

SUPPORTING MEMORANDUM

In the Matter of Petition  
For Amendments to Rules of  
Professional Conduct for  
Attorneys

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TO: Chief Justice Patience D. Roggensack  
Justice Shirley S. Abrahamson  
Justice Ann Walsh Bradley  
Justice N. Patrick Crooks  
Justice David T. Prosser, Jr.  
Justice Annette Kingsland Ziegler  
Justice Michael J. Gableman

Filed with the Clerk of Court Diane Fremgen  
Clerk of Supreme Court  
110 E. Main Street Suite 215  
Madison, WI 53703

INTRODUCTION

The State Bar of Wisconsin and the State Bar's Standing Committee on Professional Ethics provide the following memorandum in support of the petition to amend Wisconsin's Rules of Professional Conduct for Attorneys, Supreme Court Rules ("SCR") Chapter 20. The petition reflects the recent American Bar Association ("ABA") Ethics 20/20 amendments to the Model Rules of Professional Conduct and proposes certain other amendments that the petitioners believe would provide enhanced guidance for Wisconsin lawyers.

The Ethics 20/20 amendments to the Model Rules were adopted to modernize the model rules to reflect the technological and marketing realities of contemporary practice. Adopting the recent revisions to the model rules is important to maintain the consistency of Wisconsin's rules with current professional responsibility law and to assist Wisconsin lawyers with guidance that takes account of the realities of contemporary legal practice. The proposed changes that are not part of the Ethics 20/20 amendments are designed to meet the same goals.

#### I. BACKGROUND

Wisconsin's Rules of Professional Conduct for Attorneys are based upon the ABA Model Rules. The ABA periodically reviews and amends the model rules.<sup>1</sup> Article 4, Section 3 of the State Bar By-Laws, states that the State Bar's Standing Committee on Professional Ethics (the "Committee") "shall consider the "Rules of Professional Conduct for Attorneys" as adopted by the Wisconsin Supreme Court and the observance thereof, and shall make

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<sup>1</sup> The last major revisions of the ABA Model Rules was in 2002 in response to the report of the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000). The Wisconsin Supreme Court subsequently created the Wisconsin Ethics 2000 Commission to review Wisconsin's Rules of Professional Conduct for Attorneys in light of the changes to the Model Rules. The Wisconsin Ethics 2000 Committee filed a petition in July 2004. After extensive review and several public hearings, the Court issued Rules Order No. 04-07, adopting significant changes to Wisconsin's Rules of Professional Conduct for Attorneys. This was the last major revision of SCR Chapter 20.

recommendations for appropriate amendments thereto." In observance of that charge, the Committee monitors proposed and adopted changes to the ABA Model Rules.

**A. ABA ETHICS 20/20 COMMISSION**

In August 2012, the ABA House of Delegates voted to adopt certain changes to the model rules as proposed by the ABA's Commission on Ethics 20/20 (the "Commission"), which described its purpose and guiding principles in the Introduction and Overview filed with the ABA House of Delegates as follows:

Technology and globalization have transformed the practice of law in ways the profession could not anticipate in 2002. Since then, communications and commerce have become increasingly globalized and technology-based. In August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to tackle the ethical and regulatory challenges and opportunities arising from these 21st century realities. She charged the Commission with conducting a plenary assessment of the ABA Model Rules of Professional Conduct and related ABA policies, and directed it to follow these principles: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

(footnotes omitted)

Members of the ABA Commission on Ethics 20/20 included Attorney Jamie S. Gorelick (Co-Chair), Attorney Michael Traynor (Co-Chair), Professor Stephen Gillers, Professor Attorney Jeffrey Golden, Attorney William C. Hubbard, Attorney George W. Jones, Jr, Attorney Linda A. Klein, Hon. Elizabeth B. Lacy, Attorney Carolyn B. Lamm, Attorney Judith A. Miller, Attorney Hon. Kathryn A. Oberly Attorney Roberta Cooper Ramo, Attorney Herman J. Russomanno, Professor Theodore J. Schneyer, Professor Carole B. Silver, Attorney Frederic S. Ury, Hon. Gerald W. VandeWalle, Professor Andrew M. Perlman (Chief Reporter), Professor Paul D. Paton (Reporter), Professor Anthony Sebok (Reporter), Professor W. Bradley Wendel (Reporter) and Attorney Ellyn S. Rosen (Commission Counsel).

The Commission met twenty-six times and conducted extensive outreach, including thirteen public hearings and numerous speaking and continuing legal education presentations. The Commission's efforts culminated in the presentation of reports and resolutions to the ABA's House of Delegates at the ABA meetings in August 2012 and February 2013.<sup>2</sup>

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<sup>2</sup> Further information about the work of the Commission is available at Commission's web page: [http://www.americanbar.org/groups/professional\\_responsibility/ab\\_a\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/ab_a_commission_on_ethics_20_20.html)

After the changes as proposed by the Commission were adopted and incorporated into the model rules, states which base their disciplinary rules on the model rules began studying the changes. The ABA Center for Professional Responsibility Policy Implementation Committee reports that, as of June 3, 2015, eighteen states have adopted the August 2012 amendments to the model rules in whole or in part and another seventeen states are studying the amendments. The states that have adopted the amendments in whole or part include Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Nevada, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, West Virginia and Wyoming.<sup>3</sup>

#### **B. REVIEW BY THE COMMITTEE**

The Committee monitored the work of the Commission from its formation in 2009 through the conclusion of its work in 2013 and some members of the Committee were able to attend public hearings held by the Commission. After the Commission concluded its work, the Committee began evaluating whether to recommend that the court adopt the ABA revisions in whole or in part.

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<sup>3</sup> State by State Adoption of Selected Ethics 20/20 Commission Policies  
[http://www.americanbar.org/groups/professional\\_responsibility/policy.html](http://www.americanbar.org/groups/professional_responsibility/policy.html).

The Committee considered the changes adopted by the ABA over the course of several meeting from late 2012 through 2014. Members of the Committee during this period included Attorney Dean Dietrich (Chair - Wausau), Attorney James Wickhem (Vice Chair - Janesville), Attorney Michael Apfeld (Milwaukee), Attorney Lisa Baiocchi (Milwaukee), Attorney Edward Hannan (Waukesha), Attorney Megan McDermott (Madison), Attorney William McKinley (Appleton), Attorney Kim Peterson (Brookfield), Attorney Margaret Raymond (Madison), Attorney Joseph Russell (Milwaukee), Attorney Deborah Smith (Madison), Attorney Jay Urban (Milwaukee), Attorney Susan Walker (Afghanistan), Attorney Warren Wood (New Richmond), Attorney Michael Cohen (Milwaukee), Attorney Timothy Pierce (Staff Liaison - Madison) and Attorney Aviva Kaiser (Staff Liaison - Madison).

The ABA adopted amendments to the Model Rules in August 2012 and February 2013. The August 2012 amendments focused on the impact of technology on the practice of law and included amendments to the rules governing competence, confidentiality and advertising, among others. The February 2013 amendments focused on the globalization of legal services and concerned model rules governing pro hac vice admission, in-house counsel registration, foreign licensed lawyers and choice of law. The Wisconsin supreme court however, considered and addressed many of the same issues as the February 2013 amendments in 2008 in response to Rules Petition

06-06. The Committee did not believe that it was necessary to revisit the recently adopted Wisconsin rules and therefore focused its review on the August 2012 amendments.

After conducting its review, the Committee concluded there are several reasons to recommend that the court adopt, in large part, the August 2012 Ethics 20/20 amendments.

First, in the experience of the Committee, the issues addressed by the Ethics 20/20 Commission are issues faced currently by Wisconsin lawyers. Technology has greatly impacted the ways lawyers practice law. For example, lawyers who exchange electronic documents must be mindful of the metadata contained in such documents, and the resulting issues of competence and confidentiality. Lawyers also now often use "cloud" based information management systems to store information relating to their clients, but such information is contained on servers which the lawyer does not own or control, thereby implicating the lawyer's duty of confidentiality. Technology has also affected the way clients find lawyers. Lawyers frequently have a social media presence, and there has also been a proliferation of internet based "lead generation" services which channel prospective clients to participating lawyers. Wisconsin's current rules do not neatly address such issues.<sup>4</sup> The Ethics 20/20 amendments provide better

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<sup>4</sup> Wisconsin Ethics Opinion EF-12-01 discusses metadata and Wisconsin Ethics Opinion EF-15-01 discusses lawyers'

guidance on these and other evolving issues than Wisconsin's current rules, and as the practice of law and regulation of lawyers changes rapidly, it is important to keep pace.

Second, the Committee believes that the Ethics 20/20 amendments, for the most part, do not greatly alter the substance of the existing rules, but rather clarify obligations that already exists. For example, the proposed amendments to SCR 20:1.18 (Duties to prospective client) do not create new duties owed to prospective clients, but rather provide a clearer definition of a prospective client. Many of the proposed amendments are also to the ABA Comments, which assist lawyers in interpreting the rules. Therefore, the Ethics 20/20 amendments will not, for the most part, substantially alter the existing obligations of Wisconsin lawyers. The proposed amendments will, however, provide enhanced guidance for lawyers in navigating the changing landscape of the practice of law.

There are further sound reasons to follow the ABA and adopt the Ethics 20/20 amendments in Wisconsin. First, the ABA Ethics 20/20 Commission performed careful and high-quality work in developing its proposals, with extensive involvement by a wide array of experts both within and outside the legal community.

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responsibilities when using cloud based information management or storage systems. The committee took note of the Ethics 20/20 changes in EF-15-01.

Second, it is important that Wisconsin follow, absent compelling reasons to the contrary, the current model rules. The overwhelming majority of states base their disciplinary rules on the model rules<sup>5</sup>, and the model rule formulation is enriched by interpretive guidance provided by courts and commentators; this benefit is reduced when Wisconsin's rules deviate from the model rules. Third, many legal matters have multi-state dimensions so that consistency among the states is desirable, at least when important policy concerns are not implicated.

In the course of its meetings, the Committee also considered certain other issues relating to Wisconsin's current rules that the committee believed created problems of interpretation and implementation for Wisconsin lawyers in light of changes in the practice of law. For example, certain existing Wisconsin rules that differ from, or do not exist in the model rules (SCR 20:1.8, SCR 20:5.7) conflict with other rules. The Committee also believed there were reasons to deviate from the Ethics 20/20 changes to reflect the way law is currently practiced [proposed SCR 20:1.6(c)(6)] and the current state of evidentiary law [proposed SCR 20:4.4(c)].

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<sup>5</sup> California is currently the only state that does not base its disciplinary rules on the model rules, and California is currently evaluating its disciplinary rules. Information about that review is available at

<http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx>

After consideration and debate, the committee voted to recommend the following:

1. That the supreme court adopt, in large part, the Ethics 20/20 amendments to the model rules;
2. That the supreme court adopt amendments to the language of three current rules (SCR 20:1.6, SCR 20:4.4, SCR 20:5.7), adopt changes to the language of the Wisconsin comment of one current rule (SCR 20:1.8) and adopt one additional ABA Model Rule that was not part of the Ethics 20/20 process (ABA Model Rule 5.7).<sup>6</sup>

## II. HIGHLIGHTS OF PROPOSED AMENDMENTS

The Committee proposes amendments to the language of certain rules, Wisconsin Committee comments and ABA comments. The court has not adopted the comments, but has ordered that they be published so they may be consulted as guidance in interpreting and applying the rules.<sup>7</sup> A redlined version of the proposed amendments, with more extensive explanation of the changes is attached to the petition as Appendix A. The proposed amendments to the rules and comments are summarized as follows.

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<sup>6</sup> In advance of presenting these proposals to the State Bar's board of governors, committee staff liaison also met with Keith Sellen, the director of the office of lawyer regulation to review and discuss the committee's proposals and provided a copy of the proposals which the director presented to the board of administrative oversight in March 2015.

<sup>7</sup> Preamble, SCR Chapter 20, Wisconsin Comment.

A. PROPOSED CHANGES FROM ETHICS 20/20

SCR 20:1.0 Terminology: The petition proposes adding language to ABA comment [9], which provides guidance on screening procedures. The proposed addition would include segregation of electronic information as a normal part of screening procedures. This proposed change to the ABA comment acknowledges the fact that much of the information that formerly constituted a client file is now stored in electronic form, and this electronic information should be normally be subject to screening procedures when such procedures are implemented.

SCR 20:1.1 Competence: The petition proposes adding new ABA comments [6] and [7] discussing factors lawyers should consider to ensure that outsourced legal and other services are performed competently. This change will assist lawyers in ensuring that outsourced services are performed competently and clients are thereby protected. The petition proposes adding language to renumbered ABA comment [8] (currently [6]) acknowledging that knowledge of benefits and risks of technology used in a lawyer's practice is now a necessary aspect of competent representation. This proposed change reflects the fact the technology has changed the way lawyers provide legal services to clients (e.g. e-filing, email and "cloud" based practice management systems). In order to

competently provide those services, lawyers must understand the implications of technology used in modern law practice.

**SCR 20:1.4 Communication:** The petition proposes replacing the reference to "telephone calls" in ABA comment [4] with "communications." This proposed change to the comment reflects that much client communication now occurs in forms other than telephone calls, such as email.

**SCR 20:1.6 Confidentiality:** The petition proposes creating a new (d) of the rule requiring that lawyers must make reasonable efforts to safeguard information relating to the representation of clients. This proposed change provides better guidance by moving the language regarding the duty to make reasonable efforts to safeguard client information from the current ABA comments [16] and [17] to the black letter rule. The petition also proposes adding language to renumbered ABA comments [18] and [19] discussing factors to consider in assessing what such reasonable efforts may be. These proposed changes to the letter of the rule and the comment reflect the fact that protected client information is increasingly held in electronic form and will assist lawyers in assessing what steps will adequately protect such information. The list of factors provided by proposed renumbered ABA comment [18] is particularly important to lawyers in assessing the technology used to manage electronically stored client information and is consistent with Wisconsin Ethics Opinion EF-15-01.

**SCR 20:1.17 Sale of a Law Practice:** The petition proposes adding language to ABA comment [7] referencing the rule pertaining to the limited permissive disclosure of information relating to the representation of clients for the purpose of detecting and resolving conflicts. This proposed change to the language of the comment is consistent with the proposed creation of SCR 20:1.6(c)(7) (see *infra* at page 16) and will provide enhanced guidance to lawyers in connection with the sale of law practices.

**SCR 20:1.18 Duties to Prospective Clients:** The petition proposes amending (a) and (b) of rule to clarify the definition of prospective client and the duties owed to prospective clients. The petition also proposes adding language to ABA comment [2] to further clarify the definition of a prospective client. These proposed changes will assist lawyers in determining who qualifies as a prospective client. This proposed change is also consistent with Wisconsin Ethics Opinion EF-10-03.

**SCR 20:4.4 Respect for Rights of 3rd Persons:** The petition proposes amending (b) of the rule to include inadvertently sent electronic information (e.g. metadata<sup>8</sup>) as also requiring prompt

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<sup>8</sup> Wisconsin Ethics Opinion EF-12-01 defines metadata and discusses its significance as follows: "Metadata is embedded information contained in electronic documents. This information describes the document's history, tracking and management. By searching (i.e. "mining") for this data, it may be possible for a user to identify changes that were made to the document during its preparation and

notification of sender upon receipt. The petition proposes adding language to ABA comments [2] and [3] discussing change to (b). This proposed change will clarify the obligations of lawyers who receive inadvertently sent electronic information. This proposed change is consistent with Wisconsin Ethics Opinion EF-12-01.

**SCR 20:5.3 Responsibilities Regarding Nonlawyer Assistance:** The petition proposes adding language to ABA comments [3] and [4] to clarify lawyers' obligation of supervision with respect to outsourced services used in connection with the representation of clients. These proposed changes to the comment will provide enhanced guidance to lawyers when employing nonlawyers to assist in the representation of clients. These proposed amendments are consistent with Wisconsin Ethics Opinion EF-15-01.

**SCR 20:5.5 Unauthorized Practice of Law:** The petition proposes amending (d) of the rule to clarify that lawyers who are not admitted in Wisconsin but who practice for the federal government, or exclusively and permissibly practice federal law, are not prohibited from establishing a systematic and continuous presence in Wisconsin. This proposed change does not differ substantively from the guidance provided by current ABA comments [15]-[18] and will provide enhanced guidance to Wisconsin lawyers.

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revision, comments made by the individuals that prepared or reviewed the document, and other information embedded within the document."

**SCR 20:7.2 Advertising:** The petition proposes adding language to comment [5] to clarify what constitutes a "recommendation" of a lawyer's services and to provide criteria for determining whether a lawyer may ethically use specific internet based lead generation services.<sup>9</sup> This proposed change will provide enhanced guidance to Wisconsin lawyers in determining which internet based advertising services are appropriate.

**SCR 20:7.3 Solicitation of Clients:** The petition proposes adding a newly created ABA comment [1] clarifying what constitutes a "solicitation" and what activities are simply advertising, and thus governed by SCR 20:7.2 rather than SCR 20:7.3. This proposed change will provide enhanced guidance to Wisconsin lawyers in determining what specific activities are governed by SCR 20:7.3 because the current rule and comments do not clearly define what constitutes a "solicitation." The petition also proposes adding language to renumbered ABA comment [3] clarifying that email or other electronic communications do not constitute prohibited real-

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<sup>9</sup> An internet based lead generator is typically a for-profit business that is not a law firm and that maintains a website that provides information on legal subjects and advertises the services of lawyers who practice in a particular area of law (such as bankruptcy). Consumers are typically able to connect with lawyers practicing in that area by calling a toll-free phone number or submitting an online form. The information provided by the interested consumer is then provided to a lawyer who has paid to be listed with the lead generator as the lawyer in that subject matter for the ZIP code in which the consumer is located.

time communication. This proposed change will clarify lawyers' obligations under SCR 20:7.3(a).

B. PROPOSED CHANGES THAT WERE NOT PART OF, OR DIFFER FROM, ABA ETHICS 20/20 CHANGES.

SCR 20:1.6 Confidentiality: ABA Ethics 20/20 proposed an amendment to model rule 1.6 to allow lawyers to make limited disclosures to detect and resolve conflicts under certain circumstances. The Committee recommends a different change. The Committee recommends the court create (c)(6) of the rule to permit disclosure of limited information about the identities of clients and matters to detect and resolve conflicts without limitation as to circumstance. The corresponding ABA Ethics 20/20 provision is limited to circumstances in which a lawyer is changing employment or a firm is changing composition. To illustrate, if a lawyer undertakes the representation of a new client and detects a former client conflict, the lawyer may wish to disclose limited information about the former client to the new client (and vice versa) to seek a waiver of the conflict. The ABA rule would permit such a disclosure only if the conflict arose in the context of the lawyer changing employment or the lawyer's firm was changing composition (e.g. merging with another firm). In all other circumstances, the ABA rule requires the informed consent of the current or former client before making such disclosures. The Committee's proposed

amendment would allow make such disclosures without the current and former client's informed consent to resolve the conflict if such disclosure would not compromise the lawyer-client privilege or otherwise prejudice the former client even if the conflict arose the normal course of the lawyer's practice.

The Committee is recommending that Wisconsin's rules permit such limited disclosures to detect and resolve conflicts in broader circumstances than permitted under the model rule for two reasons. First, the Committee believes that the risk to clients is minimal. The Committee is not aware of any case of a client being injured by or a Wisconsin lawyer being disciplined for making limited disclosures to resolve conflicts. Second, in the experience of the Committee, the proposed rule better reflects the way such conflicts are actually handled in current practice.

**SCR 20:1.8 Conflict of interest: Prohibited Transactions:** The petition proposes adding a Wisconsin committee comment alerting lawyers to language in ABA comment [8] that contradicts SCR 20:7.3(e) (which prohibits lawyers from, at their own instance, drafting documents that require the future services of the lawyer). This proposed change will alert Wisconsin lawyers to an important difference between the ABA comment and Wisconsin's rules that has caused confusion.

**SCR 20:4.4 Respect for Rights of 3rd Persons:** The petition proposes creating (c) of the rule to impose a duty to cease review

and abide by sender's instructions when a lawyer receives an inadvertently sent document that is subject to lawyer-client privilege or work product protection. There is no similar provision in the ABA model rule, but other states have adopted similar provisions in their disciplinary rules.<sup>10</sup> The proposed change also is consistent with the modern law of lawyer-client privilege. The Committee believes that adopting the proposed (c) will provide enhanced guidance and assist lawyers in appropriately handling potentially privileged materials.

**SCR 20:5.7 Limited Liability Legal Practice:** The petition proposes amending (a)(1) of the rule to clarify that lawyers who are otherwise authorized to practice in Wisconsin may practice in firms organized under SCR 20:5.7 (Limited Liability Legal Practice). Wisconsin's current rules permit, in some circumstances, a lawyer who is not admitted in Wisconsin to practice in Wisconsin, but the current SCR 20:5.7(a)(1) prohibits that lawyer from practicing in a limited liability legal practice. The petition also proposes amending (d) of the rule to clarify that out of state firms that wish to register under the rule must have a Wisconsin licensed lawyer who has an ownership share in the firm. These proposed changes will clarify the language of the rule, harmonize it with

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<sup>10</sup> See e.g. Tennessee Rule of Professional Conduct 4.4, Alabama Rule of Professional Conduct 4.4, Hawaii Rule of Professional Conduct 4.4 and Maine Rule of Professional Conduct 4.4.

SCR 20:5.5 (Unauthorized Practice) and provide enhanced guidance to Wisconsin lawyers.

**SCR 20:5.8 Responsibilities Regarding Law-Related Services:** The petition proposes creating SCR 20:5.8, which is identical to ABA model rule 5.7. The model rule provides a framework for determining when a lawyer providing law-related services should be bound by the Rules of Professional Conduct in the provision of such services. ABA model rule 5.7 was adopted by the ABA in 1992, but has not been part of Wisconsin's rules.<sup>11</sup> The Committee has noted, however, that as the legal landscape changes, members of the Committee regularly receive requests for guidance from Wisconsin lawyers seeking to provide law-related services to clients. Given the lack of a current Wisconsin rule, the Committee frequently relies upon the principles in ABA Model Rule 5.7 in providing guidance.

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<sup>11</sup> To the best of the Committee's knowledge, ABA model rule 5.7 was considered by the Wisconsin Ethics 2000 commission, but ultimately not recommended to the court. Staff liaison Tim Pierce contacted, Professor Michael McChrystal, who was the reporter for the Ethics 2000 commission and Attorneys Dean Dietrich and Keith Sellen who were members of the commission. None of them were able to recall the precise reason 5.7 was not recommended for adoption. A review of the petition and court order available on the court systems website at <http://wicourts.gov/scrules/0407.htm> did not reveal any further relevant information. It is the belief of the Committee that adopting ABA rule 5.7 now would not harm the interests of the public or lawyers, and to the contrary, would be beneficial to both.

In Wisconsin Ethics Opinion E-83-14, the Committee opined that lawyers who owned a business providing services to the trucking industry and operated the business out of their law office would be bound by the rules of professional conduct in the provision of those services. This position is consistent with ABA model rule 5.7. Thus, the guidance currently provided is consistent with the proposed rule. Adopting the proposed rule would assist Wisconsin lawyers by providing a clear framework for the ethical obligations of lawyers who provide law-related services to clients.

CONCLUSION

The State Bar of Wisconsin and the Committee urge the court to adopt the proposed amendments to Wisconsin's Rules of Professional Conduct for Attorneys, as set forth in the petition and appendix accompanying this memorandum. The proposed amendments will modernize Wisconsin's Rules, allow Wisconsin to keep pace with other jurisdictions and provide enhanced guidance to Wisconsin lawyers.

Dated June 29, 2015.

RESPECTFULLY SUBMITTED,

STATE BAR OF WISCONSIN



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