

# SUPREME COURT OF WISCONSIN

No. 15-04

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In the matter of the Petition to Modify  
SCR 20:1.9(c)

**FILED**

**JUL 21, 2016**

Diane M. Fremgen  
Clerk of Supreme Court  
Madison, WI

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On September 9, 2015, Attorneys Michael D. Cicchini and Terry W. Rose filed this rule petition asking the court to amend Supreme Court Rule (SCR) 20:1.9(c), which addresses a lawyer's duties to former clients, specifically, prohibitions relating to a lawyer using and/or revealing information relating to a representation of a former client. In short, the petitioners assert that this rule could be construed in a manner that would render an absurd result and that clarification is needed.

The court discussed this petition at open rules conference on November 16, 2015 and voted to schedule a public hearing. On December 30, 2015, a letter was sent to interested persons, seeking input. Comments were received from the Office of Lawyer Regulation (OLR) on January 15, 2016, expressing concern with the proposed amendment, and from Attorney Robert Henak individually and on behalf of the Wisconsin Association of Criminal Defense Lawyers on January 21, 2016, expressing support for the proposal. The petitioners filed

a response to the OLR's comments on January 25, 2016. The State Bar Standing Committee on Professional Ethics filed a statement dated February 9, 2016, Attorney Edward A. Hannan filed a letter dated February 12, 2016, and Attorney Dean Dietrich filed a letter dated February 16, 2016, all opposing the petition.

The court conducted a public hearing on the matter on February 23, 2016. Attorney Michael D. Cicchini presented the petition to the court. Attorney Robert Henak and Attorney Ellen Henak testified in support of the petition. Attorney Robert Henak offered a slightly different proposal. State Bar of Wisconsin Professional Ethics Counsel Timothy J. Pierce testified in opposition to the petition. The court asked Attorney Robert Henak to forward his proposal for clarifying the scope of SCR 20:1.9(c) to the State Bar for consideration. The court did not reach the matter for discussion that day.

On February 23, 2016, Attorney Robert Henak submitted a written proposal to the State Bar (the Henak Proposal) and provided a copy to the court for posting on the court rules website. Attorney Cicchini filed a response dated February 23, 2016, endorsing Attorney Henak's proposal. On March 25, 2016, Attorney Dean Dietrich, on behalf of the State Bar Standing Committee on Professional Ethics, filed a letter opposing the Henak Proposal and setting forth the reasons for the opposition.

On May 6, 2016, Attorney Robert Henak filed a letter defending his proposal and challenging the State Bar's interpretation of SCR 20:1.9(c). On May 9, 2016, Attorney Dean Dietrich, on behalf of the State Bar Standing Committee on Professional Ethics filed a letter

proposing, as an alternative, two new comments intended to address the concerns raised by the petitioners and Attorney Henak.

At the open rules conference on May 12, 2016, the court discussed the matter at some length. The court acknowledged the challenge of defining what is "generally known," a phrase that appears in SCR 20:1.9(c)(1). The court opted to retain the language of the rule, as drafted, noting that it is based on the ABA Model Rule. The court considered whether additional comments are warranted, for example, to clarify that a lawyer who represents a client in a matter that has resulted in a court decision may discuss that decision with another lawyer or in a continuing legal education presentation, so long as the lawyer does not disclose any other information relating to the representation of that client except as permitted by this Rule. However, the majority of the court was not persuaded that changing the rule or adding to the existing comments was warranted. Following the court's discussion, the court voted 4-3 to deny the petition. Justice Shirley S. Abrahamson, Justice Ann Walsh Bradley, and Justice David T. Prosser opposed the motion to deny the petition. Therefore,

IT IS ORDERED that rule petition 15-04, In the Matter of the Petition to Modify SCR 20:1.9(c), is denied.

Dated at Madison, Wisconsin, this 21st day of July, 2016.

BY THE COURT:

Diane M. Fremgen  
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). I would not deny this petition. Testimony at the hearing and written communications to the court demonstrate that the petition addresses significant concerns about the existing version of SCR 20:1.9(c).

¶2 I would not deny the petition for two reasons:

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¶3 First, the existing version of SCR 20:1.9(c) obviously needs work. The State Bar is apparently considering, if the court denies this petition, issuing an ethics opinion on this matter to provide additional guidance to its members. If guidance is needed, why isn't the court providing it? This leads me to the second reason.

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¶4 Second, I would add this petition, along with Rule Petition 15-03, to the work of a committee to be appointed by the court to review the Rules of Professional Conduct for Attorneys. I would not approach changes in the Rules piecemeal unless exigent circumstances exist.

¶5 I proposed such a committee in Rule Petition 15-01.<sup>1</sup> The committee I proposed would also have reviewed the organization, operation, processes, and procedures of the lawyer discipline system. The court dismissed Petition 15-01 as part

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<sup>1</sup> Rule Petition 15-01 and the court's order dismissing it can be found at <https://www.wicourts.gov/scrules/supreme.htm>. Rule Petition 15-01 was dismissed on December 21, 2015.

of an inventive ruse, namely on the grounds that it was not a proper subject for a rule petition.

¶6 As was noted at the court's November 16, 2015 open conference and in the order dismissing Rule Petition 15-01, the dismissal of Rule Petition 15-01 does not necessarily end the prospects for the appointment of a committee.

¶7 Unfortunately, however, any decisions about whether a committee will be established and the composition, mission, and functioning of any such committee will be made behind closed doors.

¶8 The Rules of Professional Conduct for Attorneys and lawyer discipline are of great importance to the bench, the bar, and the public. Discussions about whether (or how) to change the Rules of Professional Conduct for Attorneys, in my opinion, should take place in public.

¶9 I write separately here not only to express my views about Rule Petition 15-04, but also to repeat my commitment to keep the bench, the bar, and the public informed as best as I can about what progress (or lack thereof) is made in the creation of such a committee. As of this date, the public has not been advised about progress, if any.

¶10 For the reasons set forth, I write separately.

¶11 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissent.

