IN SUPREME COURT
STATE OF WISCONSIN

In the Matter of the Amendment of
Supreme Court Rules SCR 20:1.0 and
SCR 20:1.10

MEMORANDUM IN SUPPORT
OF PETITION

No. _____

INTRODUCTION

Before the court is a joint petition from the State Bar Standing Committee on Professional Ethics (the Committee) and the State Public Defender to modify two provisions of the Rules of Professional Conduct for Attorneys (the "rules") Chapter 20 of this Court's rules.

More than 25,000 lawyers are licensed to practice in Wisconsin.[1] Their practices vary widely. The balkanization of the legal profession presents a daunting challenge to create a unitary code of conduct that is both general enough to apply to all practice areas yet specific enough to provide guidance in specialized cases. This Court has done an impressive job of meeting this challenge. Nonetheless, ambiguities and unforeseen issues inevitably arise which invite clarification to improve the rules' guidance.

One such ambiguity is whether public defenders[2] are "government officers and employees" such that their conflicts of interest are governed by SCR 20:1.11, or whether the nature of their

[1] https://www.wisbar.org/aboutus/overview/pages/member-statistics.aspx.

[2] The State Public Defender employs nearly 400 attorneys and is responsible for providing representation to nearly 140,000 indigent defendants yearly. Due to conflicts of interest and caseload considerations more than one-third of these cases are appointed to private bar attorneys. https://wispd.org/index.php/about-the-spd/spd-facts-at-a-glance.

work suggests they should be guided by SCR 20:1.10, the rule applicable to conflicts within private law firms.

One can find support in the current rules for either view. On one hand, public defenders are government employees, part of a government-created agency.[3] This suggests SCR 20:1.11 applies to their conflicts of interest. On the other hand, their practices differ significantly from that of government lawyers – district attorneys, municipal attorneys, attorneys general, and attorneys for government agencies – given that they represent individuals and not governmental entities. Because their practice most closely approximates that of lawyers with traditional clients, it can be said that SCR 20:1.10 best fits the conflicts they encounter. Adoption of the proposed amendments to SCRs 20:1.0 and 20:1.10 would make this clear.[4] If adopted, the current ambiguity would be resolved, our rules would more closely track constitutional jurisprudence regarding the right to counsel in criminal cases[5], and follow the lead of a majority of states that have considered the issue[6].

[3] *See* Chapter 977 Wisconsin Statutes. The Office of the Federal Public Defender operates under authority of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

[4] The proposed rule changes would apply to Wisconsin State Public Defenders and federal defenders licensed as Wisconsin lawyers, a class of government-funded lawyers who represent indigent federal defendants. Throughout this petition the phrase "public defender" refers to both state and federal defenders.

[5] *See Strickland v. Washington*, 466 U.S. 668 (1984), *Mickens v. Taylor*, 535 U.S. 162 (2002), *Holloway v. Arkansas*, 435 U.S. 475 (1978), *Wheat v. United States*, 486 U.S. 153 (1988), *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

[6] Jurisdictions applying Rule 1.10 to public defender conflicts – *Richard B. v. State*, 71 P. 3d 811 (Alaska 2003); *Ariz. Ethics Op.* 93-06; *Childress v. State*, 907 S.W. 2d 718 (Ark. 1995); *Ward v. State*, 753 So. 2d 705 (Fla. App. 2000); *Ga. F.A.O*. 10-1; *State v. Mark*, 231 P. 3d 478 (Haw. 2010); *State v. Severson*, 215 P. 3d 414 (Idaho 2008); *State v. Cole*, 2107 IL 120997; *I.S.B.A.* 91-17; *Mich. Ethics. Op.* RI-334; *State v. Thompson*, 20 A. 3d 242 (N.H. 2011); *N.Y.S.B.A.* 862 (2011), 1105 (2016); *N.C. Ethics Opinion R.P.C.* 65 (1989); *State v. Dillman*, 591 N.E. 2d 849 (Ohio Ct. App. 1009); Or. *Formal Ethics Op.* 2005-174; *S.C. Ethics Adv. Comm.* 92-21; *Va. Legal Ethics Op.* 1776; *D.C. Ethics Op.* 237 (1992).

Jurisdictions applying Rule 1.11 to public defender conflicts – *People v. Shari*, 204 P. 3d 453 (Colo. 2009); *State ex rel. Horn v. Ray*, 325 S.W. 3d 500 (Mo. App. 2002); *Anderson v. Commissioner of Corrections*, 308 Conn. 456 (2013); *In the Matter of Neuhardt*, 321 P.3d 833 (Mont. 2014); *Hart v. State*, 62 P. 3d 566 (Wyo. 2003).

1. **Conflicts of Interest in General**

Wisconsin's conflict of interest rules are designed to promote loyalty to the client and protect client information. They primarily address issues that arise in the traditional lawyer-client paradigm – the lawyer representing an individual client. They serve the client's loyalty and confidentiality interests in several ways.

First, they prohibit certain representations altogether and others absent the informed consent of the client. For example, a concurrent conflict of interest exists if "the representation of one client will be directly adverse to another client"[7] or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[8] In both situations representation is prohibited absent the written informed consent from each client[9], the lawyer's "reasonab[e] belie[f]" competent representation to both is possible[10] and compliance with the other requirements of the applicable rules.[11]

Additional protection is provided by imputing one lawyer's conflicts, in most circumstances, to other lawyers in the firm.[12] That is, if one lawyer in a firm cannot represent a person no other lawyers in the firm may do so.[13] The imputation rule is based on several assumptions about firm

[7] SCR 20:1.7(a)(1).

[8] SCR 20:1.7(a)(2).

[9] SCR 20:1.7(b)(4).

[10] SCR 20:1.7(b)(1).

[11] SCR 20:1.7(b)(2), (3).

[12] The committee believes the State Public Defender is a "firm" within the meaning of SCR 20:1.0(d). See also *Wis. Formal Ethics Op.* E-90-6.

[13] SCR 20:1.10(a). Personal interest conflicts are not imputed to other firm lawyers. SCR 20:1.10(a)(1).

practice – that firm lawyers share, discuss, and have access to information about all firm clients and cases; that they share each other's financial interests, and that a prophylactic rule best avoids requiring a client to prove the misuse of protected information or a betrayal of loyalty, a difficult or impossible burden.[14]

Imputation rules have not been without controversy; client protection comes at a cost to the lawyer and the client. Strictly applied, they can limit employment options for individual lawyers, prevent firms from representing certain desirable clients, and interfere with the client's choice of counsel. To ameliorate these effects, most states, including Wisconsin, have adopted screening options for lawyers moving from one firm to another. Screening protocols differ from state to state and have been the subject of much contentious debate.[15]

Screening in Wisconsin is limited. It applies only to former and not current clients and even then only if the screened lawyer "performed no more than minor and isolated services in the disqualifying representation", the screened lawyer does not share in any fee earned, and notice is given to the affected former client.[16] The screening rules apply to cases that are the "same" or "substantially related".[17] In addition, protected information from a former client may not be "used" or "revealed" to advance the new client's interests.[18] The protections provided by SCR 20:1.9 may be waived with the former client's informed consent.[19]

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[14] *See* Comment b to §123 of the *Restatement (Third) of the Law Governing Lawyers* (2000).

[15] *For example, see*, Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty, 121 Yale Law Journal Online* 567 (2012).

[16] SCR 20:1.10(a)(2).

[17] SCR 20:1.9(a).

[18] SCR 20:1.9(c).

[19] Id.

SCRs 20:1.7 through 1.10 provide basic conflict of interest guidance for lawyers with traditional clients. The State Public Defender has relied on these rules in managing their offices. Granting this petition will make clear these are the rules that should guide public defenders.

2. Government Lawyer Conflicts of Interest

Government lawyer practice differs from that of lawyers with traditional clients in several respects: identification of the client,[20] allocation of authority between lawyer and client,[21] external controls on conduct,[22] confidentiality,[23] and, in their treatment of conflicts of interest. The preamble to the rules notes:

> [18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client−lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority.

Chapter 20 contains two rules that only apply to government lawyers – SCR 20:3.8 regarding prosecutors and SCR 20:1.11 regarding conflicts of interest. SCR 20:1.11(f) controls imputation of conflicts for within a government law office.[24] The rule follows the longstanding practice of

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[20] *See* Clark, *Government Lawyers and Confidentiality Norms*, 85 Wash. Univ. L. Rev. 1033, 1056-1062 (2008); Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 Fed. B.J. 61, 66 (Fall 1978); Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293, 1298 (1987). *See also* SCR 20:1.13(a), cmt. ¶¶1, 9.

[21] *See* Wis. Stat. §165.25(6) (a), (e).

[22] *See* Wis. Stat. §19.45.

[23] A complex body of law addresses access to government information and consequently impacts what is confidential and protected by SCR 20:1.6. *See Wisconsin Open Records Law*, Wis. Stat. §§19.32, 19.35(1)(a); *Federal Freedom of Information Act* – 5 U.S.C. § 552; *see also* SCR 20:1.13(b).

[24] SCR 20:1.10(d).

treating government lawyer conflicts differently than those involving private attorneys.[25] The most significant difference from SCR 20:1.10 is the absence of imputation – the conflicts of one government lawyer are not imputed to other firm lawyers.[26] Thus, simultaneous representation of conflicting interests by different government lawyers in the same firm is permissible as long as they are screened.[27] And, unlike the screening protocol for private lawyer conflicts, there is no requirement to notify the affected current or former clients of the screen or provide an opportunity to ensure compliance with the rules.[28]

Another difference involves the circumstances which trigger a former government lawyer conflict – substantial personal involvement in the matter, whether as an attorney or otherwise, regardless whether the prior involvement was adverse.[29]

A third difference concerns protection of confidential government information – facts not generally available to the public obtained through use of government authority.[30] A former government lawyer may not represent a private person with interests adverse to person about whom the lawyer had acquired, in government service, confidential government information.[31]

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[25] *See* 91 *Law. Man. Prof. Conduct* 4101, 4104 (2020); Gilmore, *Who Is the Public Attorney's Client? How Do the Public Attorney's Rules for Conflict of Interest Differ From the Private Attorney's*, 45-FEB Advocate (Idaho) 10, 10 (2002); ABA Formal Ethics Op. 342.

[26] SCR 20:1.11(f).

[27] Id.

[28] Id. cf. SCR 20:1.10(a).

[29] SCR 20:1.11(a)(2), (d)(2)(i).

[30] SCR 20:1.11(c).

[31] SCR 20:1.11(c). Note that this conflict is intended to protect the subject of the confidential information and not the government. It may not be waived with government consent.

Several policies underly the different treatment of government lawyer conflicts. One is that relaxed conflict restrictions encourage government service by removing the limits caused by traditional rule analysis, making experienced government lawyers more able to move between the government and private job markets.[32] Another is that absence of a profit motive for government lawyers, which reduces the risk of harm to current or former clients.[33] The restrictions upon involvement in matters in which the government lawyer had substantial personal involvement in a matter are intended to prevent use of government authority for personal benefit, a concern largely absent from public defender work.[34] Relaxed conflict rules can also reduce public costs by eliminating the need to retain outside counsel.[35] For the most part, these policies are not relevant to public defender work.[36]

3. Public defender conflicts of interest are best governed by SCR 20:1.10

The rules that govern conflicts for private attorneys with traditional clients discussed in section one have proven sound. They are the same rules that apply to private criminal defense attorneys and have been a source of guidance for the State Public Defender.

Two problems arise if the public defender looks to SCR 20:1.11 for guidance.

The first concerns simultaneous representation of clients with conflicting interests. This could involve a variety of scenarios; for example, one public defender representing the defendant and another representing a codefendant, a victim, or a prosecution witness. SCR 20:1.7 prohibits

[32] ABA Formal Opinion 342 at 4-5; 91 *Law. Man. Prof. Conduct* 4101, 4103-4104 (2020).

[33] *People v. Cole*, 2017 IL 120997, ¶¶43-44 (assumption that public defenders' fidelity to client interests outweighs their allegiance to their agency); 91 *Law. Man. Prof. Conduct* 4101, 4104 (2020).

[34] ABA Rule 1.11, Cmt ¶¶ 2-4; 8-10; ABA Formal Opinion 342 at 4.

[35] 91 *Law. Man. Prof. Conduct* 4101, 4104 (2020).

[36] Any theoretical cost savings by allowing public defenders to represent conflicted clients would likely be lost by an increase in post-conviction challenges based on the right to counsel.

concurrent representation when client interests are adverse or when the duty to one client could materially limit representation of the other.[37] At present, the public defender would not permit both cases to remain in the office. However, SCR 20:1.11 (f) permits such representations if the two attorneys were screened even without notice to the affected clients. The same option would be available with former clients under SCR 20:1.11(f). The possibility of the same public defender's office representing codefendants with starkly antagonistic interests would be problematic for several reasons. First, the clients would be rightly concerned if the same firm was representing their adverse interests. Fidelity to each client and protection of client information would be reasonably questioned. Second, effective screening would be difficult or impossible, particularly in smaller offices with limited staff. Finally, allowing the same firm to represent antagonistic interests could undermine public confidence in the fairness of such a system.

The second, and related, problem is the absence of notice requirements in SCR 20:1.11(f). The persistence of imputation rules, as controversial as they have been, underscores the belief that the only effective means to protect clients – current or former – is to prohibit representation in conflict situations.[38] While it is true that SCR 20:1.11(f) requires screening, client protections are weakened by the lack of a requirement of notice to the affected clients that would allow them to ensure compliance with the rules, protections embedded in SCR 20:1.10. If applied to public defenders, SCR 20:1.11 would permit representation in cases not permissible under SCR 20:1.10

[37] The most obvious example of direct adversity would be two co-defendants charged with the same crime, with each blaming the other. However, adversity also includes situations in which a client is an adverse witness. *See Wis. Formal Op*. EF-20-02 (2020).

[38] *See* Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L. J. 1, 11-18 (1983) (the author's survey revealed that many public defenders sought information in former client files who are now adverse witnesses in order to effectively cross examine the witness on behalf of the current client).

or current public defender policies[39], and would almost certainly generate challenges to convictions based on a denial of effective representation.[40]

4. The proposed rule changes provide a clear and workable solution to the current ambiguity.

The ambiguity in the current rules can be resolved with two relatively minor rule changes.

The first is creation of a definition of "government officers [or] employees" to clarify to whom SCR 20:1.11 applies:

> . . . (er) A "government lawyer" includes a "prosecutor" as defined by SCR 20:1.0(j) and any lawyer who represents a governmental actor or entity and is employed by a governmental entity. It does not include an attorney employed as a public defender or a private attorney contracted to represent a governmental agency.

The following proposed comment would provide additional explanation:

> Wisconsin Committee Comment
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> [1] This subsection is new. Presently, Chapter 20 treats conflicts of interest differently for government and non-government lawyers but does not clearly define who is a government lawyer. New subsection SCR 20:1.0(er) defines government lawyer but excludes two groups – public defenders and private attorneys contracted to represent a government agency. Conflicts of interest for government lawyers are addressed by SCR 20:1.11 whereas conflicts of interest for private lawyers and public defenders are regulated by SCR 20:1.10.
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> [2] Excluding attorneys employed by the public defender or private attorneys contracted to represent a governmental agency from the definition of "government lawyer" is limited to the Rules of Professional Conduct for Attorneys under SCR Chapter 20 and should not be construed to apply to any definition of "government lawyer" outside of this chapter.

Second, the petitioners propose a new subsection in SCR 20:1.10(a) that would apply only to public defenders and allow screening if:

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[39] *See* Wis. Adm. Code PD §2.05; SPD Operations Manual Case Appointments and Client Representation: Section VII. Conflicts of Interest.

[40] Although the presence of an ethics violation alone does not establish a violation of a defendant's constitutional rights, Chapter 20, Scope ¶20, the existence of certain conflicts of interest may deprive an accused of her constitutional right to the effective assistance of counsel. *Wood v. Georgia*, 450 U.S. 261, 271 (1981), *see also Mickens v.* Taylor, 535 U.S. 162 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

(3) The prohibition arises under SCR 20:1.9 and the conflict arises with the public defender agency, and
(i) the personally disqualified lawyer is timely screened from any participation in the matter; and
(ii) written notice is promptly given to any affected former client to enable the affected client to ascertain compliance with the provisions of this rule.

The proposed comment explains how the rule would apply:[41]

> New subsection (3) addresses former client conflicts with public defenders. The rule applies to both state public defenders and federal defenders licensed in Wisconsin. For purposes of this rule, reasonable efforts to notify an affected former client should be deemed in compliance with the requirements of SCR 20:1.10(a)(2)(iii) and (a)(3)(ii). Note also the new definition of "government officers and employees" in SCR 20:1.0 (er) makes clear that public defender conflicts are controlled by SCR 20:1.10(a)(3) rather than SCR 20:1.11(f).

Petitioners believe that existing SCR 20:1.10(a)(2) is not a good fit for public defender conflicts given its limited application – cases in which the lawyer performed only "minor and isolated services" – and its reference to apportionment of fees, which has no relevance to public defender work. Retaining the former limitation would complicate rather than simplify the rules for public defenders, requiring a determination of what constitutes "minor and isolated services". As public defenders are not paid by their clients, the fee sharing prohibition is irrelevant. Thus, a new subsection was viewed as the best way to clarify the current rules.

CONCLUSION

For the reasons stated, petitioners respectfully request that this Court amend SCRs 20:1.0 and 20:1.10 as requested. It should be noted that this petition and the proposed changes have been shared with several interested entities.[42]

[41] Note the proposed amendment would exclude private attorneys who perform part-time contract work for governmental entities from the definition of "government lawyer". Like public defenders, the policies supporting different treatment of government lawyers are not at play with private attorneys who represent a mix of private and public clients.

[42] Drafts of this petition and proposed changes have been shared with the Federal Defender Office in Wisconsin, the Wisconsin District Attorney's Association, the Wisconsin Department of Justice, and the Wisconsin State Bar's Government Lawyer's Division and Administrative and Local Government Law Section. All have either agreed or take no position on the proposed changes.