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Hon. Chief Justice Patience Roggensack
Justices of the Supreme Court of Wisconsin
Supreme Court of Wisconsin
State Capitol
Madison, WI 53701

Dear Chief Justice Roggensack and Supreme Court Justices:

As an attorney who is experiencing now and will hereafter a higher risk of more severe complications from the coronavirus COVID-19, I respectfully respond to the court's public hearing notice arising from *In the Matter of an Interim Rule Re Suspension of Deadlines for Non-Criminal Jury Trials Due to the COVID-19 Pandemic*, March 31, 2020.

May it please this court, permit me to make the following observation.

Recently, the Supreme Court found "(m)aintaining current court operations in the courts of this state, especially jury trials, presents substantial health risks to the public, . . . , to witnesses, to law enforcement personnel, to litigants, to lawyers, to judges, and to court employees."¹ This fundamental finding of court operation health risks on its face, which incorporates the reality in which we live today, necessarily applies to all civil and criminal court proceedings of any nature. Out of this context, however, the court by its IR that limits its application only to non-criminal jury trials, leaves open to exposure to the "substantial health risks" to all others at in court proceedings in all other civil and criminal proceedings of any nature.

If I am interpreting the IR correctly, the court finding and its subsequent IR raises two questions about the professional responsibility of attorneys who are "... older adult(s) or have a serious underlying health condition" and "who are at higher risk of getting very sick" whom the Wisconsin Department of Health Services²

¹ See, *In Re The Matter of Jury Trials During the COVID-19 Pandemic*, Supreme Court of Wisconsin, Filed March 22, 2020, 1., at 1.

² See Wisconsin Department of Health Services, at <https://www.dhs.wisconsin.gov/covid-19/risks.htm>. "Some groups of people are at a higher risk of getting very sick from COVID-19. Adults over the age of 65 . . . may be at higher risk for more serious complications from COVID-19."

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identifies, and who are “(p)eople (w)ho (a)re at (h)igher (r)isk for (s)evere (i)llness” whom the U.S. National Institute of Health³ identifies.

These attorneys face higher risks in any case in any courtroom than even the general in court participants during the COVID-19 pandemic. As a matter of the reality for these attorneys who may self-identify appropriately, each attorney is, and continues to be, at higher risk of contracting the highly contagious COVID-19 with serious health consequences until a vaccine is developed and administered at some indefinite future date notwithstanding the social distancing strategy and the “flattening the curve” strategy. Flattening the curve is only about creating and maintaining sufficient hospital beds to treat persons infected with the virus.⁴ This reality is virtually a given even when the COVID-19 may abate.

This comment is germane to the IR, in my view. It applies to general court administration of a class of cases. It does not recognize the unique circumstances that exist in court to higher risk attorneys who face continuing risks of serious health consequences and who by self-identifying under the rules of professional responsibility may mitigate such continuing higher risks.

My first professional responsibility question arises under Wis. Stat. ch. 20:1.7(a)(2), presented as an issue as it might appear in a court brief.

I. Whether a conflict of interest of “. . . a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer” exists under Wis. Stat. ch. SCR 20:1.7(a)(2) when the attorney’s personal interest is his status as a member of the class at “higher risk of developing serious complications from COVID-19” under the Wisconsin and Center for Disease Control standards?

An attorney at higher risk of developing serious complications from COVID-19 faces two compelling realities daily. First, such attorney faces the clear health risks not to be underestimated that, for higher risk as to age, “8 out of 10 deaths reported

³ See U.S. National Institute of Health, at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>?, “older adults and people of any age who have serious underlying medical conditions might be at higher risk for severe illness from COVID-19.”

⁴ See <https://healthblog.uofmhealth.org/wellness-prevention/flattening-curve-for-covid-19-what-does-it-mean-and-how-can-you-help>, “Those who do (get sick from coronavirus) could overwhelm the number of beds and care teams that our nation’s hospitals have available, according to Howard Markel, M.D., PhD., a University of Michigan expert who has studied the effects of similar responses to past epidemics.

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in the U.S. have been in adults 65 years old and older.”⁵ Second, this now ever mindful severe health consequence can meaningfully detract from the capacity to concentrate on and provide to clients the disinterested competent representation to which they are entitled. Recognizing that attorneys in such class have a conflict of interest with their clients can better enhance the understanding and quality of legal services provided to clients.

I respectfully urge the court to recognize this conflict of interest exists in a footnote in any final rule and to determine such higher risk attorney is entitled to claim that higher risk status reasonably constitutes a personal interest that with client consent establishes a rational basis for a conflict of interest to which a court ought to accord great weight under SCR 20:1.7(a)(2).

If the court decides to recognize such conflict of interest here, a footnote might be framed along the following line. The court notes in some circumstances, counsel in good faith may face in a civil or criminal proceeding a conflict of interest issue based on the coronavirus COVID-19 under SCR 20:1.7(a)(2). Such possible conflict merits great weight.

My second question arises under Wis. Stat. ch. 20:1.16 (b)(7) and is presented similarly as a specific issue in a court brief.

II. Whether “good cause for withdrawal” exists under Wis. Stat. ch. SCR 20:1.16(b)(7) when the attorney in the class of “higher risk of developing serious complications from COVID-19” under the Wisconsin and Center for Disease Control standards exercises sound judgment to seek withdrawal from representation with client consent?

In addition to a higher risk attorney’s two compelling considerations faced daily expressed above is the reality of a court focusing more on its statutory and other duties to move cases along and taking lightly and dismissing the real-life concerns and dangers a higher risk attorney faces that social distancing may not sufficiently mitigate. This raises the question whether court administration day-to-day is more important than the health of a higher risk attorney who knows his/her circumstances best and understands the implications to him/her of contracting highly contagious COVID-19 and spreading the disease to a spouse and family members.

Similarly, I also respectfully urge the court to recognize this withdrawal for good cause issue in a footnote in any final rule and to determine such higher risk attorney is entitled to claim withdrawal where higher risk status reasonably

⁵ See Center for Disease Control, “Older Adults,” at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

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constitutes good cause as a rational basis for withdrawal to which a court ought to accord great weight under SCR 20:1.16(b)(7).

If the court decides to recognize withdrawal for good cause here, a footnote might be framed along the following line. The court notes in some circumstances, counsel in good faith may face in a civil or criminal proceeding withdrawal for good cause based on the coronavirus COVID-19 under SCR 20:1.16(b)(7). Such possible request to withdraw merits great weight.

By acknowledging and recognizing appropriately if it chooses to do so these two professional responsibility issues, the Supreme Court may carve out for attorneys at such higher risk of serious health consequences a process for them to declare a conflict of interest or withdraw from representation that enables clients to be properly represented in court and a court free to implement a proper balance between administering justice and enabling the health of such at higher risk attorneys.

Your consideration is appreciated.

Thank you.

Sincerely,
Kevin B. Cronin
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