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VIA E-MAIL ONLY

Wisconsin Supreme Court
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RE: Rules Petition 15-04

Honorable Justices:

I urge the Court to deny Rules Petition 15-04 To Modify SCR 20:1.9(c) not only for the reasons asserted by the OLR Director and the State Bar Professional Ethics Committee, but also because the proposed modifications, if approved, will disavow client autonomy, undermine the essential fiduciary character of the lawyer-client relationship, and threaten public confidence in both the judiciary and the bar.

I have served as a member and Chairperson of OLR's District II (Milwaukee County) Investigative Committee, as a member and Chairperson of OLR's Preliminary Review Committee, and as a member of the State Bar Professional Ethics Committee. Also, I have participated as a speaker in many PinnaCLE and other seminars on attorney's professional responsibilities. My law practice for approximately forty (40) years (since July 1976) has emphasized civil trial and appellate litigation, including controversies involving attorney malpractice.

Rules Petition 15-04 requests the following revisions to SCR 20:1.9(c):

- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter do either of the following:
- (1) Use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known. *“Generally known” information includes information that is publicly available or has been disclosed in a public forum.*
 - (2) Reveal information relating to the representation except as these rules would permit or require with respect to a client. *Information that is “generally known” has already been revealed.*

If adopted, the proposed revisions would authorize an attorney to not only reveal but also to use any information relating to a former client's representation to the disadvantage of the former client, without notice to or the consent of the former client, and even over the former client's objection, if the information "is publicly available or has been disclosed in a public forum."

Lawyers are "special agents in service of clients."¹ As an agency relationship, the lawyer-client relationship is *fiduciary* as a matter of law.² *Thiery v. Bye*, 228 Wis. 2d 231, 241, 597 N.W.2d 449, 453-454 (1999) succinctly defines the relationship:

The relationship between an attorney and a client is fiduciary and confidential in character demanding a high degree of trust and confidence. Ott v. Hood, 152 Wis. 97, 104, 139 N.W. 762, 764 (1913). The attorney-client relationship is also one of agent to principal and as an agent, an attorney must act in conformity with his or her authority and is responsible to the principal if he or she violates that duty. *Id.*³ (emphasis added)

Loyalty is the "general fiduciary principal" governing all agency relationships.⁴ "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."⁵ More firmly stated, "[a]bsolute fidelity and loyalty to the interests of his principal is the first duty and the highest obligation of an agent."⁶

Further, the fiduciary duty of *confidence* is a subset of the overarching fiduciary duty of *loyalty*. See, *Thiery v. Bye*, 228 Wis. 2d 231, 241, 597 N.W.2d 449 (Ct. App. 1999): "As agent an attorney occupies a confidential relationship to his or her client... Principles of agency

¹ *Marten Transp. v. Hartford Specialty Co.*, 194 Wis. 2d 1, 13-14, 533 N.W.2d 452 (1995); also see, *Security Bank v. Klicker*, 142 Wis. 2d 295, 298, 418 N.W.2d 30 (Ct. App. 1987) ("In general, the relationship of attorney and client is one of agency based on contract...")

² *Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶ 41, 752 N.W. 2d 800; *Burkes v. Hales*, 165 Wis. 2d 585, 478 N.W.2d 37 (Ct. App. 1991); 1 Restatement (Third) Law Governing Agency § 1.01 (2006) at 17.

³ *Accord*, 1 Restatement (Third) Law Governing Lawyers § 16 cmt. b (2000) at 146: ("A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence and loyalty are therefore vital.")

⁴ 1 Restatement (Third) Law of Agency § 1.01 (2006) at 17.

⁵ 2 Restatement (Third) Law of Agency § 8.01 (2006) at 249; and see, *Harman v. LaCrosse Tribune*, 117 Wis. 2d 448, 454, 344 N.W.2d 536 (Ct. App. 1984) ("These rules and ethical considerations establish that an attorney has a duty of loyalty to his or her client -- i.e., a duty to act in the client's best interests during the course of the representation. Breach of this duty constitutes professional misconduct (citing former SCR 20.04) and may result in discipline.")

⁶ *Brockemuhl v. Jordan*, 270 Wis. 14, 18, 70 N.W.2d 26 (1955).

recognize an agent's duty to protect a principal's confidential information." The fundamental fiduciary duties of *loyalty* and *confidence* foster and protect the client/principal's autonomy, including the client/principal's control and right of control over the client/principal's property, which includes information relating to the representation.

A former client's express or implied authorization permitting the client's lawyer to publish information relating to the client's representation for a specified purpose, for example to present a claim or to defend a claim, is not wholesale authorization to publish, disclose or use the information for any other purpose. The proposed revisions substantially undermine, if not entirely subvert, the fiduciary character of the lawyer-client relationship precisely because they expressly *nullify* the former client's autonomous and continuing right of control over all information relating to the former client's representation: The revisions authorize a lawyer to use information relating to the former client's representation without notice to or the former client's consent, even if the use disadvantages the former client or the former client objects to such disclosure or use.

"The foundation of an attorney's relationship with clients and the legal system is trust."⁷ A lawyer's fiduciary duties to clients fosters and protects that essential trust in part by continuing after termination of the lawyer-client relationship. By nullifying fiduciary duties owed to a former client, the proposed revisions substantially undermine the trust essential to maintaining the integrity of the lawyer-client relationship and the effective functioning of the judicial system.

Petitioners contend that unless modified as proposed SCR 20:1.9(c) transgresses Petitioners' rights of free speech under the First Amendment, citing to *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013). First Amendment rights are not absolute, and may be waived consensually.⁸ The *Hunter* decision's rationale has been soundly criticized for its improper emphasis on the status of information – of public record – rather than the status of the proposed user of the information – a fiduciary owing consensual duties of loyalty, confidence and communication with respect to the information. See Jan L. Jacobowitz and Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in*

⁷ *In Re Horth*, 148 Wis. 2d 562, 563, 435 N.W.2d 732 (1989).

⁸ See *La. Crisis Assistance Ctr. v. Marzano-Lesnevich*, 827 F. Supp. 2d 668, 684, 2011 U.S. Dist. LEXIS 135374, *40-41, 40 Media L. Rep. 1113 (E.D. La. 2011) ("The First Amendment does not bar enforcement of a contract restricting speech or the right to publish certain information between private parties. The United States Supreme Court, along with several others, has concluded that First Amendment rights are not absolute, and may be limited by contract. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-71, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991) (holding that the First Amendment did not bar enforcement of restrictions on speech or publication which are "self-imposed"); *Krystkowiak v. W.O. Brisben Companies, Inc.*, 90 P.3d 859, 865 (Colo. 2004); *Perricone v. Perricone*, 292 Conn. 187, 972 A.2d 666, 680 (Conn. 2009) (holding that a confidentiality agreement constitutes a valid waiver of First Amendment rights, even in the absence of any express reference to the First Amendment).

Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter, 36 Campbell L. Rev. 75 (2014)⁹

Confidentiality has been recognized as a core fiduciary duty defining the lawyer-client relationship since the seventeenth century.¹⁰ The ABA Model Rules of Attorney's Professional Responsibility ("the ABA Model Rules") regulating a lawyer's core fiduciary duty of confidentiality have been adopted by a majority of the states, including Wisconsin. The ABA Model Rules endeavor to rationally balance the various interests implicated by the core fiduciary duty of confidentiality.¹¹ The drafters of the ABA Model Rules, all of whom have earned nationwide reputations in the jurisprudence of attorneys' professional responsibility, have not recommended or approved a "publicly available" or "disclosed in a public forum" exception to ABA Model Rule 1.9(c).

Petitioners' assertion that SCR 20:1.9(c) as currently stated is "irrational" and yields "absurd" and "bizarre" results flows from a misapprehension of the nature and importance of the lawyer's fiduciary role both as an officer of the judicial system and as a special agent in service to clients.

Respectfully,


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⁹ Available at <http://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1574&context=clr> (last accessed 02-11-2016).

¹⁰ See Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1069-70 (1978).

¹¹ See, Susan R. Martyn, *Symposium: Nebraska and the Model Rules of Professional Conduct: In Defense of Client-Lawyer Confidentiality... And Its Exceptions...*, 81 Nebr. L. Rev. 1320 (2003).