

STATE OF WISCONSIN

IN SUPREME COURT

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In the Matter of the Amendment of  
Supreme Court Rules Chapter 20  
Rules of Professional Conduct for Attorneys

PETITION

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PETITION

Wisconsin Ethics 2000 Committee respectfully petitions the Wisconsin Supreme Court to revise the Rules of Professional Conduct for Attorneys (Chapter 20, Supreme Court Rules) as recommended in the committee's Proposed Amendments to Supreme Court Rules Chapter 20 attached to this Petition.

BACKGROUND

*Mission.* The Wisconsin Supreme Court created the Wisconsin Ethics 2000 Committee in February 2003 and issued the following Mission Statement:

The Commission on the Evaluation of the Rules of Professional Conduct, commonly known as Ethics 2000, was a commission appointed by the American Bar Association to review the ABA Model Rules of Professional Conduct and propose changes or revisions to update the rules for today's legal practice. The commission was charged to conduct a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; examine and evaluate the Model Rules and the rules governing professional conduct in the state and federal jurisdictions; conduct original research, surveys,

and hearings; and formulate recommendations for action. The commission completed its work in 2001 and proposed changes to the Model Rules which the ABA House of Delegates considered and adopted in part in 2002.

In response, the Supreme Court of Wisconsin has created the Wisconsin Ethics 2000 Committee. Its mission is as follows:

1. The committee shall conduct a comprehensive review of the Wisconsin Rules of Professional Conduct for Attorneys in light of the changes, both proposed and adopted, to the Model Rules by the commission, and any other changes the committee deems appropriate. This shall include consideration of the rules petition to be submitted to the court from the Fee Arbitration Study Committee; the committee shall respond to that petition at the court's public hearing on the matter in the fall, 2003. The committee shall not consider matters relating to multi-jurisdictional or multi-disciplinary practice.

2. The committee shall recommend changes, if any, to the existing Wisconsin Rules via a petition to this court for a rules change. The petition, with detailed comments, shall be filed by October, 2004. The court anticipates scheduling the matter for a public hearing in winter, 2004.

3. In the interest of providing full and fair consideration of these important public policy issues, the committee shall solicit comments from the bench, bar, and public. In planning its meeting, the committee shall consider the state's fiscal condition and keep expenditures at a minimum, so far as consistent with conducting a comprehensive review. Accordingly, the committee is urged to seek

written submissions and utilize teleconferencing and subcommittees as appropriate.

This Petition is filed by the committee pursuant to the court's direction in the Mission Statement.

*Meetings.* The full committee had ten day-long meetings, which were held on April 21, June 24, September 23, and November 18, 2003, and on January 27, March 1, March 23, April 27, May 17, and June 24, 2004. Five subcommittees held many additional meetings in person and by teleconference. Considerable work was also performed by email, which was facilitated by a list serve hosted by the State Bar of Wisconsin.

*Outreach.* Tentative drafts of the committee's proposals have been posted on the State Bar web site since late April, 2004.

Members of the committee met with approximately two hundred state bar members in a three-hour session at the annual meeting of the State Bar in Madison on May 7, 2004. In addition, committee members met with many other groups of lawyers and laypersons, including at meetings sponsored by Milwaukee Bar Association, Waukesha County Bar Association, Barron County Bar Association, Inns of Court in Brown County and Milwaukee County, Eau Claire County Bar Association, Wausau Early Bird Rotary Club, Dane County Bar Association, Wisconsin chapter of the American Corporate Counsel Association, Legal Aid Society of Milwaukee, Wisconsin Legislative Institute, Wisconsin Prosecutors Seminar, Wisconsin Bar non-resident members in Chicago and Minnesota, Wisconsin Department of Justice, Civil Trial Counsel of Wisconsin, Marquette University Law School, and University of Wisconsin

Law School Resource Center on Impaired Driving. The committee also consulted in person and in writing with the Wisconsin Supreme Court Fee Arbitration Study Committee, particularly with respect to issues concerning fees.

In addition to the extensive comments received in these various meetings, the committee received written submissions from a number of individuals and groups. Among the groups submitting written comments were the Government Lawyers Division of the State Bar, the State Public Defender's Office, and the Lawyer Dispute Resolution Committee.

#### GENERAL COMMENTS

*Format.* The attached proposal concerning Supreme Court Rules Chapter 20 contains the following components:

- The current rules are presented in a red-line format that highlights all proposed changes (i.e. amendments to current rules, proposed new rules, proposed deletions of current rules).
- With respect to proposed rules that differ from their counterpart provisions in the American Bar Association Model Rules of Professional Conduct (August 2003), a Wisconsin Committee Comment is included that identifies the difference between the proposed rule and the model rule.
- The Preamble and Scope sections of the Model Rules and ABA comments to each model rule are included, without noting changes from prior versions.

The committee recommends that the court retain the current format of chapter 20. Currently, only the "black letter" provision of each rule is promulgated by the court, but

the Preamble and Scope sections of the Model Rules and ABA comments to each model rule are included in chapter 20 for information purposes. This approach provides helpful guidance to the meaning of the rules and is consistent with the design of the Model Rules. See Model Rules Scope ¶21.

The committee recommends including in chapter 20, for information purposes, Wisconsin Committee Comments for rules that differ from their model rule counterparts. These comments identify differences from the model rules; for the most part, they do not explain or justify those differences. Under this approach, the rule language speaks for itself, and additional interpretive problems are not introduced in the Wisconsin Committee Comments.

*Working assumptions.* The ABA Ethics 2000 Commission proposed, and the American Bar Association adopted, very extensive changes to the model rules. The great majority of these changes, however, are intended to clarify rather than change existing duties. For this reason, a cursory review of the committee's proposals may be misleading. While the committee, following the lead of the ABA, proposes amendments to over half of the rules, the vast majority of these proposed amendments clarify rather than alter existing policy. After approximately twenty years of experience under the model rules as adopted in most jurisdictions, certain gaps and ambiguities have surfaced. Much of this revision resolves those problems without significantly changing underlying policy.

In undertaking its analysis and formulating its proposals, the committee generally deferred to the model rule formulations of duty, unless an important policy concern dictated otherwise. This policy preference in favor of the model rules is appropriate, in

the committee's view, for a number of reasons. First, the ABA Ethics 2000 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. Second, the model rule formulation is enriched by interpretive guidance provided by courts and commentators; this benefit is reduced when minor changes in language are incorporated into the Wisconsin rule. Third, many legal matters have multi-state dimensions so that consistency among the states is desirable, at least when important policy concerns are not involved.

This mild deference to model rule language means that the committee generally did not "tweak" the wording of proposed rules for stylistic reasons. Absent a meaningful policy concern, the committee generally recommends adoption of the model rule as it is written.

#### KEY PROPOSALS

The committee recognizes that certain of its proposals involve significant changes that should be specially brought to the court's attention. The following proposals fall in that category.

*Rule 1.0 Terminology.* This new rule defines certain terms used throughout the rules. Among its most significant provisions is the standard of "informed consent" which is applied in the proposed rules to many decisions that clients are responsible for making. The rules do not currently include "informed consent" as the standard. In addition, the committee proposes definitions for "misrepresentation" (to include only intentional misrepresentation) and "prosecutor" (to include municipal prosecutors and prosecutors in juvenile court) that are not contained in the model rule.

*Rule 1.5 Fees.* Amendments to this rule are pending before the court by virtue of a petition filed by the court's Fee Arbitration Study Committee. The present proposal, which differs in a couple of respects from the committee's response to the Fee Arbitration Study Committee petition, was developed after consultation with the Fee Arbitration Study Committee and based on comments by lawyers and others.

*Rule 1.6 Confidentiality.* The proposal contains the distinctive exception to the duty of confidentiality that is in the current rule, arising in certain cases involving client crimes and frauds. The proposal adopts the model rule exceptions for compliance with a court order to testify and also for disclosures that "comply with other law." Because of the latter exception, the committee proposes deletion of the current reference to §§ 19.43 and 19.44, Stats.

*Rule 1.8 Conflicts of interest: prohibited transactions.* Among other proposed changes, the committee recommends deletion of the insurance defense exception to the requirement that a client consent to the lawyer's fee being paid by a third party. One of the recurring themes in the proposed rules is that lawyers clarify their relationships, and the committee views this as equally important in the insurance defense setting. See *Marten Transport, Ltd. v. Hartford Specialty Co.*, 194 Wis. 2d 1, 533 N.W.2d 452 (1995).

*Rule 1.10 Imputed disqualification: general rule.* The committee proposes that, when a lawyer changes firms, the lawyer's conflict of interest in a matter will not be imputed to lawyers at the new firm if (1) the conflict arises from legal services that were only minor and isolated and (2) the personally disqualified lawyer is timely screened from participation. The committee believes that this limited screening rule protects important client interests, while responding in a fair and practical way to the abuse of

disqualification motions as a litigation strategy. See generally *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439 (E.D. Wis. 1993).

*Rule 1.18 Duties to prospective clients.* The committee recommends that the court adopt this new rule which currently has no counterpart in chapter 20.

*Rule 2.2 Intermediary and Rule 2.4 Lawyer serving as third-party neutral.* The committee recommends that Rule 2.2 be deleted in its entirety, as it is in the revised model rules, because the issues addressed by this rule are better dealt with in other rules, including conflicts of interest rules and new Rule 2.4.

*Rule 3.8 Special responsibilities of a prosecutor.* The committee proposes new provisions, not contained in the model rule, to clarify what communications are permissible between a prosecutor and an unrepresented defendant. The committee believes that a prosecutor should be able to negotiate a plea with an unrepresented defendant, but the prosecutor should not provide other legal advice or assistance to the defendant in the process.

*Rule 3.10 Threatening criminal prosecution.* The committee recommends that this provision, which has no counterpart in the model rules, be deleted. The standards for establishing a violation of the rule are high, and the facts of individual cases will often contain sufficient ambiguity to make the rule inapplicable. See generally *In re Disciplinary Proceedings against Coe*, 2003 WI 117, 665 N.W.2d 849, 265 Wis.2d 27 (2003). To the extent that threats to present criminal charges amount to extortion, the conduct can be prosecuted under appropriate provisions in Rule 8.4.

*Rule 4.1 Truthfulness in statements to others.* The committee proposes a new paragraph, not found in the model rule, that recognizes that prosecutors may advise and



supervise others with respect to lawful undercover investigations that involve deception. The failure of the rules to address this issue leaves such conduct largely unregulated because the parameters of ethical conduct are unstated. Moreover, the committee believes that it is wise to encourage the supervision by prosecutors of investigations so that the rights of suspects will be protected.

*Rule 4.5 Guardians ad litem.* The committee proposes this new rule, which has no counterpart in the model rules, in order that guardians ad litem understand that their conduct is governed by the rules, even though their responsibilities may differ, in some respects, from those in the usual representation.

*Rule 6.1 Pro bono publico service.* The committee proposes that lawyers be required to file a report annually concerning their pro bono activities. This requirement is recommended as a way to emphasize the pro bono responsibilities of lawyers and to collect information about pro bono services and needs. The model rule does not contain a reporting requirement.

*Rule 6.5 Nonprofit and court-annexed limited legal services programs.* This new rule, which is part of the model rules, provides limited protection against disqualifying conflicts of interest for certain legal advice hotlines and advice-only clinics that qualify.

*Rule 7.6 Political contributions to obtain government legal engagements of appointments by judges.* This is a new model rule, designed to prohibit “pay-to-play” practices. The committee did not see this as a problem in Wisconsin, but believes that the express prohibition of such practices is sound policy.

*Rule 8.4 Misconduct.* The committee has proposed two new paragraphs that are not included in the model rule. Paragraph (h) restates the lawyer’s duty to cooperate in

the investigation of a grievance, in the belief that placement of the duty in chapter 20 will provide better notice to lawyers. Paragraph (i) makes it misconduct to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. This provision is intended to reinforce the strong commitment to equal justice under law.

**CONCLUSION**

This petition and the attached proposal will be posted on the State Bar web site. The committee may meet again if comments from others are such that a meeting would be appropriate to consider additional revisions. The committee expresses its gratitude to the court for this opportunity to be of service.

Respectfully submitted this \_\_ day of \_\_\_\_\_, 2004.

WISCONSIN ETHICS 2000 COMMITTEE

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