which is public information but is *embarrassing or likely to be detrimental to the client*."

Despite the narrow focus of Virginia's rule (compared to Wisconsin's rule), the court still held that it was unconstitutional—even with regard to mere commercial speech. It held: **"State action that punishes the publication of truthful information can rarely survive constitutional scrutiny. . . . To the extent that the information is aired in a public forum, *privacy considerations must yield to First Amendment protections*. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom."**

For these reasons, and for the reasons stated in our original Petition and supporting Memorandum, we urge the Court to adopt our Petition.

[1] For example, petitioner Michael Cicchini's article criticizing Rule 1.9 is 36 pages long, yet less than one page of it is dedicated to attorneys' First Amendment rights. *See* Michael D. Cicchini, *On The Absurdity of Model Rule 1.9*, 40 VERMONT LAW REVIEW 69 (2015), available at www.CicchiniLaw.com.