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

Ms. Julie Ann Rich
Supreme Court Commissioner

FROM: Dean R. Dietrich
Ruder Ware

DATE: January 21, 2016

RE: Rule Petition 15-03 – Petition for Amendment to Rules of Professional Conduct for Attorneys

Dear Deputy Clerk – Rules and Ms. Rich:

I am preparing this Memorandum to address certain proposed changes to the Wisconsin Rules of Professional Conduct that will be considered by the Supreme Court on February 23, 2016. Currently, I am not available to attend the Supreme Court hearing on that date and wanted to provide written comments to the Court regarding the proposed rule changes.

The proposed rule changes being considered on February 23 are changes that were not included as part of the changes to the ABA Model Rules of Professional Conduct. In some instances, the proposed change is different from what was proposed as part of the Model Rule changes considered by the American Bar Association.

Initial Review Of Rule Changes To Be Considered

Attached to this Memorandum is a list of items identified by the Supreme Court that will be considered on February 23, 2016. One of the items listed is a proposed change to the comment for SCR 20:5.5 (Unauthorized Practice of Law; Multi-jurisdictional Practice of Law). I do not believe that this change as proposed is different from the change proposed in the ABA Model Rule consideration. The background material suggests this is actually a proposed change from the ABA Model Rule with the rationale identified as part of the ABA review.

Rule Clarifications

There is a proposed change to SCR 20:5.7 (Limited Liability Legal Practice) which involves proposed amendments to clarify that lawyers who are otherwise authorized to practice in Wisconsin may practice in firms organized under SCR 20:5.7. I believe that this proposed change is clear on its face and is intended to clarify a drafting ambiguity that occurred at the time that this rule was adopted in 2007. The intent of the rule change is to clarify that a lawyer who is authorized to practice in Wisconsin (but not licensed to practice in Wisconsin) may practice in a firm that is organized under the limited liability rules of SCR 20:5.7. I believe that this is a clarification that does not change the intent or purpose of SCR 20:5.7.

The proposed change to the comment to SCR 20:1.8 (Conflict of Interest: Prohibited Transactions) is also a clarification that does not require significant discussion. The proposed comment reminds Wisconsin lawyers of the existence of SCR 20:7.3(e) which is a rule that clearly addresses a lawyer's insistence that the lawyer's services be required as part of the drafting of any estate planning documents. This requirement has existed in Wisconsin for a number of years within the language of SCR 20:7.3. Many lawyers are not fully aware of the requirements of this rule, therefore, the Wisconsin Comment provides clarification and direction to the lawyer regarding the drafting of estate planning documents. Again, this proposed change appears very straight forward and appropriate under the circumstances.

Proposed Change To Confidentiality Rule (SCR 20:1.6)

The Ethics Committee is proposing a broader language change to the Confidentiality Rule (SCR 20:1.6). The proposed change would create a broader exception to the non-disclosure of client information and allow for the disclosure of very limited client information by an attorney when engaging in the activity of determining whether or not a conflict of interest exists and whether a waiver of a conflict of interest can be obtained from a client. The particular focus of this change is to provide a way for a lawyer to exchange limited client information with another party (lawyer for client, another client or a third party) to allow the lawyer to discuss the potential existence of a conflict of interest and the potential waiver of the conflict of interest.

Lawyers currently can discuss information about a representation with another lawyer in the same law firm in order to determine whether a conflict of interests exists and whether the law firm can obtain a waiver of a conflict of interest to allow the law firm to continue representing a current client and represent a new client that may be adverse or that such representation would be materially limited because of the duties owed to another party There are, however, many times

when a lawyer is required to talk to one client about a conflict of interest involving another client and disclose very limited information to explain why the lawyer is asking for a waiver of a conflict by the one client to allow for the continued or new representation of another client. This communication may be with a client personally or with an attorney representing that client such as general counsel for a corporate entity. There also are limited circumstances where a lawyer may have to talk to a third party in order to obtain limited information about the representation of a client and whether that representation may involve a conflict with the representation of another client by the law firm.

The ABA Model Rule change expanded the exception to confidentiality in the limited circumstance where a lawyer is transferring from one law firm to another law firm. The Ethics Committee certainly understands the need for an exception in that instance but also felt that the language in the exception should be expanded because it is quite often that a lawyer has to talk to someone else about a potential conflict of interest and the potential waiver of that conflict of interest. The discussion would be limited to identification of the client and identification of the nature of the representation provided to the client where the conflict may arise but would involve no other disclosure of client information.

I submit that this expanded version of an exception to the confidentiality rule will not harm the purpose of the confidentiality rule and provides guidance to Wisconsin lawyers as to the ability to disclose client information (on a very limited basis) when seeking to discern whether a conflict of interest exists and whether there is a basis for a waiver of the conflict of interest. This will allow lawyers to engage in appropriate discussion with other parties regarding the matter of a conflict of interest and possible waiver of the conflict of interest. This change is necessary in order to assure that lawyers will engage in a meaningful discussion regarding a conflict of interest and be able to obtain informed consent from a client regarding a possible waiver of a conflict of interest.

Revision to SCR 20:4.4 – Additional Guidance to Lawyers

The Ethics Committee is proposing additional language be added to SCR 20:4.4 relating to the inadvertent receipt of attorney-client confidential or attorney-client privileged information which provides direction for the lawyer receiving the inadvertent information. The current language of SCR 20:4.4 and Model Rule 4.4 provides little guidance to lawyers if they receive information inadvertently from opposing counsel or other opposing party. This has created confusion for Wisconsin lawyers as to what steps they should take when receiving information that they learn or realize is inadvertently sent to him/her. This confusion can result in action taken by the

lawyer that ultimately could result in the lawyer being disqualified from continued representation of his/her client.

The proposed change would clearly require that a lawyer, upon receiving and understanding that information has been sent inappropriately and is considered protected, to (1) stop reading the information; (2) notify the sending party that the information has been received; and (3) to follow the direction of the opposing party as to the handling of the information without further disclosure or reading of the information. These steps are consistent with a prior ABA Opinion that addressed the steps that a lawyer should take if the lawyer receives inadvertently sent information that would be considered confidential and/or privileged. The steps identified in the prior ABA Opinion would be considered best practices, however, the ABA Opinion was withdrawn after changes were made to Model Rule 4.4. This is why the Ethics Committee felt that this new language should be added to SCR 20:4.4.

I submit that this change, while different from the Model Rule, provides clear guidance to Wisconsin lawyers as to how to handle inadvertently sent information that is considered protected by attorney-client confidentiality and/or attorney-client privilege. The new language provides clear direction for the lawyer to follow and results in a circumstance where the confidentiality is protected and the information is not used in a manner that could cause counsel for one party to seek the disqualification of an attorney. In this way, the legal system is protected because the confidential information is not used by the attorney to the disadvantage of the opposing party and the attorney is protected from the potential of disqualification by preserving the confidentiality of the information. I recommend that this language be included in SCR 20:4.4 as a codification of a best practice to preserve the interests of the clients and the legal system.