

May 6, 2016

Ms. Julie Rich
Supreme Court Commissioner
110 E Main St. Suite 440
Madison, WI 53703-3328

VIA E-MAIL ONLY

Email Address: Julie.rich@wicourts.gov

Dear Ms. Rich:

At the public hearing on Rules Petition 15-04, Chief Justice Roggensack inquired whether it would be possible for the State Bar's Standing Committee on Professional Ethics (the "Committee") to draft proposed comments to the Rules of Professional Conduct for Attorneys that would help clarify lawyers' duty of confidentiality, particularly with respect to generally known information as that term is used in SCR 20:1.9(c)(1). The Committee met on April 22, 2016, to consider possible comments to SCR 20:1.6 and SCR 20:1.9 to clarify lawyers' confidentiality obligations with respect to information about the law and "generally known" information. The proposed comments are in the attached document.

The proposed comment to SCR 20:1.6 is intended to clarify that the duty of confidentiality does not prohibit lawyers from using or disclosing information lawyers learn about the law. The proposed comment to SCR 20:1.9 is intended to provide guidance to Wisconsin lawyers on when information becomes "generally known." SCR 20:1.9(c)(1) permits lawyers to use generally known information in a manner that is adverse to the interests of former clients even if that information related to the representation of the former client. The current rule, however provides no guidance as to when information becomes generally known. The proposed comment is intended to provide that guidance.

In drafting the proposed comments, the Committee considered comments from the rules of other jurisdictions, ethics opinions, case law and the Restatement (2nd) of the Law Govering Lawyers. The proposed comments are intended to provide interpretive guidance that is consistent with existing law and persuasive authority and are not intended to alter the obligations of Wisconsin lawyers under the current SCR 20:1.6 and SCR 20:1.9.

The Committee thanks the Court for its consideration of this matter and stands willing to provide whatever further assistance the Court may request

Sincerely,

Dean R. Dietrich, Chair
Standing Committee on Professional Ethics

pc: Michael D. Cicchini [mdc@cicchinilaw.com]

Terry W. Rose [rose-law@sbcglobal.net]

Keith L. Sellen [keith.sellen@wicourts.gov]

Edward A. Hannan [ehannan@hannanlegal.com]

Members of the State Bar's Standing Committee on Professional Ethics

Proposed Wisconsin Comment to SCR 20:1.6

Information that is protected by this Rule does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. For example, during legal research of an issue while representing a client, a lawyer may discover a particularly important precedent, devise a novel legal approach, or learn the preferable way to frame an argument before a particular judge that is useful both in the immediate matter and in other representations. Such information is part of the general fund of information available to the lawyer. The lawyer and other members of the lawyer's firm may disclose that information in other representations, so long as they thereby disclose no protected information except as permitted by this Rule. Thus, a lawyer who represents a client in a matter that has resulted in a court opinion may disclose that opinion in other representations so long as the lawyer does not disclose any other information relating to the representation of that client except as permitted by this Rule.

This Rule also does not prohibit a lawyer from disclosing information about the law for purposes of providing professional assistance to other lawyers, whether informally, as in educational conversations among lawyers, or more formally, as in continuing-legal-education lecture, so long as the lawyer does not disclose any other information relating to the representation of that client except as permitted by this Rule. For example, 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.

Proposed Wisconsin Comment to SCR 20:1.9

Paragraph (c) distinguishes between use and disclosure of information relating to the representation of a former client. Use of information includes taking the information into account in a significant way in framing a course of action. Disclosure of information is revealing the information to a person not authorized to receive it. Paragraph (c)(1) governs the use of information, and paragraph (c)(2) governs the disclosure of information.

Paragraph (c)(1) provides that information acquired by the lawyer in the course of representing a former client may not subsequently be used to the disadvantage of that former client. However, the fact that a lawyer has once represented the former client does not preclude the lawyer from using information to the disadvantage of that former client if that information is "generally known." Information is "generally known" when it is widely or commonly known. Whether the information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that the information is available to the public does not mean that it is known by the public. Moreover, the mere fact that the information has become known to some other persons, does not mean that it is generally known. Consequently, the mere fact that the information is available to the public or known to some other persons does not deprive that information of its protection under this Rule.

Paragraph (c)(2) prohibits a lawyer from disclosing information relating to the representation of a former client except as SCR 20:1.6 would permit or require with respect to a current client. As a result,

the duty of confidentiality owed to a former client is the same as the duty owed to a current client. There is no exception that permits disclosure for “generally known” information. However, information that is protected by SCR 20:1.6 does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters. For example, a lawyer who represents a client in matter that has resulted in a court opinion may disclose that opinion in other representations as long as the lawyer does not disclose any other information relating to the representation of that client except as permitted by SCR 20:1.6. Similarly, SCR 20:1.6 does not prohibit a lawyer from disclosing such information about the law for purposes of providing professional assistance to other lawyers, whether informally, as in educational conversations among lawyers or more formally, as in continuing-legal-education lectures. See Wisconsin Comment to SCR 20:1.6.