

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

PETITION

No. \_\_\_\_\_

---

The State Bar Standing Committee on Professional Ethics (hereinafter the Committee) and the State Public Defender, through Ben Kempinen, Chair of the Committee and State Public Defender Kelli Sue Thompson, respectfully petition this court to modify Supreme Court Rules 20:1.10 and 20:1.0 to clarify that conflict of interests involving public defenders<sup>1</sup> should be controlled by SCR 20:1.10 rather than SCR 20:1.11, and in support of this petition states as follows:

1. Among the responsibilities of the Committee is “[making] recommendations for appropriate amendments [to the Rules of Professional Conduct for Lawyers. . .]”, State Bar Bylaw Article IV, section 3;
2. Co-petitioner Kelli Thompson, as the State Public Defender, is responsible for the operation and management of the State Public Defender’s Office and as such has an interest in rules that provide clear guidance for attorneys in her agency;
3. Wisconsin ethics rules do not make clear if public defenders are “government officers and employees” such that conflicts of interest within their agency are controlled by SCR 20:1.11 or

---

<sup>1</sup> It is assumed that the proposed rule change would apply as well to 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.

whether the nature of their practice supports application of SCR 20:1.10, the rule that applies to private attorneys who generally represent individual rather than government clients;

4. This ambiguity is problematic for state public defenders, whose written policies refer to Chapter 20 for guidance in resolving conflicts<sup>2</sup>;

5. Resolution of this ambiguity is important because there are significant differences in the treatment of conflicts for government lawyers<sup>3</sup>, including:

(a) government lawyer conflicts are not imputed to other lawyers in the “firm” lessening both loyalty and confidentiality protections<sup>4</sup>;

(b) screening is permitted for both concurrent and former client conflicts of interest of government lawyers even in the face of direct adversity or material limitations between clients, an option not permitted for any other class of Wisconsin lawyer, 20:1.11(f); cf. 20:1.10(a);

(c) screening for government lawyers is more broadly available and less protective of client interests than in the context of private practice<sup>5</sup>;

(d) former client conflicts of government lawyers are triggered by “personal and substantial participation” in a matter, whether as an attorney or in another role, and whether or not the attorney’s posture was adverse, whereas former client conflicts of private lawyers are

---

<sup>2</sup> See Wis. Adm. Code PD §2.05; SPD Operations Manual Case Appointments and Client Representation: Section VII. Conflicts of Interest.

<sup>3</sup> Use of the term “government lawyer” in this petition refers to government officers and employees who are also licensed attorneys. See SCR 20:1.11(a).

<sup>4</sup> Lawyers working together in some form of government entity are considered a “firm” under the Wisconsin rules. SCR 20:1.0(d). The committee believes that the State Public Defender and the Federal Defender are “firms” within the meaning of these rules. See also Wis. Formal Op. E-90-6.

<sup>5</sup> Screening for private attorneys is only permitted if the conflicted lawyer “performed no more than minor and isolated services in the disqualifying representation”, written notice is given to the affected former client, and the lawyer does not share in any fee. SCR 20:1.10(a)(2). These limitations do not apply to screening for government lawyers. SCR 20:1.11(f).

triggered by representation adverse to the former client in the “same” or a “substantially related” matter. SCR 20:1.9(a), 20:1.11(a);

(e) The definition of and protective responsibilities for confidential information differ depending on whether the lawyer acted in a private or governmental role, SCR 20:1.6; 20:1.9(c); 20:1.11(c);

6. These differences reflect distinct interests and policy concerns regarding government lawyers – including city attorneys, corporation counsel, attorneys general, district attorneys, and attorneys for government agencies including:

(a) the nature of the client – government lawyers may represent the government, an agency within the government, or individual government actors and the allocation of authority between lawyer and client often differs from that of the traditional lawyer-client paradigm<sup>6</sup>;

(b) the interest in encouraging government service by minimizing future restraints on attorney migration to the private sector<sup>7</sup>;

(c) protection against the misuse of confidential government information<sup>8</sup>;

(d) discouraging the use of governmental authority or information for personal benefit<sup>9</sup>;

7. These concerns are largely absent from public defender work which is limited to the representation of indigent persons charged with crimes;

8. Because SCR 20:1.11 was drafted with the unique practice characteristics of government lawyer in mind the ambiguity has only been problematic for public defenders;

---

<sup>6</sup> See SCR Scope Cmt. ¶18; 20:1.13(a), Cmt. ¶9.

<sup>7</sup> See A.B.A. Formal Opinion 342 at 4-5; 91 *Law. Man. Prof. Conduct* 4103-4104 (2020).

<sup>8</sup> See SCR 20:1.11(c).

<sup>9</sup> See SCR 20:1.11, Cmt ¶¶ 2-4; 8-10; A.B.A. Formal Opinion 342 at 4.

9. Given the nature of public defender work, most states that have addressed this issue have chosen to treat public defender conflicts under Rule 1.10 rather than Rule 1.11<sup>10</sup>, the approach petitioners believe is most appropriate for Wisconsin public defenders;

10. Moreover, two features of Wisconsin's treatment of government conflicts – not imputing conflicts to others in the firm and allowing concurrent conflict representation with screening create a risk that ethics compliant representation could be incompatible with a criminal defendant's constitutional right to effective representation<sup>11</sup> as well as being inconsistent with current practices of the Wisconsin State Public Defender<sup>12</sup>;

11. These concerns can be resolved by modifying SCR 10:1.0 to exclude public defenders from the class of lawyers who are “government officers [or] employees” under SCR 20:1.11(a)<sup>13</sup> and modifying SCR 20:1.10 to include a subsection specifically designed for public defender situations (see attached Exhibits A, B);

Wherefore, for the forgoing reasons the petitioner respectfully asks this Court to modify Chapter 20 as outlined in Appendices A and B to this petition.

Dated: May 24, 2021

Respectfully submitted,

---

<sup>10</sup> At least eighteen states have concluded public defender conflicts are best treated by application of some variant of A.B.A. Rule 1.10 given the nature of their practice. Seven other states have chosen to treat public defenders as government lawyers under versions of A.B.A. Rule 1.11. *See* n. 6, Memorandum in Support of Petition.

<sup>11</sup> 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).

<sup>12</sup> *Infra*, n. 2.

<sup>13</sup> Note the proposed amendment would also exclude private attorneys who perform part-time contract work for governmental entities from the definition of “government lawyer”. Like public defenders, the policies supporting

/s/ Ben Kempinen

Ben Kempinen

Chair

State Bar Standing Committee on Professional Ethics

572 Gately Terrace

Madison WI 53711

(608) 233-2077

kempinen@wisc.edu

No. 1016597

/s/ Kelli Sue Thompson

Kelli Sue Thompson

State Public Defender

P.O. Box 7923

Madison WI 53707-7923

(608) 266-5480

No. 1025437

---

different treatment of government lawyers are not at play with private attorneys who represent a mix of private and public clients. See Appendix B.

## APPENDIX A

NOTE: In this proposal added language is in bold font.

SCR 20:1.10 Imputed disqualification: general rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 unless:

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition arises under SCR 20:1.9, and

(i) the personally disqualified lawyer performed no more than minor and isolated services in the disqualifying representation and did so only at a firm with which the lawyer is no longer associated;

(ii) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written notice is promptly given to any affected former client to enable the affected client to ascertain compliance with the provisions of this rule.

**(3) The prohibition arises under SCR 20:1.9 and the conflict arises within 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.**

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by SCR 20:1.6 and SCR 20:1.9 (c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in SCR 20:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by SCR 20:1.11.

### Wisconsin Committee Comment

**This proposal would create new subsection (3) to address former client conflicts with public defenders. Note also that the new definition of “government lawyer” in SCR 20:1.0 (er) makes clear that imputation of public defender conflicts are controlled by SCR 20:1.10 rather than SCR 20:1.11. The committee views the State Public Defender and Federal Defender as law firms for purposes of applying this rule.**

## APPENDIX B

NOTE: In this proposal Added language is in bold font.

### **SCR 20:1.0 Terminology**

**... (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.**

#### **Wisconsin Committee Comment**

**[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.**

**[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.**